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

SIXTY-FOURTH SESSION

In re DE FRANCHI

Judgment 901

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Massimo de Franchi against the International Labour Organisation (ILO) on 18 June 1987 and corrected on 31 August, the ILO's reply of 4 December 1987, the complainant's rejoinder of 16 January 1988 and the ILO's surrejoinder of 10 March 1988;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 1.2, 4.12, 11.4 and 13.2 of the Staff Regulations of the International Labour Office;

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

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

A. The ILO employed the complainant, who is Italian, from 1980 to 1982 as an expert in rural development and employment in Ethiopia. It granted him a further appointment at grade P.4 from 21 September 1986 as an expert in economic planning on a project of the United Nations Development Programme (UNDP) relating to labour-intensive public works in Niger. His appointment was for one year, his duty station was to be in the region of Maradi, and he took up duty in Niamey on 27 September 1986. Having learned that he and the chief technical adviser of the project, Mr. Lopez-Julios, were at loggerheads, the ILO sent a project officer to Niamey to make an inquiry at the end of October. He reported that the complainant had been critical of policy and people and that the Government of Niger did not want him to go to Maradi. On 11 November the Director of the Employment and Development Department wrote from headquarters to the Resident Representative of the UNDP, Mr. Cavalli, asking whether that was so. On 24 November the Planning Minister of Niger wrote to Mr. Cavalli praising Mr. Lopez-Julios, saying that the complainant was making trouble and concluding: "the necessities of the service render impracticable the use of Mr. Massimo de Franchi in the duties and at the duty station assigned to him". On 1 December Mr. Cavalli gave him the gist of that letter. By a telegram of 9 December headquarters told him that in compliance with the Government's request and Article 11.4 of the Staff Regulations ("1. The Director-General may terminate the appointment of a fixed-term official - ... (d) if the necessities of the service render impracticable the use of the official in the duties or at the duty station assigned to him.") his appointment was terminated with one month's notice. In a telegram of 11 December he claimed the right to reply under 11.4.2, but headquarters retorted on 12 December that the provision did not apply and he could comment anyway if he came to Geneva on his way home to Italy. On 15 December he sent a telegram reasserting his right to reply. He returned to Italy without going to Geneva. He filed an internal "complaint" in mid-March 1987 under Article 13.2 of the Staff Regulations alleging wrongful termination, but by a letter of 8 May 1987, the decision impugned, the Director of the Personnel Department informed him that the Director-General had rejected his claims.

B. The complainant says that he was given no opportunity to show his mettle and things went wrong from the start. Government people were turned against him by Mr. Cavalli and more especially by Mr. Lopez-Julios, who was in their good books and took a dislike to him, being underqualified and therefore feeling ill at ease with him. Mr. Lopez-Julios was unhelpful and therefore to blame for what happened. The complainant was denied the right to defend himself because he was not allowed to see the letter from the Planning Minister and the ILO did not give the Government authorities the full facts. He asks that his personal records be corrected so that he will not suffer for the wrongful treatment of him. He claims six months' pay in compensation for loss of earnings, having found no other employment until 1 July 1987, and two months' pay in moral damages.

C. The ILO replies that it duly terminated the complainant's appointment under 11.4.1(d). Although the provision does not entitle the official to comment before the decision is taken, the complainant was given due notice and a chance to comment, which he did not take. Mr. Cavalli had many talks with him and before his appointment ended,

on 10 January 1987, he had an opportunity to comment on the substance of the letter from the Planning Minister. Actually seeing the text, which the ILO discloses, would have added nothing to what he knew. The Director-General acted at discretion, and the Tribunal may not substitute its own opinion on whether the complainant should have been kept on. There was no procedural or other flaw in the Director-General's exercise of his authority. The decision was substantiated. The Government of Niger asked that the complainant go not because he did not get on with Mr. Lopez-Julios but because he was behaving in a manner unbefitting an international civil servant and in breach of Article 1.2. Only the letter from the Minister is in the records and there is nothing else that may harm his interests. His claims are unfounded.

