

EIGHTY-SEVENTH SESSION

In re Balkenhol

Judgment 1868

The Administrative Tribunal,

Considering the complaint filed by Mr Bernd Balkenhol against the International Labour Organization (ILO) on 5 June 1998, the ILO's reply of 25 August, the complainant's rejoinder of 11 November and the Organization's surrejoinder of 2 December 1998;

Considering Articles II, paragraph 1, and VII 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, who is German and was born in 1949, joined the staff of the International Labour Office, the secretariat of the ILO in 1977 as an "associate expert" under a fixed-term contract and in 1979 he was appointed to a position financed from the regular budget. In 1985 the ILO gave him a contract without limit of time. By 1986 he held grade P.4. From 1986 to 1990 he was seconded to a technical cooperation programme in Dakar (Senegal) at grade P.5 under a fixed-term contract. His grade reverted to P.4 at the end of that period.

In August 1990 he was again seconded, on a fixed-term basis, to a technical cooperation programme based in Geneva and his grade went from P.4 step 7 to P.5 step 6. His letter of appointment said that at the end of his assignment he would revert to his without limit of time status "under conditions to be specified by P/DEV" (the Personnel Development Branch). At the material time he was in charge of the Poverty-oriented Banking Unit in the Enterprise and Cooperative Development Department (ENTREPRISE).

As part of a staffing review in that Department, and as his secondment was soon to end, the complainant saw two members of the Personnel Department on 26 September 1995. By a note for the file dated 9 October the chief of Personnel Planning and Career Development (P/PLAN) confirmed that he would be "reintegrated" into ENTREPRISE and would return to grade P.4 as from 1 January 1996. That date was, however, subsequently deferred. In a note for the file of 23 October 1995 the complainant pointed out that his secondment need not end in December and he would qualify for personal promotion to P.5 as from March 1996.

The Director of ENTREPRISE proposed the creation of a regular budget post of "Head, Enterprise Finance Unit". He sent a description of the post to the Personnel Department with a minute of 3 June 1996 asking for its classification and for the appointment of the complainant to the post by direct selection at grade P.5. He added that the complainant had been "undertaking this work at P.5 level at Headquarters since 1990". In a minute of 16 July the chief of P/PLAN concurred with the appointment but told the Director that the post had been graded P.4 and that the complainant would revert to that grade.

By an undated minute received by the Personnel Department (PERS) on 19 July 1996 the Director of ENTREPRISE contested the grading of the post and asked to see the ratings applied. An exchange of minutes followed. The grading was twice reviewed by the Classification Unit and the grade was upheld. In a minute to the complainant of 6 February 1997 the Director of Personnel told him that the proposed post had been graded P.4 and that a further review would take place. On 17 February the complainant filed an appeal with the Professional Grading Appeals Committee against that decision.

The vice-chairman of the Committee informed the complainant on 18 March that it was unable to accept his appeal because no appeal lay against the grading of a vacant post. The complainant lodged a "complaint" with the Director-General on 15 September 1997, under Article 13.2 of the Staff Regulations, against the decision to grade the post P.4 and against the Committee's decision not to hear his appeal. On the same day the Director of ENTREPRISE sent a request under circular 575, series 6, for classification of the position as "Head, Social Finance Unit" together with a completed "position description questionnaire".

On 6 March 1998 the Director of Personnel informed the complainant of the Director-General's decision to reject his "complaint". That is the decision he impugns.

Meanwhile in a letter of 4 March 1998 the head of Personnel Planning and Career Development had informed him of the Director-General's decision to give him a personal promotion to P.5 as from October 1996. By March 1998 he had reached P.5 step 11, but after this promotion he only held P.5 step 8.

B. The complainant contests the grading of his post at P.4 and asserts that the Personnel Department did not follow "normal procedures" in grading it. Personnel altered the title on the job description from "Head, Enterprise Finance Unit" to "Senior Officer, Enterprise Finance" and lowered the qualifications required. In spite of several requests Personnel did not let the Director of ENTREPRISE know the ratings which resulted from applying the Master Standard of the International Civil Service Commission to grade the post. There was no transparency. Personnel did not properly inform the Selection Board that there was contention over the grade. They informed the Director of ENTREPRISE of the grading only two days before the Board met.

