

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

FIFTY-FIRST ORDINARY SESSION

In re PINTO DE MAGALHAES (No. 2)

Judgment No. 589

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Constantino Pinto de Magalhães on 11 November 1982 and brought into conformity with the Rules of Court on 20 January 1983, the ILO's reply of 29 March, the complainant's rejoinder of 27 May and the ILO's surrejoinder of 29 July 1983;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal, Articles 3.2, 3.7, 4.2(f) and 13.2 of the Staff Regulations of the International Labour Office and ILO Circular No. 144, Series 6, of 31 December 1969;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. This case is the sequel to one on which the Tribunal delivered a judgment, No. 311, on 6 June 1977, and the complainant's earlier career in the ILO is summarised therein. The Tribunal quashed his transfer from the Budget and Finance Branch to the Office Supply Section of the Internal Administration Branch. Talks with the Administration led to his writing a minute to it on 6 September 1977 insisting on reinstatement in his old post. The head of the Branch, Mr. Cohen, talked the matter over with him again. Exactly what was said is in dispute, but the upshot was the confirmation, on 11 October, of his transfer to the Office Supply Section as a "purchasing officer" with effect from 1 November. He consented in writing on 13 October. His grade at the time was G.5. On 19 October Mr. Cohen wrote to the department head suggesting training for him. On 18 September 1980 there began, at his request, an evaluation of his post, and in July 1981 he was told it had been regraded G.6. He at once applied for review, though in vain, on the grounds that all the previous incumbents had been graded G.7. On 14 July he appealed to the General Service Grading Appeals Committee, alleging that Mr. Cohen had promised him G.7 if he completed the training -- which he had. The reply from the Chief of the Personnel Development Branch on 23 September 1981 was that, though "Mr. Cohen believed in good faith that the position was graded G.7 and therefore gave you an expectation of promotion to this grade", he had never been "in a position to promise you the G.7 grade, and for this reason the Office cannot accept an obligation to promote you to G.7". The Committee confirmed the grading and on 17 June 1982 the complainant appealed under Article 13.2 of the Staff Regulations claiming G.7. This was refused in a letter of 13 August 1982 from the Chief of the Personnel Department, which is the impugned decision. After further correspondence in which the Director-General expressed willingness to meet his reasonable expectations, but without infringing the rules on grading, he appealed to the Tribunal.

B. The complainant says that he had no reason to mistrust Mr. Cohen's promise of G.7: the post he was to hold carried that grade, and Mr. Cohen made the promise in good faith, as the Chief of the Personnel Development Branch admits. It was binding on the ILO, the more so as it was the consideration for which he waived his right to reinstatement in his old section. It is immaterial that his post has been reduced to G.6, since even when a post is downgraded the incumbent keeps the grade it had before. He has been seeking transfer to a post in a field office and has indeed competed, to no avail, for many such posts. To his mind his success in the first case has harmed him, and he has been discriminated against. He seeks the disclosure of his personal records and those of other candidates in competitions he has entered so that the Tribunal may verify his allegations on this score, promotion to G.7 with effect from 1 January 1980; and an award of 50,000 Swiss francs as damages for moral injury.

C. The ILO replies as follows. (1) Mr. Cohen was not competent to promise the complainant G.7. One way of obtaining promotion is to get a post with a higher grade; but then, with some exceptions not relevant here, Article 4.2(f) of the Staff Regulations requires competition, and, as the complainant knew, neither Mr. Cohen nor even the

Director-General could disregard that rule. The other way is to have one's own post upgraded after objective evaluation. What Mr. Cohen promised and was competent to promise was that the complainant would be given greater responsibilities which might warrant G.7; but Mr. Cohen had no say in the grading, which must follow the rules in Circular No. 144, Series 6, of 31 December 1969. (2) In fact Mr. Cohen did not promise G.7. It is odd that the complainant let four years go by before even speaking of a promise, and has been applying for other posts, including a G.5 one in New York. Someone of Mr. Cohen's experience could not possibly have thought himself competent to make such a promise. A letter he wrote to the ILO on 16 March 1983 and which it supplies says that he knew he was not and that he merely told the complainant that a job audit would be carried out and that he would get G.7 if his duties so warranted. (3) What Mr. Cohen did promise has been done. A grading exercise was duly carried out and the post correctly regraded G.6. There are no objective grounds for upgrading it. Nor is there any evidence of discrimination: the ILO granted the complainant an additional step increment in 1982 and has undertaken to consider giving him new responsibilities.

D. In his rejoinder the complainant contends that the ILO has not respected Mr. Cohen's valid promise. It has drawn a mistaken analogy between his own duties as a "purchasing officer" and those of an assistant purchaser in the Technical Co-operation Equipment and Subcontracting Branch, which he describes in detail. There are more than two ways of getting promotion: there are also the grant of a special post allowance under Article 3.7 of the Staff Regulations, which his supervisor applied for on his behalf, in vain, and direct promotion. The grading procedure suffers from serious defects and the grading at G.6 is an abuse of authority. The principle of equal treatment requires the grant of P.3, the true grade of a "purchasing officer". Altering his claims, he seeks the disclosure of files on competitions he has entered and on the candidates, of the Grading Appeals Committee's report and of the file on the application for the special post allowance; he invites the Tribunal to order his promotion to P.3 or, failing that, to G.7, with effect from 1 January 1980. Besides 50,000 Swiss francs as damages, he claims 7,500 towards costs.