D. In his rejoinder the complainant asks that the Minister's letter be removed from his personal file. He submits that there was nothing wrong in getting in touch with organisations he expected to be dealing with in Maradi. Nor did the Government object to his going there on mission in late October 1986, the only reason why he did not actually go being the state of his health. Mr. Lopez-Julios must have written to headquarters to complain about him soon after he arrived, and he has never seen a copy of that letter, though it was that that persuaded the ILO to send the project officer to Niamey. The text of the Minister's letter, which he has at last seen and which quotes 11.4.1(d) word for word, shows that someone in the ILO had put the Minister up to it. How did he act in breach of Article 1.2? All he can be accused of is failing to get on with Mr. Lopez-Julios and that was not his own fault.E. In its surrejoinder the ILO observes that the complainant does not deny that the Government may reject an expert and did not want him to stay on. That being so, the ILO had no choice but to terminate him. All governments of member States have access to ILO Staff Regulations, and it is not surprising that the Government should know the text since it takes part in recruiting project staff. Government people were dissatisfied enough with the complainant as early as October not to need any persuading from Mr. Lopez-Julios. It was not a letter from Mr. Lopez-Julios that alerted headquarters but one he wrote himself to an official in Geneva. He had ample opportunity to state his views: he wrote a letter on 29 October to the Chief of the Employment and Development Department answering the allegations against him. The breach of 1.2 lay not in his getting in touch with organisations but in his refusal to heed warnings about offending the authorities. His personal file contains only what Article 4.12 of the Staff Regulations allows: the Minister's letter is not in that file but only in the records of the project and of his case.

CONSIDERATIONS:

The termination of the complainant's appointment

1. The ILO offered in July l986 and the complainant accepted an appointment as an economic planning officer in Niger. A contract was concluded for one year starting on 21 September l986 and after a short spell for briefing at headquarters he arrived in Niamey on 27 September. But his mission did not last long: a telegram sent on 9 December and delivered the next day in Niamey summarily ended his appointment. That decision, which the ILO took long before the date of expiry of his appointment, is the one he is now impugning.

2. What he held was a fixed-term appointment, i.e. one for a continuous period ending on the date stated in the contract of appointment or in the decision giving effect to that contract.

When the contract expires the appointing authority has wide discretion in deciding whether to extend or terminate it, and although the staff member may decline a new offer he has no right to any extension. Should there be a dispute the Tribunal will exercise only a limited power of review.

The case is different if the appointment still has time to run. The holder of it then has a right to its continuance and only in exceptional circumstances may the organisation take away that right of its own accord.

Article 11.4 of the Staff Regulations of the International Labour Office provides for four contingencies in which the appointment of a fixed-term official may be terminated before expiry. Two are straightforward: a state of health which makes the official unfit to perform his duties satisfactorily throughout the remainder of his appointment, and unsatisfactory performance. The other two need have no direct connection with the person of the official but arise out of "the necessities of the service" either because they "require a reduction in staff" (11.4(a)) or because they "render impracticable the use of the official in the duties or at the duty station assigned to him" (11.4(d)).

Even where termination before expiry is due to the necessities of the service there must be explanation and justification of the decision because it amounts to unilateral breach of the contract. The Director-General does not

then have the discretionary authority he may exercise on expiry and, for one thing, the Tribunal will consider whether the decision serves the organisation's interests, as it should.

3. The grounds for the impugned decision are stated in the telegram of 9 December 1986: the complainant's appointment is being ended under 11.4(d), at a request from the Government of Niger, because the necessities of the service "render impracticable the use" of his services in that country. That is all the telegram says by way of explanation.

The decision was thus prompted by a letter from a member of the Government of Niger. But before going into the substance and purport of the Minister's letter, which is one of the items of evidence, the Tribunal will put it in context.

4. By the time the complainant had got to Niamey on 27 September 1986, the Chief of the Emergency Employment Schemes Branch had issued his first instructions, and one thing he had decided on was the functions of two of the officials in charge of carrying out the project. One of them, who was already on duty and was known as the chief technical adviser, was to represent the project in dealings with the Resident Representative of the United Nations Development Programme and with the Government and to be broadly in charge of the project. The other official, the complainant, was to support the chief technical adviser but take charge only in his own province. The recommended policy was that in practice decisions and reports about the project should reflect agreement between the members of the project team.

The policy foundered. Very soon the complainant and the chief technical adviser were at odds and even at loggerheads. The ILO discloses a letter the complainant wrote on 29 October to the Director of the Employment and Development Department at headquarters. He said, and the ILO does not deny, that he had not yet been officially presented at the competent government department. Actually headquarters had already heard of the difficulties caused by the ill feeling between the two officials, who were communicating only in writing.

The Director wrote a letter on 11 November to the UNDP Resident Representative mentioning the strained relations between the two. Apart from the complainant's letter the Director had received an oral report from another ILO official who had gone to Niamey and seen everyone concerned. The Director said in his letter that he was troubled by the wrangling but could scarcely tell the rights and wrongs of the matter; his main worry was that the Government might refuse to let the complainant take up duty in the field, and he asked the Representative to sound out the Government about what they were minded to do. So all he wanted was that the Representative put out feelers; quite plainly he was thinking only about the ILO's interests and being careful not to allot blame.

The Minister wrote a letter on 24 November to the Representative which, though it was written as if unsolicited and said nothing of earlier contact, was in fact the answer to the Director's query of 11 November.