The Director of Personnel sent minutes to the complainant which referred to a "special decision" to grant him P.5 on secondment. Yet there was no mention of such a decision in his 1990 letter of appointment. Nor was there any mention therein of his reverting to P.4 when his secondment was over.

He submits that he was demoted through his personal promotion as he lost three steps which lowered his take-home pay. There was bias and prejudice against him, and he was treated unfairly. He suffered the consequences of "inconsistent grading methods". This led to "confusion" in his contractual situation because although he held a permanent contract, he had eight contract extensions over a fourteen-month period. His personal promotion was a "device" that Personnel used to sidestep the grading issue.

The Professional Grading Appeals Committee was wrong to refuse to hear his appeal since the post was not "vacant". He was the incumbent since he had been performing its duties for the past eight years.

Personnel was flexible in applying its procedures, and "systematically" applied them to his "detriment". For example, his right to accelerated increments for language allowance was withdrawn until his contract reverted to without-limit-of-time status because it was not open to technical cooperation staff. However, he was able to benefit from the personal promotion system which was not open to him as a technical cooperation staff member either. He concludes therefore that he should have been able to benefit from the accelerated increments during his secondment from 1990 to 1998.

He asks the Tribunal to quash the Director-General's decision rejecting his 13.2 "complaint": and, in particular, to instruct the Personnel Department to provide details of the grading ratings in writing; to acknowledge receipt of his request for classification of his post dated 15 September 1997; to produce evidence that the "requirements of the grading exercise" have been respected; to furnish the report of the Selection Board; to pay him the "accelerated language allowance" and to give him the number of steps he had before personal "promotion". He seeks damages for stress, anxiety, unfair treatment and "lack of consideration", as well as costs.

C. In its reply the Organization submits that the complaint shows no cause of action. The complainant kept the temporary P.5 status of his secondment until he obtained permanent P.5 status through personal promotion.

His claims for an acknowledgement of receipt of the request of 15 September 1997 for classification of his post, for a language allowance and for an award of damages for unfair treatment are irreceivable because he has failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires.

The Organization points to a difference between the posts held by fixed-term officials, which are financed from the regular budget, and those of officials in technical cooperation projects, also known as "experts", which are financed from extra-budgetary sources. At the material time the Technical Cooperation Personnel Branch (EXPERTS), responsible for staff on such projects, was separate from the Personnel Department. On secondment on a fixed-term contract the complainant was at P.5, the grade set by EXPERTS, rather than P.4, the grade determined by Personnel who applied the ICSC Master Standard.

At the end of his secondment the ILO's sole obligation was to give back to the complainant his without-limit-of-time status, as well as the grade he had previously held with "annual increments corresponding to the period of detachment". Taking such increments into account, upon return to a regular budget position he was entitled to P.4

step 12 in 1 January 1996, and step 13 of the same grade in October 1996. The P.5 grade was only linked to his secondment.

The Professional Grading Appeals Committee and the Director-General were correct not to consider him as both the holder of a P.5 position with EXPERTS and the incumbent of a P.4 position financed from the regular budget.

The Personnel Department made only slight changes in the job description which were necessary to ensure consistency within the ILO of titles and minimum qualification standards. If the new post had been graded P.5 a competition would have been necessary.

The calculation of his steps upon promotion was done according to Article 3.4 of the Staff Regulations and he went from P.4 step 13 to P.5 step 8. He could not retain the steps he had held as an expert.

D. In his rejoinder the complainant insists that his request for the language allowance was an "argument" in his complaint and not a claim.

The distinction that the Organization draws between two kinds of fixed-term officials is irrelevant: he is a permanent official. He maintains that the post at issue was not vacant since he was performing its duties and that there was continuity of work, place of work and incumbent. There is nothing in the rules which says he had to return to a lower grade at the end of his secondment: Personnel wanted him to revert to P.4 "at all costs".