E. In its surrejoinder the ILO again submits that, as the complainant cannot in good faith gainsay, Mr. Cohen was not competent to promise promotion to G.7, something he could obtain only by winning a competition or by regrading. He does not qualify for direct selection since he does not come within any of the categories for which alone Article 4.2(f) allows it. A special post allowance is, according to Article 3.7, granted only for the temporary discharge of the higher responsibilities of a vacant post. The fact that his supervisor applied for one for him belies any desire to victimise him. The objections he now makes to the grading exercise formed no part of his Article 13.2 "complaint" and are irreceivable; indeed he even said in that complaint that the G.6 grading was "irrelevant to the point at issue". Besides, the grading exercise was properly carried out and the findings correct. The title of a post does not determine its grade, and his comparison with the duties of other "purchasing officers" in the Office is irrelevant. No analogy was drawn in grading his post. He has failed to show any mistake of fact or any mistaken conclusion drawn from the facts.

CONSIDERATIONS:

Receivability of the claims in the rejoinder founded on mistakes in grading and for promotion to P.3

1. In the complaint form, dated 11 November 1982, the complainant invites the Tribunal: "Principally: To state that the plaintiff has to be granted the grade (G.7) retroactively to January 1st, 1980 in view of the promises given to him by the ILO." In his rejoinder, dated 27 May 1983, he seeks "promotion, on personal grounds and in keeping with the principle of equal treatment, to grade P.3 with retroactive effect from 1 January 1980, or, failing that, promotion, on personal grounds and in fulfilment of the promises made by Mr. Cohen, to grade G.7 with retroactive effect from 1 January 1980".

In support of the latter claims the complainant pleads, not only Mr. Cohen's promise, but "the clearly mistaken conclusions of the grading officer and the Grading Appeals Committee, who, on the strength of a false analogy, took an unjustified decision".

The ILO submits that, being founded on alleged errors in the grading, the new claims are irreceivable. In so far as the rejoinder merely puts forward new grounds for allowing the claims as set out in the complaint the plea falls. But where there is a change in the substance of the original claims the new one is irreceivable. And in this instance it is, since what the complainant claimed on 11 November 1982 was promotion to G.7, whereas in his rejoinder of 27 May 1983 he seeks promotion to P.3.

The new claim goes beyond the original ones and is irreceivable because it was filed after the ninety-day time limit in the Statute of the Tribunal.

The merits

2. By Judgment No. 311 of 6 June 1977 the Tribunal quashed the Director-General's decision to transfer him from the Budget and Finance Branch to the Office Supply Section of the ILO. The complainant submits that the reason why he did not insist on the ILO's giving effect to that judgment is that, after taking the matter up on several occasions with the Administration, he received from Mr. Cohen, the Chief of the Internal Administration Branch, an assurance that the post he was to hold was graded G.7, whereas the one he had held till then was G.5.

There is no real doubt that Mr. Cohen did enter into some sort of commitment in talking the matter over with the complainant. Indeed Mr. Skerrett, the Chief of the Personnel Development Branch, wrote the complainant a minute on 23 September 1981 in which he said: "Mr. Cohen believed in good faith that the position was graded G.7 and therefore gave you an expectation of promotion to this grade. On the other hand, it is clear that Mr. Cohen was never in a position to promise you the G.7 grade." That is corroborated by an affidavit Mr. Cohen signed on 16 March 1983, and in which he affirms that he told the complainant that if he stayed on in the Office Supply Section "I would demand a job audit" and he would get grade G.7 if the audit showed that that was the level of his post. The complainant produces no evidence to cast serious doubt on those two statements and indeed his subsequent behaviour seems to bear out the ILO's case. For one thing, when he received notice of the decision of 11 October 1977 to transfer him for good to the Office Supply Section, he consented unconditionally. For another, he completed the training provided for him by Mr. Cohen, and then, as had been intended, he started the procedure on 18 September 1980 for grading his post. His case went first to the grading officer and then on appeal to the General Service Grading Appeals Committee. Because the standard appeal procedure did not bring him satisfaction, he addressed a "complaint" to the Director-General on 17 June 1982 under Article 13.2 of the Staff Regulations. In a letter of 13 August 1982 the Chief of the Personnel Department informed the complainant that the Director-General acknowledged the existence of Mr. Cohen's commitments towards him, but believed that they had been "fulfilled insofar as it was proper to fulfil them". The Director-General was entitled to take that view. The commitments did not confer on the complainant any right to the upgrading of his post to G.7. The ILO was not in breach of any obligation, has caused the complainant no injury on that account, and is not liable. Neither damages nor costs are due to him.

There is no need to consider ordering the ILO to produce the files of the complainant and of other candidates in competitions he has entered, the report of the Grading Appeals Committee confirming his post at G.6, and the file asking for a special post allowance for him. The files have not given rise to any dispute involving those concerned, and their disclosure would provide nothing of relevance beyond what is contained in the four detailed briefs filed by the parties and the many items of evidence appended thereto.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable Lord Devlin, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Devlin

E. Razafindralambo

A.B. Gardner