5. What the Minister said calls for scrutiny.

The first paragraph of his letter said that the project had got under way since the chief technical adviser had taken over and praise was due for what he had done, but trouble was looming because the technical adviser - i.e. the complainant - was not fitting into the team and that was holding up progress. Then came the nub: "That being so, and in keeping with the rules about fixed-term appointments, I invite you to conclude that the necessities of the service render impracticable the use of Mr. Massimo de Franchi in the duties and at the duty station assigned to him". The letter ended with a call for proper backing for the continuance of the project.

The Minister's letter reached Geneva on 1 December l986, the very day on which the Representative saw the complainant and attests to having given him the gist of it. Indeed the complainant acknowledges as much, adding that the Representative told him the Minister preferred a purely administrative solution to ordering his expulsion on political grounds (he had reportedly criticised the policy for rural development and seen people belonging to non-governmental organisations).

6. The complainant was not given the text of the Minister's letter and maintains that merely having it read out to him did not enable him to comment properly. He alleges breach of his right of reply.

The ILO's plea in law is that when a contract is terminated because of the necessities of the service it is under no duty to give the official the reasons for the decision before it is taken.

That plea fails. No decision that is adverse to a staff member, as is the decision impugned in this case, may be taken unless the reasons for it have been stated. That general principle is reflected in 11.4(2), which stipulates that a fixed-term official whose appointment is terminated "shall be informed of the ground for termination". Such information will serve a purpose only if provided before the decision is taken, and the variations allowed under 11.4(2) relate merely to the procedure to be followed, which turns on circumstances.

7. So the material issue is whether on the facts the complainant's right of reply was respected.

On 1 December he was given the gist of the Minister's letter and on the 10th the signed text of the decision to terminate his appointment. The ILO pleads that that left him time in which to address his observations to the Resident Representative or send a telegram to headquarters.

To allow that plea would be to disregard the many ins and outs of the case, as set out in 4 and following above.

Actually the ILO acknowledged by implication that its decision had been hasty because it asked the complainant to report to Geneva to state his case by 20 December on his way home. The invitation had no bearing on the application of Article 11.4(2) of the Staff Regulations because he had been dismissed on 10 December, and it is immaterial that he did not go to Geneva.

Although the Minister's letter does state reasons for his request, it was not the only basis in fact for the challenged decision. That the Resident Representative was aware of that is plain from his having told the complainant that the real reason had to do with politics. The evidence suggests, and the Minister's letter does not preclude the possibility, that another reason was dissension between the members of the team.

But the letter afforded the only basis in law for the decision, the complainant was given only ten days in which to answer it, and so, not knowing the real reasons for termination, he was not given a proper opportunity to defend himself.

When an international official on mission shows professional shortcomings or fails in his duty of "reserve" the government may of course ask the organisation to withdraw him. But termination is not the inevitable outcome. For one thing, so long as the contract is in force the Director-General does not have discretionary authority; for another, he may discuss the matter with the government and may also - and it is more likely - seek some explanation. The Tribunal will not interfere. In any case even when the organisation acquiesces it need not terminate the appointment on that account.

What the Tribunal does require is that before dismissing someone a government wants to go the organisation summon him to headquarters and away from any emotional atmosphere there may be, and give him an opportunity to answer questions and have his say.

Moreover, there was no objective report on this case. The letter written on 11 November 1986 by the Director of the Department of Employment and Development takes no stand; the Organisation cites no correspondence nor even conversations between the Minister and the Resident Representative; and it acted at once on the Minister's proposal without the slightest attempt to get more information.

All this makes it plain that summary termination under 11.4 was in breach of the complainant's right of reply and cannot stand.

8. The Tribunal will not quash the decision under Article VIII of its Statute because the complainant's appointment would have expired anyway long ago. Instead it will order the Organisation to pay damages for material and moral injury. Though dismissed on 10 December 1986 he was paid salary up to 10 January 1987 and end-of-service entitlements equivalent to another eight weeks' pay. He started other employment on 1 July 1987.

All things considered, a fair award will be a sum equivalent to six times the monthly pay he would have got had his appointment been allowed to continue.

Correction of the complainant's personal records9. The complainant does not produce any evidence to suggest that his personal records contain false or mistaken information. Although it was immaterial for the Organisation to bring up in this case the complainant's attitude during an earlier assignment to Ethiopia, there is nothing wrong with keeping the records of that assignment in his personal file.

There being no need to consider whether his claim is receivable, the Tribunal rejects it on the merits.

Costs

10. The complainant is entitled to payment of 1,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The ILO shall pay the complainant total damages equivalent to six times the monthly pay he would have got had his appointment been allowed to continue.

2. It shall pay him 1,000 Swiss francs in costs.

3. His other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.