He wants the Administration to reveal what it told the Selection Board about the post in 1996, to produce evidence of the "special decision" to grant him P.5 taken in 1990 at the beginning of his secondment, and to clarify what his contractual status was at that time.

E. The Organization argues that the classifiers could not justify a grade higher than P.4 for his post. In any case if it had been graded P.5 a competition would have been held which would have delayed any promotion to P.5. The best option was to delay reverting to his initial grade until personal promotion could come into effect.

On promotion his salary was calculated in relation to the step "notionally" reached in grade P.4. If he had obtained promotion to a regular budget post at grade P.5 in 1990 he would have had fewer steps than as an expert. What the complainant saw as a drop in salary was just a return to his "permanent salary status".

CONSIDERATIONS

1. The complainant joined the International Labour Office in 1977 and served for two years as an "associate expert". He was given a fixed-term contract in 1979 financed from the regular budget. This became a contract without limit of time in 1985. In 1986 when he was at grade P.4 step 2, he was seconded from Geneva to a technical cooperation programme in Dakar (Senegal) at grade P.5. He was told at the time that on completion of his assignment he would revert to his substantive P.4 grade. In 1990, therefore, he changed from P.5 step 5 to P.4 step 6.

2. In August 1990 he was once more seconded by the Technical Cooperation Personnel Branch (EXPERTS) as Project Coordinator with his duty station at Geneva. He was told in a minute of 14 August 1990 that his without limit of time contract would be suspended during his assignment and also that the duties and responsibilities in the job description had been evaluated by the Personnel Department at grade P.4 "notwithstanding that EXPERTS may assign another grade when offering [him] the position".

3. The complainant took up his duties in 1990 at P.5 step 6. From 1992 he reported to the Director of the Enterprise and Cooperative Development Department (ENTREPRISE). On 9 October 1995 he was told that he would return to a grade P.4 post as from 1 January 1996. In a note for the file of 23 October 1995 he said that his secondment did not have to end on 31 December, and that there were good reasons for the Administration and himself to be more flexible about the "date of reintegration". He added that he would be eligible for personal promotion to P.5 as from March 1996.

4. In January 1996 there was no suitable permanent post for the complainant. On 3 June the Director of ENTREPRISE proposed the establishment of a new position of "Head, Enterprise Finance Unit" under the regular budget and submitted a job description corresponding to the duties the complainant had been carrying out over the past few years. He proposed that the position be filled by direct selection of the complainant.

5. With some alterations to the job description by the Personnel Department, the post was graded P.4. The changes made were that the title became "Senior Officer, Enterprise Finance" and the qualifications required for the post were slightly amended. Both the grade and the method of filling the post were approved by the Selection Board in July 1996. The Director of ENTREPRISE was told on 16 July that there was no objection to filling the position by direct selection of the complainant.

6. In July 1996 the Director objected to the grading of the post and requested details of the ratings given by the Classification Unit. He subsequently provided additional information to the Personnel Department which informed him on 16 October 1996 that they had reviewed the grading and confirmed the grade of the post at P.4.

7. The Director of ENTREPRISE was informed on 13 November that the complainant should be transferred to the position of Senior Officer, Enterprise Finance, at grade P.4 but, according to the Organization, he did not take the necessary action. He asked for a third grading exercise which again confirmed the post at P.4. In the meantime the complainant's P.5 fixed-term contract as an expert was extended several times.

8. On 6 February 1997 the complainant was informed by the Director of Personnel that the post proposed for his reintegration had been graded P.4 by the Classification Unit. He appealed against that decision on 17 February to the Professional Grading Appeals Committee. On 18 March 1997 the Committee declined to accept the appeal as there was "no recourse system set up for the grading decision on vacant positions".

