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

FIFTY-NINTH ORDINARY SESSION

In re CACHELIN

Judgment No. 767

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Odette Cachelin against the International Labour Organisation (ILO) on 17 July 1985 and corrected on 1 October, the ILO's reply of 29 November 1985, the complainant's rejoinder of 6 February 1986 and the ILO's surrejoinder of 11 April 1986;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 11.2 and .16 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written evidence;

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

A. The complainant, a Swiss citizen, joined the ILO in 1953 as a typist. She was an established official. By 1978 she had reached grade G.6 and was employed in the Official Relations Branch. Her annual reports were good. On 23 January and 19 February 1985 she wrote to her supervisors saying that for reasons of her own she wished to retire early, on 31 October 1985, and claiming the "financial benefits" that other staff leaving before time had been awarded. That was, or the ILO took to be, an allusion to the grant provided for in Article 11.16 of the ILO Staff Regulations. The clause is headed "Agreed termination" and reads:

"The Director-General may terminate the appointment of an official if such action would be in the interest of the efficiency of the work of the Office, provided that the official concerned consents to the action. The Director-General may pay to an established official terminated under this Article an indemnity not more than 50 per cent higher than that payable under Article 11.6 (Indemnity upon reduction of staff)."

In forwarding the complainant's claims to the Personnel Department the chief of her department wrote a minute saying that "the termination of the appointment of an official of Miss Cachelin's degree of excellence cannot be construed to be 'in the interest of the efficiency of the work of the Office'". Personnel refused on 20 February. On the morrow she lodged a "complaint" under Article 13.2 of the Staff Regulations. By a letter of 19 April, the final decision she impugns, the Chief of the Personnel Department told her the Director-General rejected her claims. She resigned from the Organisation on 30 December 1985.

B. The complainant alleges breach of the principle of equal treatment. By 30 June 1985 over 200 officials had been granted an indemnity of up to 18 months' pay, and many, she submits, were in the same position as she in fact and in law. The ILO has argued that the indemnity is due only when the Director-General ends the contract in order to raise efficiency or meet a shortage of funds. It has also said that he has never reached a terminal settlement with anyone whose supervisor maintains that it would not be in the ILO's interests for the official to go. The complainant challenges both assertions. A circular, No. 330, went out on 20 May 1985, and paragraph 2 does say that it is for the Director-General, not the official, to start action under 11.16. Yet he has since granted the indemnity on resignation, and the Organisation's policy is as unfair and arbitrary as ever. The complainant seeks payment of the indemnity, which she sets at 114,743 Swiss francs, interest and costs.

C. In its reply the ILO submits that the complaint is devoid of merit on several grounds. (1) The purpose of 11.16 is the early ending of an official's appointment in the Organisation's own interest, the indemnity being intended merely to offset the financial drawbacks of a shortened career. It is therefore mistaken for the complainant to object to the ILO's refusal to release her: if she wants to leave she may resign under 11.2. (2) Article 11.16 is intended to enable the Director-General to improve efficiency, and he may do so, for example, by getting rid of surplus staff -- as he did when the United States withdrew from membership -- or of those whose performance, though not so bad as to warrant dismissal, is unsatisfactory. Although many who left were glad enough to go, the sole criterion for award of the indemnity is the ILO's efficiency. (3) It is for the Director-General to act under 11.16, not the staff

member, since he alone is competent to determine what the ILO's interests require. The Director-General's authority being discretionary, he is not bound by precedent. (4) There was no breach of equality: the complainant's position may be distinguished on the facts. The ILO's finances improved after the United States returned to the fold, so that by 1985 there was not the same need to reduce staff and the only reason for letting anyone go was poor performance. The complainant's work being good, the Director-General was right to endorse her supervisor's view that her departure would not serve the Organisation's interests.

