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

NINETY-SEVENTH SESSION

Judgment No. 2335

The Administrative Tribunal,

Considering the complaint filed by Mr T. E. T. against the International Labour Organization (ILO) on 20 August 2003 and corrected on 10 September 2003, the Organization's reply of 8 January 2004, the complainant's rejoinder of 1 March and the ILO's surrejoinder of 22 April 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a Cameroonian national, born in 1960. He was recruited by the ILO Office in Yaoundé (Cameroon), in December 1998, as an administrative and financial assistant. His six month short-term contract was extended to 31 December 1999. As from 1 January 2000 he was given fixed-term contracts, the last of which was due to expire on 31 December 2003.

The upgrading of the complainant's post was to have taken effect on 1 December 1999, but he was informed in February 2000 that he could not be promoted before the end of his probationary period. He therefore submitted a request for review of the grading of his post on 25 September 2001, when his probationary report was ready.

In June 2002 the complainant was questioned about a sum of money intended to fund a development centre for labour administration, which he had allegedly kept in the form of cash in his office safe since December 2001. On 26 June 2002 the Chief of the Regional Administrative and Financial Services was sent on a mission of inspection, after which he concluded that the complainant had committed numerous irregularities. At the time, these were estimated to have cost the ILO approximately 13 million CFA francs. The matter was subsequently referred to the Committee on Accountability and the complainant was suspended from duty with effect from 26 August. He was nevertheless placed on half pay from 1 September 2002.

Further investigations were conducted in October and November 2002. In a memorandum of 1 April 2003, the Chairperson of the Committee on Accountability informed the complainant that there was evidence of fictitious payments and that irregularities had been found in the withdrawal of ILO funds. The Committee found that the complainant had deliberately attempted to conceal these irregularities and estimated the resultant loss to the Organization at 3,217,985 CFA francs; it recommended recovering the loss by deducting sums from the complainant's salary or indemnities and referring the file to the Human Resources Development Department for appropriate disciplinary action.

On 8 May 2003 the Director of that department wrote to inform the complainant that the Director General wished to notify him that he was being summarily dismissed under Article 12.7 of the Staff Regulations and that his salary would cease to be paid as from 15 May 2003. On 14 May he wrote to him again, stating that as his case was not being referred to the Joint Committee, his dismissal would take effect the following day. In a letter of 8 August 2003, which is the impugned decision, the Chairperson of the Committee on Accountability explained to the complainant that 50 per cent of his salary for the period 1 April to 15 May 2003 had been retained, as well as the payment of accrued leave, in order partially to offset the amounts he owed the Organization. The complainant was asked to arrange for the balance of 1,167,773 CFA francs to be deposited with the ILO Office in Yaoundé as soon as possible.

B. The complainant submits that his "basic rights" as a worker have been breached and that he was the victim of

a “witch hunt”. He alleges that the Organization made every effort to “get rid of him”, first by asking him to resign at a meeting held on 27 June 2002, and then by alleging initially that the Office’s losses came to more than 13 million CFA francs. He points out that the investigation conducted in October and November 2002 established that it had not been proved that he had pocketed the missing amounts.

He claims the payment of the “salaries retained” for the period 1 September 2002 to 15 May 2003; the award of the “grade of the post [he] held from 1 December 1999” and the resulting adjustment of his pay; and 30 million CFA francs for moral and material damages.

C. In its reply the ILO argues that the letter of 8 August 2003 does not constitute a decision that can be impugned before the Tribunal, since it merely “outlined the financial consequences” of the decisions of 1 April and 14 May 2003. It submits, furthermore, that the claim to the upgrading of his post is irreceivable on the grounds that internal remedies were not exhausted. As for the other two claims, the Organization considers that to a large extent they constitute an indirect challenge to the decision to suspend him without pay and to the consequences of his summary dismissal. But insofar as he does not contest the Office’s main action, i.e. the disciplinary measure taken against him, he cannot object to its subsidiary action. Nevertheless, considering that the complainant opted not to refer his case to the Joint Committee, the ILO states that, “in the interests of justice”, it would not object if the Tribunal were to waive the prescribed time limit.

On the merits, the Organization denies that the salaries claimed by the complainant were retained. It refers to Article 12.9 of the Staff Regulations, and asserts that in the event of summary dismissal, the salary need not be paid during the period of suspension. It adds that if it continued nevertheless to keep the complainant on the payroll during his suspension, it was to alleviate the pressure on his family. It also points out that the complainant has still not reimbursed the amount he owes the Organization.

According to the ILO, there is no evidence to support the complainant’s allegation that it tried to get rid of him. It maintains that the reason why his application for the upgrading of his post was rejected was that he did not submit a request for a review of his job grade within the prescribed time limit and failed to send examples of his tasks and responsibilities in writing as he had been requested.

D. In his rejoinder the complainant contends that his complaint is receivable, on the grounds that the decision of 8 August 2003 was final and appealable before the Tribunal.

On the merits, he argues that the ILO’s interpretation of Article 12.9 of the Staff Regulations is “fragmentary”, considering that in fact he was suspended “with salary”. Since the term “salary” is defined in that article as meaning “salary and allowances”, he concludes that his “salaries” were wrongly retained during the period in dispute. He claims interest on the amounts he considers are owed to him.