The complainant appealed against that decision to the Director-General under Article 13.2 of the Staff Regulations. On 6 March 1998 the Director of Personnel replied on the Director-General's behalf refusing to uphold his appeal. She said that following the creation of a post similar to the one the complainant occupied, the grade was attributed according to normal procedures. The complainant's transfer to the new post was postponed pending the possibility of personal promotion. Since he held a P.5 post in ENTREPRISE he could not be the incumbent of a P.4 post financed by the regular budget, let alone lodge an internal "complaint" against the grading of the position. That is the decision impugned.

9. On 1 April 1998 the complainant was transferred to the new regular budget post upon the expiry of the last extension of his technical cooperation contract on 31 March 1998. In the meantime he was granted personal promotion by the Director-General on 4 March 1998 to grade P.5 which was retroactive to October 1996.

10. The complainant is asking the Tribunal:

(a) to quash the decision of the Director-General not to uphold his "complaint" under Staff Rule 13.2;

(b) to quash the decision of the Professional Grading Appeals Committee not to accept his appeal;

(c) to quash the Director-General's decision which graded the post that he is occupying at P.4;

(d) to instruct the Personnel Department to provide the details of the grading (ratings) in writing;

(e) to order the Personnel Department to acknowledge receipt of his request for classification of his post dated 15 September 1997;

(f) to order the communication to the Tribunal of the written evidence that the procedural and substantive requirements of the grading exercise were respected;

(g) to order that the Administration provide the report of the Selection Board meeting of July 1996 where this matter was first discussed;

(h) to order the Personnel Department to pay him the accelerated language allowance due and to also reinstate him at the step level of his salary before he obtained his personal promotion;

(i) to order compensation for the costs incurred in the preparation and presentation of this complaint (SF2,000); and,

(j) to award him compensation for "stress and anxiety suffered over a period of almost two years as a result of

unfair treatment and lack of consideration" (the precise amount of the compensation is at the discretion of the Tribunal).

11. The complainant disputes that the post created in July 1996 was graded according to "normal procedures". He alleges administrative inconsistencies in the grading process for which he must suffer the consequences. He disputes the decision that the post was vacant and claims that the Director of Personnel admitted in the impugned decision that he was the incumbent of this post. He says that his letter of appointment made no mention of reverting to P.4 and that his request for reclassification of his post of "Head, Enterprise Finance Unit" on 15 September 1997 remains unanswered; he takes this as evidence of bias and prejudice. He claims confusion over the title of the post after the Selection Board had taken a decision on the matter. He says he would have been prepared to enter a competition if the post had been graded at P.5. He asks how it is possible to "transfer" him to a lower grade. He submits that the Personnel Department has systematically applied its own procedures, where there is room for discretion, to his detriment. He contends that logically he should also have been entitled to an accelerated language allowance from 1990 to 1998, which is granted to holders of without limit of time contracts, since the personal promotion system, applicable only to regular staff, was applied to him while on secondment.

12. He contends that personal promotion was used to deflect his request concerning the grading of the post and that the personal promotion granted to him on 4 March 1998 was an abuse of his right to obtain redress. He says he has been demoted to a post graded P.4 without valid reason.

13. In its reply, the Organization emphasises the difference between fixed-term officials whose posts are funded by the regular budget and officials on technical cooperation projects. Those officials are known as "Experts", and their posts are financed from extra-budgetary sources, and a unit called EXPERTS is responsible for them. At the material time, this unit was separate from the Personnel Department. The appointment of an expert on a project does not give rise to any expectation of a career in the Organization. Experts are normally appointed without holding a competition. The ILO maintains that the complainant is mistaken in assuming that the position to which he was seconded in 1990 is the same as the one he now holds with the exception of a difference in the source of funding. The post created in 1996 was governed by Article 4.2(f) of the Staff Regulations relating to the filling of vacancies, and under which he could be transferred to that post without competition. If the post had been graded P.5 he could not have been appointed to it without a competition. The ILO claims that its sole obligation was to give the complainant his without limit of time status back at his previous grade with the appropriate step in view of the period of secondment. The complainant did not have the right to retain the P.5 grade which was linked to his secondment. That grade was not based on the ICSC Master Standard and his post was not subject to competition procedures.