D. The complainant presses her claims in her rejoinder. She maintains her allegations of arbitrariness and breach of the principle of equal treatment. She cites four cases, out of the many she says are identical to her own, of officials who did get an indemnity: like her they all resigned and had good performance reports; like her own, the supervisors of two of them were against paying them the indemnity. She seeks production of the annual reports of the four officials and of one other, which the ILO has refused to disclose. She concedes that she does not qualify for the 11.16 indemnity as the ILO interprets the article. But she submits that it is distinct from the one she is claiming, which she calls "the golden handshake". The ILO's arguments relate to the award of the 11.16 indemnity proper, not to the golden handshake, and are therefore irrelevant. Since the ILO has re-employed officials who got the indemnity, presumably the terms of 11.16 were not strictly complied with since they apply to those whose work is not wholly satisfactory. Moreover, others who got the indemnity left posts which were filled after they had gone, so that the purpose cannot have been to get rid of surplus staff. In fact the ILO has either enlarged the scope of 11.16 by putting on it a special construction of its own, or else has created a new benefit by custom and usage, and she seeks to benefit from the construction or the custom as many others have. Even if the Director-General has discretion he must still abide by the general rules of law, such as that of equal treatment. She amends her principal claim to 114,712 Swiss francs.

E. In its surrejoinder the ILO maintains that the rejoinder merely repeats, at length, arguments that rest neither on the material texts nor on a proper grasp of the facts. It rejects as absurd the contention that the golden handshake is not the indemnity in 11.16. It develops its pleas that the indemnity is not a benefit but compensation for an early termination of appointment; that the Organisation may decide whether there is to be termination and that the Director-General has consistently exercised his discretion correctly in that respect; that the cases on which the complainant relies were distinguishable from hers in respect of the Organisation's broad interests and policy; and that, even if she was in the same situation as others who did get the indemnity in keeping with a more liberal policy, the ILO was free to alter its practice and revert to a stricter one.

CONSIDERATIONS:

1. Article 11.16 of the Staff Regulations of the International Labour Office empowers the Director-General to terminate an appointment, with the official's consent, "if such action would be in the interest of the efficiency of the work". The official is paid a large sum in consideration.

What 11.16 provides for is neither dismissal, since the official consents, nor acceptance of resignation, since it is the ILO that takes the initiative. It is intended to make for efficiency at times of financial stringency -- such as there have been since 1977 -- or quite simply to serve in discharging staff whose work record, though not so bad as to warrant disciplinary action, is not quite up to standard.

2. The complainant joined the ILO in 1953, and her work has always been wholly satisfactory. But for family reasons and because of poor health she applied in January 1985 for early retirement and payment of the 11.16 indemnity. The ILO refused the indemnity on the grounds that she did not fulfil the conditions. She appealed and the ILO rejected the appeal by a decision of 19 April 1985, the one now impugned.

On any strictly literal reading of 11.16 the complainant undoubtedly fails to qualify. One reason, and in itself a sufficient one, is that she herself wanted to leave. And there is another, though it is not quite so obvious. It is hard to make out that her leaving was "in the interest of ... efficiency", though she does say she was no longer fit. Her supervisor did not agree, but the ILO staff physician and other doctors found her to be in poor health.

3. Be that as it may she founds her objections to the impugned decision on a quite different reasoning.

4. Her first plea is that the legal basis for the indemnity is not 11.16 at all but a usage some ten years old commonly known as "the golden handshake".

The ILO strongly demurs, and its objections are sound. There is no evidence before the Tribunal to bear out the plea. No international organisation could conceivably introduce benefits which did not rest on some provision of its Staff Regulations or Staff Rules approved by its general assembly or governing body. The Tribunal holds that the golden handshake is just another name for the 11.16 indemnity.

5. Another of the complainant's pleas, and a more cogent one, is that the construction the ILO has itself put on 11.16 supports her claim. Indemnities have been bountifully handed out even when the conditions were not met. She cites cases of officials who have got the indemnity even though they had already resigned, and she submits that indeed the practice is a common one. In all, she says,205 staff members have received the indemnity and she names 84 who got it between 29 February 1980 and 30 June 1985. Not until she herself was refused it did the Chief of the Personnel Department put out, on 20 May 1985, a month after the impugned decision, a circular reminding the staff of the terms of 11.16 and saying that no claim lodged by an official of his own accord would be entertained.

Thirdly, the complainant submits that some who left with a golden handshake have since been taken back and that it is odd, to say the least, to reappoint people who were got rid of to improve efficiency on the grounds that their work was not up to standard.