With regard to the grading issue, the complainant explains that he was unable to produce the required written evidence on account of his suspension. Referring back to the facts of the case, he submits that he was subjected to harassment. The Organization’s officials, according to him, tried to humiliate and intimidate him in order to make him lose his job or to prevent him from having his post upgraded.

E. In its surrejoinder the Organization insists that the complaint is irreceivable. It adds that, despite the mistrust generated by the serious suspicions concerning the complainant, every effort was made to ensure that his dignity and reputation were preserved at every stage of the investigation.

CONSIDERATIONS

1. After the complainant was accused of financial irregularities, disciplinary proceedings were initiated against him. During the proceedings, he was suspended from duty but nevertheless continued to receive half his pay from 1 September 2002. In a letter dated 8 May 2003, the Organization informed him that the Director-General intended applying the sanction of summary dismissal against him in accordance with Article 12.7 of the Staff Regulations. In an e-mail of 10 May 2003, the complainant said he preferred his case not to be referred to the Joint Committee, which the Organization acknowledged in a letter dated 14 May 2003. In that letter, it also set the date of his summary dismissal at 15 May 2003, adding that:

“the matters raised in your e-mail of 10 May 2003 […] will be dealt with […] separately.”

In a statement of account dated 8 August 2003, the Organization asked the complainant to refund the sum of 1,167,773 CFA francs. This was the sum remaining after deducting half his salary for the period from 1 April to 15 May 2003 and the amount which would have been due to him in respect of accrued leave.

2. Considering that communication to be a decision, the complainant impugns it before the Tribunal. While he does not challenge either his dismissal or the amount he is asked to refund, he claims:

– the "salaries" which were "retained" during his suspension from 1 September 2002 to 15 May 2003,

– the award of the "grade of the post [he] held from 1 December 1999", and

– compensation for moral and material injury.

3. (a) The Organization objects to the receivability of the complaint. It submits first that it is time-barred under Article VII(2) of the Tribunal's Statute, because it was not filed within 90 days of the notification of any challengeable decision. The one of 8 August 2003 was not a challengeable decision, since it merely "outlined the financial consequences" of the decisions of 1 April and 14 May 2003.

This argument is wrong. The letter of 8 August 2003 has its own significance and is an additional decision, which may therefore be challengeable as such. If that were not the case, the complainant would have no means of impugning the statement of account it contained. The complaint is not therefore time-barred.

The Organization's comment whereby "in the interests of justice, it would not object if the Tribunal were to waive the time limit stipulated in Article VII(2) of the Statute of the Tribunal in order to review the decision to terminate the complainant's contract", thus becomes redundant. It may be recalled in this respect that the decision to dismiss the complainant has not been challenged before the Tribunal.

(b) The Organization raises a further objection to receivability, namely, failure to exhaust internal remedies (Article VII(1) of the Statute of the Tribunal).

While the complainant essentially holds that his complaint is receivable, he overlooks the fact that the requirements set out in paragraphs 1 and 2 of Article VII are separate and must each be complied with.

As for the complainant's claims for the upgrading of his post and for damages, these were brought directly before the Tribunal, which can only deem them irreceivable, as internal remedies were not exhausted.

4. The Tribunal may, however, rule on the complainant's claim for the payment of the 50 per cent of his salary which he did not receive while he was suspended from duty, a claim he bases on the provisions of Chapter XI of the Staff Regulations and Circular No. 49 (Rev. 1), series 6, of 9 September 1986.

The Organization for its part chooses to refer to Article 12.9, paragraph 2, of the Staff Regulations, which reads as follows:

"Suspension may be with or without salary, provided that an official shall be suspended without salary only in cases which appear to call for the sanction of summary dismissal. If the official is not summarily dismissed, he shall be paid for any period of suspension without salary. If the official is summarily dismissed, the dismissal may be made effective as from the date of the suspension. For purposes of this article, 'salary' shall mean salary and allowances."

The Organization points out that in this case the complainant's suspension came with a decision to pay him half his salary, whereas the final decision was summary dismissal. Under the terms of Article 12.9, the Organization could have made the stoppage of the complainant's salary retroactive to the day he was suspended, but it did not do so, as was its right.

This interpretation and application of the Staff Regulations are correct. The article quoted above establishes a connection between the ultimate decision to dismiss and the provisional measure of suspension from duty: if suspension without salary has initially been decided and the sanction ultimately applied is not summary dismissal, it is logical that the effects of the provisional measure applied should be corrected by retroactively paying the

retained salary; conversely, if the sanction ultimately applied is summary dismissal, it must be possible to make it retroactive to the date of suspension, with an obligation for the official to refund the salary received during the period of suspension.

In this case, the complainant was summarily dismissed, while the decision to suspend him had allowed payment of part of his salary. In accordance with the terms of the above-mentioned article, the Organization was (formally) entitled to require a refund of the salary paid, but it chose not to do so. The complainant therefore suffered no injury.

His plea therefore fails.

The complaint must therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.