14. The Organization says that now he is the incumbent of the new post he can apply for a review of its grading in accordance with circular 253 series 6. It claims that the decision of the Professional Grading Appeals Committee and the decision of the Director-General not to recognise the holder of a P.5 position with ENTREPRISE as the incumbent of a P.4 position financed from the regular budget were correct. The grading of the position is essentially an internal matter outside the competence of the Tribunal, although the Organization agrees that the complainant would have had a right to complain if there had been an "abuse of power or a similar flaw".

15. The Tribunal is satisfied that the post occupied by the complainant while he was on secondment, financed from extra-budgetary sources and graded P.5 by EXPERTS is not the same as the post at P.4 created in July 1996 and financed from the regular budget, although the duties were basically the same. The complainant does not appear to grasp this, since he refers in his complaint to the post created in 1996 as "his" post as if it were the same post as the one he occupied in ENTREPRISE. Contrary to his allegations, the Organization did not admit in the impugned decision that it was "his" post. His transfer to the new post did not take place until 1 April 1998, after his personal promotion to grade P.5. The Professional Grading Appeals Committee was correct in refusing to accept his appeal because the right of appeal under circular 253 belongs to the incumbent of the post and the complainant was not the incumbent at that time. However, as the Organization points out, now that he occupies the post he can bring an appeal against the grading.

16. As for the grading of the new post at P.4, this was done according to the Master Standard and was reviewed three times prior to the transfer of the complainant. The change of title from "Head of Unit" to "Senior Officer" is explained by the fact that the Unit was to be a small one. There was also a wish to avoid "unnecessary hierarchical structuring". The changes in the requirements for the post were needed for the sake of consistency with similar ILO job descriptions and were aimed at introducing flexibility; in any event they did not affect the complainant as he

could have been transferred without competition. The Tribunal does not find any "confusion" in the title of the post.

17. The Professional Grading Appeals Committee is an independent, impartial body established by the Director-General under circular 253. The circular provides that the incumbent of a post may appeal, through his responsible chief, against the grade allocated to the post by the Personnel Department. Paragraph 40 of circular 253 series 6, which is about reviewing procedures, provides:

"Individual reviews of the duties and responsibilities attached to positions will be undertaken by [the Personnel Department] under any of the following conditions:

(a) whenever a new position is created ..."

18. There is no evidence whatsoever that Personnel's reviewing procedures were carried out in an abnormal manner. Every effort appears to have been made to establish the correct grade. The Personnel Department took additional information provided by the complainant's Director into account and, at his request, carried out a third examination. The Tribunal will not ordinarily review the technical aspects of such reviewing procedures, and there is no evidence of an abuse of authority in this case. It is immaterial that the complainant says he was willing to submit to a competition since the post was not graded at P.5 and therefore not open to competition.

19. The Tribunal considers that the Organization has made every effort to accommodate the complainant, who is regarded as a valued worker. The end of his secondment was delayed again and again to his benefit, and when he was ultimately transferred he had already received personal promotion to grade P.5 retroactive to October 1996. The complainant grossly exaggerates when he categorises his personal promotion as an "abuse of right".

20. The Organization, while admitting the receivability of the complaint in general, submits that three of the heads of relief sought by the complainant are outside the ambit of the decision impugned. These are: an order that the Personnel Department acknowledge receipt of his request for the classification of his post dated 15 September 1997 (which the Organization states that it never received); an order to pay him the accelerated language allowance; and, an award of compensation for stress and anxiety.

21. The order to the Personnel Department to acknowledge receipt of a request for classification of a post and the order to pay him a language allowance are not related to the impugned decision. No claim for compensation in this respect was before the Director-General when he was considering his final decision. Therefore, none of these claims is receivable on the ground of the complainant's failure to exhaust the means of internal redress.

22. The Tribunal dismisses the substantive claim and all consequential claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
Mark Fernando

Catherine Comtet