Fourthly, she cites cases of officials who resigned and who got the indemnity even though their work record had been very good. She invites the Tribunal to hear evidence from witnesses to that effect.

She concludes that the treatment of her was unfair arbitrary and an abuse of authority.

6. The ILO's pleadings in reply raise issues both of 1aw and of fact. But there is a preliminary question to be disposed of first: would accepting the complainant's contentions mean setting the impugned decision aside?

Neither 11.16, as was said above, nor indeed any other article of the Staff Regulations suffices to carry the complainant's case. If the treatment of her was lawful then it was unlawful -- assuming what she says is true -- to pay the indemnity to others. But precedent has it that one official may not rely on the unjust enrichment of another: equality in law does not embrace equality in the breach of it.

The reason is the need for legal stability, and the rule is beyond dispute when all that is challenged is the treatment of individuals If every unlawful act by an organisation entitled everyone else on the staff to protest personnel management would be difficult if not impossible.

The instant case is a different matter, however. The complainant's argument runs that the construction the ILO has wilfully and consistently put on 11.16 over several years is now part of personnel policy and must be applied to all departing staff members in like case.

The argument succeeds because it rests on general principles of law that require an international organisation to show good faith and to frame its personnel policy by objective criteria. That is something the ILO would have failed to do if the complainant's assertions proved true.

In the impugned decision the ILO acknowledges that "many have been paid the 11.16 indemnity by mutual consent", and its submissions bear that out: in paragraph 7 of its surrejoinder it states that the Office has agreed to treat with some staff members who wanted to leave.

7. Though the ILO thus admits having put a loose construction on 11.16,it maintains that that is of no moment in law: whenever someone has claimed the indemnity the Director-General has founded his decision on the Organisation's interests as seen in the broad context of the facts and he has been exercising his discretion.

8. Article 11.16 does give the Director-General authority to decide whether or not to propose termination. But the authority is not unqualified. The exercise of it is subject to review by the Tribunal, which will determine whether the decision was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or essential facts were overlooked,or there was abuse of authority, or clearly mistaken conclusions were drawn from the evidence.

The Tribunal will determine the reasons underlying decisions so as to make sure that personnel policy is properly objective. There may have to be close scrutiny of the facts in some cases.

9. Another line of argument advanced by the ILO is that even if it did construe 11.16 too loosely it could always put an end to the practice. The ILO may indeed change the interpretation provided it does not thereby infringe any provision of the Staff Regulations. But the change has to be properly made known and may not be retroactive. The only evidence adduced in support of the argument is a circular which went out after the impugned decision and which therefore could have no bearing on its lawfulness.

10. For the foregoing reasons the Tribunal will entertain the complainant's pleas. One of them is that several officials in like case did get the indemnity. The ILO denies that: some of them, it maintains, may, like the complainant, have had a good record of performance, but their position in the general context of the Organisation was not the same as hers.

11. The Tribunal concludes from submissions on the issue that, if the complainant is to succeed in law, it needs further evidence on the facts before it can rule on her allegations of discrimination.

Oral proceedings will not serve the purpose, and the complainant's application for such proceedings is rejected.

The Tribunal requires further submissions as follows:

(a) The Director of the Personnel Department of the ILO shall draw up and sign a comprehensive memorandum setting forth in detail the ILO's policy in the matter from 1981 to 31 December 1985. He shall in particular state how many officials with indefinite appointments have taken early retirement, to how many 11.16 has been applied and to which staff members the indemnity has been paid at their own instance. He shall lodge his memorandum within one month.

(b) On receipt of the present judgment the ILO shall forthwith notify to the complainant the addresses of Mrs. Passet, Mr. Pollan, Mrs. Renaud, Mr. Sanchez, Mr. von Stedingk and Mrs. Vuilloud so that she may obtain written statements in evidence from them.

(c) The Director's memorandum shall be forwarded to the complainant, who shall file submissions, together with any written statements she may have obtained, not later than one month from the date on which she receives the memorandum.

(d) The ILO shall file its final submissions within a further time limit of three weeks.

12. The question of costs is reserved.

DECISION:

For the above reasons,

The Tribunal orders the further submissions set out in 11 above.

In witness of this Judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner