NINETY-EIGHTH SESSION

Judgment No. 2376

The Administrative Tribunal,

Considering the third complaint filed by Mr J.H. G. against the International Labour Organization (ILO) on 30 October 2003, the ILO's reply of 29 January 2004, the complainant's rejoinder of 23 February, and the Organization's surrejoinder of 1 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. Facts relevant to this complaint may be found in Judgment 1881 delivered on 8 July 1999 on the complainant's first complaint.

The complainant, a former staff member of the International Labour Office, the ILO's secretariat, withdrew his second complaint before the Tribunal following a settlement agreement reached with the Office on 19 November 1999. The agreement stated, inter alia, that the decision taken not to renew his contract with the ILO "should not be construed as a judgement on [his] general ability" and that it would "not therefore in any way affect the consideration of any future application submitted by [him]".

On 4 August 2003, after having applied unsuccessfully for 16 different positions at the ILO and having made several enquiries with the Human Resources Development Department as to why his applications remained unacknowledged, the complainant filed an internal complaint alleging breach of the settlement agreement. Having received no reply, he filed this third complaint before the Tribunal on 30 October 2003.

B. The complainant argues that the ILO has breached the settlement agreement. He submits that "[k]ey to this agreement was the provision that [his] applications for future positions in the ILO [would] be seriously considered". This has not been the case. He points out that his very first application for a post in the Organization had been successful yet, despite the settlement agreement, he has not been considered for any of the 16 vacancies for which he has applied since. He finds this even more disconcerting as he has even more experience now than when he worked for the ILO. He argues that there has been an unfair recruitment process concerning his applications.

The last paragraph of the settlement agreement says that the "Office believes that a settlement in the above terms is in our mutual interest and that any future contact we may have will be undertaken on a new and positive basis". Consequently, he tried to resolve the issue concerning his applications informally with the ILO before resorting to the complaint process; however, enquiries concerning his internal complaint went unanswered.

He makes a request for discovery under Article 13.3 of the Staff Regulations, which provides that he is entitled to "all material relevant to the outcome of the process". He says that information on the selection process for all the positions he applied for is necessary to determine whether the settlement agreement has been breached.

He asks the Tribunal to order the ILO to make him a fixed-term employee in a grade P.4 or P.5 post commensurate with his skills and experience and with the potential to become a "permanent" employee. If his reinstatement is at the P.4 level, he requests that there be consideration for time lost working towards a P.5 position. He requests, as damages, his "projected ILO salary and allowances from one year after the date of [his] 19 November 1999 agreement with the ILO until reinstatement", less any salary he has received during this time. He also claims one year's full salary and allowances in moral damages, costs, and any other relief "as may be deemed just and proper" by the Tribunal.

C. In its reply the ILO contends that the complaint is irreceivable *ratione personae*. The complainant filed his complaint on the basis of his status as a former official; however, according to the Tribunal's case law his right to

submit a complaint is limited to claims relating to rights created during the contractual relationship with the Organization. The complainant ceased to be an official in 1998 and any claims arising from that fact were addressed in Judgment 1881 and the settlement agreement. It would appear that the complainant considers that the Organization undertook an obligation to rehire him; however, the only commitment the ILO undertook was not to take into account the decision terminating his previous employment in considering any future applications. Simply put, given his status as an external candidate the complainant has no standing to lodge a complaint concerning the outcome of vacancies for which he applied since 1998.

The complaint is also irreceivable *ratione materiae*. According to the case law, a decision to appoint an external candidate is a discretionary one, and as such open to limited review. In addition, the complainant did not allege breach of the agreement until some four years after the agreement had been reached, so his complaint is out of time.

In any event, the settlement agreement was never an obligation to reinstate him and the complainant has no cause of action. The ILO considers that the complainant has not presented any evidence that would support his allegation that the agreement has been breached. To overcome his lack of evidence he has made a request for discovery of a wide range of documents concerning the different selection procedures; however, this is merely a “fishing expedition” and should not be permitted. In fact, the only “evidence” provided by the complainant is an anonymous e-mail message, which is inadmissible hearsay.

D. In his rejoinder the complainant states that he did not assert that the ILO had undertaken to rehire him, but that he understood the agreement to mean that he would be “fairly considered” for positions for which he was qualified. He submits that his complaint is receivable, particularly as he can turn nowhere else but the Tribunal for enforcement of the settlement agreement. He contends that his complaint was filed within the time limit set out in the Tribunal’s Statute for instances when an administration fails to take a final decision.

He argues that although he is an external candidate, he is one “with a difference”, as he has a “contractually enforceable agreement” with the Organization. He accuses the ILO of attempting “to delay and obfuscate” and he clarifies why his request for discovery is necessary.

E. In its surrejoinder the Organization states that the complainant’s pleadings in his rejoinder have merely confirmed the former’s impression that the latter is confused about the exact content and legal consequences of the settlement agreement. It presses its pleas on receivability and adds that, if one is to look at the settlement agreement as a separate source of law, as it appears the complainant has tried to argue, then the Tribunal’s competence is not based on the terms of appointment of a former official. This provides yet one more reason why the complaint is irreceivable.

The Organization rebuts his argument that the agreement had created a legal obligation upon it towards the complainant. The terms of the agreement were clear: there is no reference in it to anything that would distinguish the complainant from any other external candidate. It reiterates that the complainant has not provided any evidence in support of his allegations that it has breached the agreement and it asks the Tribunal to reject his request for discovery.

CONSIDERATIONS

1. The complainant was employed by the ILO as a Senior Research Officer (Labour Economist) from 15 December 1996 to 31 July 1998, when his contract was terminated. This complaint is the third that the complainant has launched in connection with that termination.

2. The first complaint was brought by the complainant under Article 13.2 of the Staff Regulations in February 1998. It was in response to a recommendation of the ILO Reports Board, which was accepted by the Director-General, that the complainant’s employment be terminated before the end of his probationary period with the ILO. (This was to be accomplished by not renewing his first contract after its expiry date.) The decision was based on a negative performance appraisal from the complainant’s supervisor which the complainant felt was unfounded.

3. The ILO split the internal complaint into two issues: the non-renewal of the complainant’s contract and the alleged abuse of authority by his supervisor and dealt with them separately. In March 1998, the Director-General

asked the Reports Board to reconsider its recommendation regarding the non-renewal of the contract. The Board did so, and another negative performance appraisal was submitted by the same supervisor for the Board's consideration. The Board reiterated its original recommendation on 23 April and the Director-General implemented it on 29 May 1998.

4. The complainant appealed this decision to the Tribunal. The Tribunal found in Judgment 1881 that the ILO had breached procedural fairness in arriving at its decision, and ordered that the complainant be given the pay he would have received if he had completed his probationary period.

5. The abuse of authority allegation, which was not dealt with at the same time as the non-renewal of the contract, remained in suspense throughout this time. It was the nub of his second complaint submitted on 4 March 1999. Following the Tribunal's judgment, the ILO and the complainant reached a settlement of this second issue on 19 November 1999. As a result, the complainant withdrew suit. He now alleges a breach of the terms of the settlement agreement and that is the basis of his third complaint.

6. The complainant avers that a key term of the agreement was that his history with the ILO, specifically the decision not to renew his first contract, would not affect his being fairly considered for any ILO jobs he applied for in the future. The complainant says that he has applied to the ILO 16 times since November 1999, but has not received any acknowledgement of his applications, or any calls for interviews. He submits that this is evidence that the Organization is violating the terms of the settlement agreement.

7. On 4 August 2003 the complainant filed an internal complaint under Article 13.2 of the Staff Regulations to the Director-General about this alleged violation, in which he also requested extensive documentation under Article 13.3 (concerning all relevant material) about the manner in which the ILO had filled the 16 vacancies for which he had unsuccessfully applied. Having received no response, he filed a complaint with the Tribunal on 30 October 2003. He makes a request for discovery, stating that the documentation is necessary to prove his case. He also makes several claims for relief, among them reinstatement and moral damages.

8. The ILO argues that the complaint is irreceivable both as being out of time and as being beyond the Tribunal's competence. Since the latter point, if well taken, would foreclose any further consideration of the complainant's request for relief as well as of the ILO's argument that the complaint is out of time, the Tribunal will deal with it first. Article II of the Tribunal's Statute provides in relevant part:

"1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.

[…]

4. The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution."

9. There is no other relevant provision in the Statute and in particular no provision giving the Tribunal authority over agreements entered into between the Organization and its former staff members.

10. The ILO relies on Judgments 1845 and 2157. In both those cases the complaints were brought by former staff members who applied for new posts with the relevant organisations. The Tribunal in both cases held that a former staff member in this situation has no standing to bring a complaint.

11. The complainant asserts that he has a special ongoing contractual relationship with the ILO arising out of his former employment by the latter. The ILO responds that there was no provision in the letter, which is the only evidence of the settlement agreement, assigning power to the Tribunal to act as an arbiter of disputes. This submission is clearly correct. It is perhaps unfortunate for the complainant, who appears throughout to have acted as his own lawyer, that he did not include in the settlement agreement a clause giving jurisdiction to the Tribunal in case of dispute, but it cannot be doubted that the settlement, concluded well after the complainant's loss of his position as a staff member, was not a term or condition of his appointment, nor did it form part of the Staff Regulations. The Statute, in Article II(4), requires that where the dispute relates to an agreement outside the terms of employment of a staff member, the agreement must contain a provision giving the Tribunal competence over

disputes with regard to its execution so that the Tribunal can hear such a dispute. There is none.

The complaint is irreceivable and must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.