SIXTY-NINTH SESSION

In re JAMES

Judgment 1052

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. David Clarkston James against the International Labour Organisation (ILO) on 14 September 1989 and corrected on 24 November, the ILO's reply of 27 February 1990, the complainant's rejoinder of 4 April and the Organisation's surrejoinder of 30 April 1990;

Considering Articles II, paragraph 4, and VII, paragraph 2, of the Statute of the Tribunal and the service regulations applicable to ILO language teachers;

Having examined the evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The ILO offers to its staff courses in its official languages. The language teachers are neither ILO officials nor subject to the Staff Regulations of the International Labour Office but employed under standard contracts and subject to special service regulations. Article 16 of those regulations stipulates: "Confirmation of the appointment of new teachers is subject to satisfactory performance in a two-year probation period".

The ILO employed the complainant, a United States citizen who was born in 1929, as a teacher of English under contract from 1 September 1987 to 31 August 1988. The second year of his probation was covered by a contract dated 5 January 1989 that ran from 1 September 1988 to 31 August 1989. Clause 6 of the contract says that the service regulations form part of it; clause 8 that either party may give two months' notice of termination and that the ILO must state a valid reason for doing so; and clause 10 that any dispute arising out of the contract may be put to the Tribunal under Article II(4) of its Statute.

Some time in the first half of June 1989 the official in charge of language training, a member of the Personnel Development Branch (P/DEV) of the Office, told the Chief of the Branch orally that students had found fault with the complainant's teaching.

By a letter of 15 June 1989 the Chief of P/DEV informed the complainant that he would not be employed after the expiry of his contract on 31 August 1989, the reason being stated as follows: "... several of your students have told us that they are somewhat dissatisfied with your teaching, which they have found ineffectual and poorly organised".

That is the decision he is impugning.

After conversations and correspondence between him and the Personnel Department the Chief of P/DEV confirmed the decision in a letter of 19 October 1989 as a proper exercise of the ILO's prerogative to dispense with the services of a probationer whose work was not up to standard.

B. The complainant believes that he has not been given, as his contract required, a valid reason for the decision not to confirm his appointment.

The reason the Chief of P/DEV gave in his letter of 15 June 1989 was "minor and ill-defined" and would afford insufficient grounds for termination in any other teaching establishment the complainant has known. He failed to get even an oral explanation from the language training officer and from the Chief of P/DEV.

Although his probation was nearly at an end he had not been given his say before the decision was taken nor allowed to talk the matter over with his students or with the Administration. He himself had not had a single complaint from any of his students since taking up duty in 1987.

The way in which the decision came about was unfair and unlawful. There was incomplete consideration of the

facts in that the Chief of P/DEV acted on "unverified complaints" recorded informally and without his knowledge by the language training officer. There was no proper procedure such as most language schools have for checking the quality of teaching.

He claims reinstatement and damages for loss of pay from 1 September 1989.

C. In its reply the ILO acknowledges that the Tribunal is competent under Article II(4) of its Statute to hear the complaint.

It submits that the complainant missed the ninety-day time limit in Article VII(2): though he says in the complaint form that the decision of 15 June 1989 was notified to him the same day he did not file until ninety-one days later, on 14 September.

As to the merits the Organisation explains that since there is no system of supervision of the teachers, who work independently, it does not always get wind of students' opinions of the teaching. Not until the complainant's probation was nearly over did it learn that all was not well. He took over from a teacher who was ill, and when she went back several students, supported by the rest of the class, said that he had spent too much time talking and the level of his teaching was inhibitingly high; they had made no progress and they did not want to study under him again. She passed on the criticisms to him, but he tended to blame the students. Another teacher also heard from students that he did not allow enough practice. The two teachers reported the matter to the language training officer, whom students also told that they would not enrol in the complainant's classes and who made a full oral report to the Chief of P/DEV. She later put what she had told him in a handwritten minute of 22 June 1989 of which the ILO discloses a photocopy. The dissatisfaction with him was borne out by attendance sheets that showed a high drop-out rate for four out of five of his classes from January to June 1989.

This is a case, not of dismissal, but of non-renewal with due notice at the end of probation. Non-renewal is allowed under Article 16 of the service regulations if a teacher's work is found unsatisfactory. On the strength of evidence that the complainant's classes were not what the students needed and many would not go back the ILO could not but refuse renewal. Though no-one in the ILO had broached the matter with him he had had talks with other teachers and cannot plead ignorance. Yet the ILO admits that it should have given him a hearing before taking its decision, and it has therefore offered him compensation in the form of pay for two months, the prescribed period of notice of termination. Though he has rejected its offer it asks the Tribunal to declare that sum "appropriate compensation for its omission".

D. In his rejoinder the complainant submits that his complaint is not time-barred. Though the language training officer gave him word of the decision of 15 June 1989 on the same day he did not actually receive it until 22 June: that was the date of official notification, and so he filed in time.

He describes the ILO's language training and how the dispute arose. All seemed to be going well, he says, until 15 June 1989, when he had the shock of hearing for the first time what students were supposed to feel about him. He was time and again denied the opportunity of seeing ILO officers. On 15 February 1989 a member of the staff of P/DEV spoke to him rudely and tried to intimidate him. His conversations with the language training officer and the Chief of P/DEV were unavailing: they never explained how many complaints there had been, to whom and when they had been made, and why he had not been told at the time or at least before the decision had been taken. In his submission the factual grounds for the decision are unproven.

The language training officer's minute of 22 June 1989, as submitted in photocopy by the ILO, is not the filing card the Chief of P/DEV read from and indeed showed him in conversa-

tion; at the time the Chief promised him a copy but later refused. He asks the ILO to produce the card; failing that, he wants to see the original of the minute of 22 June. In his submission such evidence is vital.

To his mind the evidence relied on was largely hearsay. The drop-out rate is no guide to the quality of teaching: what matters is the pass rate in examinations, and his students did not do badly.

He objects to the ILO's "untidy" system of relying on alleged complaints that may turn out to be groundless or even irrelevant. The language training officer was negligent in not giving him a hearing when she got word of the students' dissatisfaction. The Chief of P/DEV's view of him may have been distorted by a predisposition to think all ILO teaching of English poorly structured. It is unfair to deny a teacher the opportunity of answering complaints

when his livelihood may be at stake. As the Chief of P/DEV acknowledged, he could have remedied some of the complaints had he been told of them in time. Though the ILO admits to not giving him his say, its offer is not adequate to the serious financial and professional injury and offends against his dignity.

E. In its surrejoinder the Organization answers several points of fact which the complainant raises in his rejoinder. It reaffirms in particular that the decision was based on his unsatisfactory performance: "eight or ten students" had made oral complaints in June 1989, towards the end of the teaching year, about the sort of instruction he was giving. He was a part-time language teacher who was still on probation. His contract was not terminated: the ILO made a legitimate exercise of its discretionary authority not to confirm his appointment. According to the case law an organisation's discretion is wider in the matter of renewal of the appointment of someone on probation. There was no conceivable reason beyond the complainant's unsuitability why the ILO should not have wanted to keep him on or why he rather than someone else should have been picked on to bear the brunt of its supposed dissatisfaction with English language teaching in general.

CONSIDERATIONS:

1. The material issue in this case is whether the ILO acted improperly in deciding not to renew the complainant's appointment as an English language teacher at the date of expiry of that appointment, which was also the date of expiry of the period of probation prescribed in his contract of service.

Competence

2. Article II(4) of the Statute of the Tribunal reads:

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

Since clause 10 of the complainant's contract makes such provision the Tribunal will entertain his complaint by virtue of the competence vested in it under II(4).

Receivability

3. Article VII(2) of the Statutes provides:

"To be receivable, a complaint must ... have been filed within ninety days after the complainant was notified of the decision impugned ...".

The ILO contends that the complaint is irreceivable under VII(2) on the grounds that although according to what the complainant says in the complaint form the impugned decision of 15 June 1989 was notified to him on the same day, he did not file his complaint with the Tribunal until 14 September, one day after the lapse of the ninety days.

That contention fails. It is true that the complainant got word on 15 June of the decision that had been taken, but he did so only at second hand, and orally, from an administrative assistant to the Chief of the Personnel Development Branch. The only date that matters for the purpose of reckoning the time limit in VII(2) is the date of formal notification of the final decision in writing. The complainant did not have such notification until he actually received the Chief of Branch's letter of 15 June 1989. He states in his brief that that letter did not reach him until one week later, and the ILO does not deny that. He therefore met the deadline in VII(2) and his complaint is receivable.

The merits

4. The case law is that a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority.

Although such criteria hold good for the review of all discretionary decisions, the Tribunal will exercise especial caution in reviewing a decision not to confirm the appointment of someone who is still on probation; else probation

would fail to serve its purpose as a period of trial. In the case of a probationer the Administration must indeed be allowed the widest measure of discretion, and its decision will stand unless the flaw was particularly serious or glaring.

What is more, where the reason given for the non-renewal is unsatisfactory performance the Tribunal will not replace with its own the Organisation's view of the complainant's fitness for his duties.

Such are the principles the Tribunal will apply in determining whether the non-renewal was lawful in this instance.

5. The complainant contends that there was a procedural defect in that he was not given his say before the decision not to renew his appointment was taken: he should have been allowed to talk the matter over first with the competent officers of the Administration.

The plea is unsound because there was no element of disciplinary sanction in the decision. What the Administration did was to make an assessment of the complainant's performance and it was under no duty to enter into any dialogue with him on the subject.

In point of fact the ILO has made him an offer - which he has turned down - of two months' pay in compensation for its supposed breach of his right to a hearing.

The Tribunal simply takes note of that offer.

6. Another flaw the complainant alleges is that the Organisation drew mistaken conclusions about the quality of his teaching and was therefore wrong to come to the view that his performance was below par.

What he is really asking is that the Tribunal assess him more favourably than did his own employer and rule, on the strength of such assessment, that he deserves reinstatement or compensation. As was said in 4 above, that is precisely what the Tribunal may not and will not do.

7. Thirdly, the complainant suggests that the ILO may have committed an abuse of authority in that its decision "may have been" arbitrary and the Chief of the Personnel Development Branch may have suffered from misconceptions about the quality of English-language teaching in the ILO.

He offers no evidence whatever in support of that contention, which he puts forward in merely speculative terms anyway, and there is no reason to believe that the decision was taken on any grounds but those the Organisation has declared.

8. Being satisfied on the evidence that there was no fatal flaw in the exercise of the Director-General's discretion in this case, the Tribunal cannot but declare the complaint devoid of merit and reject the complainant's claims in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 26 June 1990.

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner