SEVENTY-FOURTH SESSION

In re PAVLOVA (Nos. 1 and 2)

Judgment 1246

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Eléna Michaïlovna Pavlova against the International Labour Organisation (ILO) on 11 March 1992 and corrected on 16 March, the ILO's reply of 17 July, the complainant's rejoinder of 11 August and the ILO's surrejoinder of 18 September 1992;

Considering the second complaint filed by Mrs. Pavlova against the ILO on 11 August 1992, the ILO's reply of 16 September and the letter of 21 October 1992 from the complainant's counsel informing the Registrar of the Tribunal that she did not want to submit a rejoinder;

Considering Articles II, paragraph 1, VII, paragraphs 1 and 3, and VIII of the Statute of the Tribunal and Articles 5.1(a), 5.5, 6.7.3 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a citizen of the former Union of Soviet Socialist Republics (USSR) who was born in 1941, was recruited by the ILO on 9 July 1989 at grade P.5 as Chief of the Women's Questions and Industrial Activities Section of the Conditions of Work and Welfare Facilities Branch (CONDI/T), in the Working Conditions and Environment Department (TRAVAIL). She was to serve on probation, in accordance with Article 5.1(a) of the Staff Regulations, which reads:.

"An official appointed to a post or position other than of a temporary nature shall be on probation for the first two years following his appointment. After the first 18 months of service the official's performance and official conduct shall be evaluated by his responsible chief in accordance with the procedure established in Article 5.5."

She was granted a one-year fixed-term appointment, until 8 July 1990, and then an extension from 9 July 1990 to 8 July 1991.

Under Article 6.7.3 of the ILO Staff Regulations the official's responsible chief carries out a first appraisal of his performance after nine months of service and another after eighteen months. The second one is the probationary performance appraisal provided for in Article 5.5 and affords the basis for a recommendation by the Reports Board to the Director-General either to extend or not to extend the appointment.

The first report appraising the complainant's performance was made on 21 November 1990 and the second was made on 13 February 1991 and signed the next day. The complainant put in written objections on both of them.

In comments of 13 March 1991 the Reports Board said that the first had been made "very late, almost at the same time as the probationary appraisal, which did not provide sufficient time" for the complainant to improve by the end of probation. It therefore recommended another one-year extension of her appointment. But the Director-General did not agree, and her contract was extended by two consecutive periods, from 9 July to 8 October and from 9 October to 31 December 1991.

By a minute of 24 September 1991 the Director of the Personnel Department told the complainant that the Director- General had decided in accordance with Article 5.5 of the Staff Regulations not to extend her appointment beyond 31 December 1991. She asked on 1 October for review of her case and saw the Director-General on 21 October. By a minute of 12 November the Chief of the Personnel Development Branch informed her that she would get one last extension on compassionate grounds, from 1 January to 31 March 1992, on special leave with pay.

On 18 December 1991 she lodged an internal "complaint" under Article 13.2 of the Staff Regulations against the

decisions of 24 September and 12 November 1991. By a letter of 13 February 1992 the Director of the Personnel Department told her that her "complaint" was still under review and that the final decision would come on or about 24 February. On that day the Director wrote to her to say that her first-level supervisor, the chief of CONDI/T, was to be asked for his observations on return from mission early in March and that she in turn would be invited to comment.

On 11 March she filed her first complaint with the Tribunal against what she took to be the implied rejection of her "complaint".

On 20 March the Director of the Personnel Department passed on to her observations of 16 March by her supervisor, invited her to comment and said that she would then get a full and final reply. She submitted her comments on 26 March. The Director-General's decision to dismiss her "complaint" was sent to her on 14 May 1992, and that is the express decision she is impugning in her second complaint, which she filed on 11 August.

B. The complainant submits in both complaints that according to Article 6.7.3 of the Staff Regulations her first performance appraisal ought to have been made after nine months and she ought to have served another nine before a decision was taken whether or not to extend her contract. In her submission the second nine months are crucial: after the first nine a probationer finds out, perhaps for the first time, what his supervisors think of him, and he then has another nine in which to make good if need be. In her own case her first-level supervisor made the first appraisal over seven months late, in November 1990, and her second-level supervisor, the Director of the Department, endorsed it on 3 January 1991. The probationary appraisal was made on 13 February, and on 1 March her first-level supervisor recommended against extension. The second period of her probation was cut to less than two months, in gross breach of the procedural rules. That was why the Reports Board recommended extending her appointment by one year and making a new appraisal. Yet the Director-General gave her no reason for not agreeing.

Because she was not told at the end of the two years' probation of the recommendation against extension and was given a three-month extension, she signed a lease for one year, bought furniture and enrolled her son at a training college in France.

To her mind the chief of CONDI/T was prejudiced against her. He let her know at the start that she was not up to the job because she had never worked in international organisations before. Such prejudice explains why his first appraisal was late and why there were no talks between them during her probation.

She asks the Tribunal to (a) quash the decision of 24 September 1991; (b) order the Organisation to grant her a contract of at least one year and after at least nine months appraise her performance either in the same job or an equivalent one; and (c) award her full salary and allowances as from 1 April 1991 up to reinstatement, 25,000 Swiss francs in moral damages and 10,000 francs in costs.

C. In its replies the ILO submits that the first complaint is irreceivable and that in any event both of them are devoid of merit.

As to the receivability of the first one, the Organisation contends that there was no implied decision within the meaning of Article VII(3) of the Tribunal's Statute to reject her internal appeal. There had, after all, been several "decisions upon" her claims before the final one. Moreover, at each stage in the review of her case, she was told within sixty days what was going on.

On the merits of the two complaints the Organisation submits that further inquiry into her case after the filing of the first one showed most of her pleas to be immaterial. Her first-level supervisor refuted them point by point, and the only objection she pressed in her comments was to the lateness of the first appraisal.

There was no prejudice against her. The two appraisals and the observations by her chief bear out that the reason for the impugned decision was her poor performance.

In answer to her main plea - that she had too little time in which to do better because the first appraisal came late - the Organisation points out that a year went by from the date of that appraisal, and nine months from the date of the second one, until she actually left. Throughout that period she was on the same post. So, contrary to what she makes out, she did have time to show her mettle. The examples cited by the chief of CONDI/T make it plain that she did no better after the second appraisal, in February 1991, and showed no promise either. Missing the deadline

for the report, if it did amount to a procedural flaw, was one that did not taint the Director-General's decision, which took the whole period of her service into account. And even if the Tribunal upholds her view that the decision caused her injury, the three months' special leave with pay she was granted made her sufficient amends.

Her other pleas are groundless. She says that the Director-General gave no reason for turning down the Reports Board's recommendation. That recommendation rested on the consequences of the belated writing of the first appraisal and overlooked the other material evidence, and the Director- General largely answered the point in his decisions of 24 December 1991 and 14 May 1992. The ILO is not liable for her signing a lease and enrolling her son in a training college.

D. In her rejoinder on her first complaint the complainant rebuts the ILO's objections to its receivability.

On the merits she submits that the only reason why she did not challenge her supervisor's observations of 16 March 1992 was that she had resolved to put her case directly to the Tribunal, as Article VII(3) of its Statute allowed her to do, and saw no point in concurrent and belated discussion of her internal appeal. But that did not mean that she accepted the observations. She seeks to refute adverse comment on her servicing of meetings, her missions abroad, reports she wrote and her grasp of languages.

Lastly, she maintains that the services she was able to offer matched the description of her post and that if the Organisation was wrong on that score she was entitled to procedural safeguards in the form of specific guidelines on how to perform her duties. Those she was utterly denied, and three months' compassionate leave with pay was no substitute for proper observance of the rules on probation and the prospect of a career with the Organisation.

E. In its surrejoinder on the first complaint the ILO presses the main pleas in its reply. It points out in particular that, although the complainant's rejoinder is taken up with her plea that the appraisals of her were not objective, she offers not a jot of evidence. In his observations of 16 March 1992 her first-level supervisor refuted her allegations with circumstantial evidence. She failed to answer it, and she did not even state reservations when asked to comment. So when he took his final decision the Director-General had sound reason to assume that she fully concurred.

CONSIDERATIONS:

Receivability

1. In her first complaint the complainant is challenging, under Article VII(3) of the Tribunal's Statute, what she sees as the implied rejection by the ILO of her claims; in her second complaint she is impugning the express rejection of them.

The ILO objects to the receivability of her first complaint.

The cause of action and the parties' pleas being the same, the two complaints are joined and there is no need to rule on the Organisation's objection. Since the second complaint is receivable the Tribunal will go into the merits.

The merits

2. The material facts of the case are set out in A above. To sum up, in a minute of 24 September 1991 the Director of the Personnel Department informed the complainant of the Director-General's decision not to extend her appointment beyond 31 December 1991. Citing the reports by her supervisors appraising her performance, the minute said that "it emerges clearly from these reports that you do not have the aptitudes needed for the kind of work required in the post for which you were recruited". The conclusion was that "in the absence of a suitable alternative posting, there is no possible opening for retaining you for further service".

A minute of 12 November from the Chief of the Personnel Development Branch granted the complainant one last extension, from 1 January to 31 March 1992, on compassionate grounds and on special leave with pay.

Her internal "complaint" of 18 December 1991 was expressly rejected on 14 May 1992.

3. As the Tribunal has held on several occasions, for example in Judgment 1183 (in re Hernández Quintanilla), a decision by the Director-General not to confirm the appointment of a probationer -

"... is a discretionary one. Its power of review being limited, the Tribunal will set the decision aside only if it finds a mistake of fact or of law, or a formal or procedural flaw, or a clearly mistaken conclusion on the evidence, or neglect of an essential fact or abuse of authority.

The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organization. The competent authority will determine on the evidence before it whether or not to confirm the appointment and must be allowed the utmost measure of discretion in deciding whether someone it has recruited shows, not just the professional qualifications, but also the personal attributes for the particular post in which he is to be working. Only where the Tribunal finds the most serious or glaring flaw in the exercise of the Director-General's discretion will it interfere. ..."

4. The complainant puts forward the following main pleas in support of her objections to the decisions of 24 September 1991 and 14 May 1992:

(1) Essential facts were overlooked.

(2) Her first-level supervisor, the Chief of CONDI/T, was prejudiced against her and treated her unfairly.

(3) Because of flaws in the procedure the Staff Regulations were not properly applied in appraising her performance during probation.

Those pleas are taken up below.

Disregard of essential facts

5. The complainant submits, first, that essential facts have been overlooked, namely her qualifications, the quality of her services and the Reports Board's recommendation of 13 March 1991 for another one-year extension of her appointment.

6. The plea fails.

The decision of 24 September 1991, which the impugned decision upheld, did take the Board's comments into account. The minute of that date from the Director of the Personnel Department began:

"The Director-General has reviewed the recommendations of the Reports Board concerning your first and probationary appraisals."

Besides, the Reports Board is an advisory board and the Director-General is not required to endorse its recommendations.

The complainant's qualifications and the quality of her services were not overlooked either. The minute of 24 September 1991 stated that the Director-General had examined the appraisals of her performance in the period from 9 July 1989 to 31 December 1990 and had concluded that she did not have "the aptitudes needed for the kind of work required in the post" for which she had been recruited. Writing again on the Director-General's behalf in the letter of 14 May 1992 to the complainant that conveys the final decision, the Director of the Personnel Department acknowledged her "fitness or enthusiasm in some respects", but went on:

"The quality of your services has unfortunately been found to fall markedly short of what is required of someone at your level of responsibility and comparative independence."

The confirmation of a probationer's appointment being, as is said in 3 above, a matter of discretion for the Director-General, the Tribunal will not substitute its own judgment for his in assessing such matters as fitness for a particular post in the Organisation.

Personal prejudice

7. Secondly, the complainant contends that she fell foul of the personal hostility of her first-level supervisor, the Chief of CONDI/T. There was, she argues, "lack of co- operation" on his part; there was no real dialogue between them and communication was mainly in writing; he kept her out of areas of work within her competence; he made

unwarranted linguistic demands of her; he improperly gave instructions directly to her own subordinates; and, in sum, his animosity was to blame for the bad appraisals she got and the delay in making them.

8. As the Organisation observes, the burden is on the complainant to prove personal prejudice.

The ILO asked her first-level supervisor to comment on those allegations, among others, in her internal complaint. He did so in detailed comments which he addressed to the Director of the Personnel Department on 16 March 1992 and which the Organisation appends to its reply. He states that he gave her full briefings on meetings and made efforts, which he describes, to help her carry out her duties. He acknowledges her sound knowledge of French and keenness to improve her English.

There is evidence before the Tribunal to show that he did involve her in drafting CONDI/T's programme for 1992-93. He read the texts she produced and gave her as much guidance as was reasonably called for, considering that she was at the top grade in the Professional category of staff. At that level only general guidelines should be needed and, for a probationer, some explanation of how the Organisation works, not close supervision and instruction. Moreover, the second-level supervisor endorsed the appraisals of her in both reports.

Though the complainant seeks to refute her first-level supervisor's comments and presses her charge of personal prejudice, the Tribunal finds no cogent reason to question his good faith and holds that she has failed to discharge the burden of proof.

Breach of the reporting procedure

9. Thirdly, the complainant alleges breach of the Staff Regulations in that the appraisals of her performance were not made within the time limits they set. She relies on Article 6.7.3, which reads:

"A performance appraisal shall be established on the completion of an official's first nine months of service, after eighteen months, after thirty-three months, after forty-five months, and at the end of every two-year period thereafter. ..."

10. The complainant having joined the Organisation on 9 July 1989, the first appraisal was due nine months later, by 9 April 1990. On 31 March 1990 the Personnel Department asked the chief of CONDI/T to write his first report on her performance covering the period from 9 July 1989 to 31 March 1990. But he did not complete it until 21 November 1990. Though he acknowledged some qualities in the complainant he referred to several shortcomings in her work. The report was passed on to her at once and she submitted her written comments on the next day. Her second-level supervisor, the Director of the Department, endorsed the first-level supervisor's appraisal: "In my view", he said, "and having studied her comments [her] personal competence and the specific tasks in CONDI/T do not match". His endorsement bears two handwritten dates, 13 December 1990 and 3 January 1991.

The second report, which covered the period from 1 April 1990 to 31 December 1990, was called for by the Personnel Department on 31 December 1990. Her first-level supervisor signed it on 14 February 1991, or only two months and twenty- four days after he had completed the first one. It was again unfavourable, and she appended written comments on 18 February 1991. The Director endorsed the report on 28 February.

By a minute of 10 January 1991 headed "Probationary Performance Appraisal (Article 5.5 of the Staff Regulations)" the secretary to the Reports Board asked the Chief of CONDI/T to recommend or not to recommend the extension of her contract. On 1 March 1991 he signed a recommendation against extension, and her case was then put to the Reports Board. In comments dated 13 March the Board "noted that the first appraisal had been prepared very late, almost at the same time as the probationary appraisal, which did not provide sufficient time for Ms Pavlova to make significant improvements before the end of the probationary period". The Board "therefore recommended" extending her contract by one year, "during which time substantive work assignments commensurate with her grade should be given to her".

The Director-General did not approve that recommendation. Instead the Director of the Personnel Department conveyed to the complainant, in the minute of 24 September 1991 referred to in A and 2 above, the decision not to extend her appointment beyond 31 December 1991. The minute told her that although the Director-General found it "regrettable that the first report on your performance was established late" he believed that she had "been given ample notice of the shortcomings in your performance and ample opportunity to improve it".

11. It is plain from the foregoing that the first appraisal report was completed after the time limit of nine months set in Article 6.7.3 of the Staff Regulations. Indeed it was seven months and twelve days late. The second report was late too, by one-and-a-half months. Moreover, although the second report is supposed, according to Article 6.7.3, to come out nine months after the first, the consequence of the late submission of the first report was that the second one came under three months afterwards. The effect was to disrupt the whole process of appraisal of the complainant's performance as prescribed in the Staff Regulations.

12. The ILO has itself conceded the procedural flaw on several occasions, and not just in the excerpt from the minute of 24 September 1991 quoted in 10 above. In his comments of 16 March 1992, mentioned in 8 above, her first-level supervisor admitted to "having been very late in making the report". And in the letter of 14 May 1992 rejecting her internal complaint the Director of the Personnel Department too was explicit:

"The Director-General agrees with you that the delay in writing your first appraisal report - which he does not blame on any lack of good faith - was unwarranted. He regards as admissible the one-and-a-half months' delay in writing the second probationary report. But like the Reports Board he takes the view that the lapse of time between the first one, made on 21 November 1990, and the second one, made on 13 February 1991, was not long enough to let you show any appreciable improvement in your performance".

The letter concluded:

"For all the above reasons the Director-General has concluded that your claims are groundless, apart from your objections to the ILO's missing the deadline for the first report. But the omission has caused you no injury, because the time which you had afterwards was quite long enough to give you the opportunity of doing better. In any event the Director-General believes that your three months' special leave with pay up to 31 March 1992 affords you adequate redress."

13. The Organisation seeks to explain away the delay. The Chief of CONDI/T says in mitigation in his comments of 16 March 1992 that he "was most anxious to consult the Director of the Department beforehand, that the Director was absent from July to October and that in June both were much taken up" with the yearly session of the International Labour Conference.

That explanation does not hold water. The chief of CONDI/T had had the whole of April and May 1991, the two months following the issue of the report form by the Personnel Department, in which to complete the first report, and those were the very months in which he was supposed to do so. Besides, he had no reason to "consult the Director" since the form contains a special section anyway in which the second-level supervisor may review the first-level supervisor's appraisal.

14. The Tribunal also rejects the ILO's contention in its minute of 24 September 1991 and its letter of 14 May 1992 that the complainant was given ample notice of her shortcomings and ample opportunity to make them good. She may have had several months from the date of the first report in which to try to do better. But that is beside the point. The purpose of Article 6.7.3 of the Staff Regulations is that the lapse of time between first and second reports should be long enough - the period prescribed is nine months - to give the probationer a proper opportunity of showing his mettle before the second report has to be made. The period of less than three months that the complainant was allowed was far too short to allow of any substantial improvement.

The Tribunal's ruling

15. The conclusion is that the procedural flaw caused the complainant injury. As to the relief she is entitled to on that account, the Tribunal holds that it is not advisable to grant her the redress that would ordinarily be the consequence of quashing the impugned decision, namely reinstatement. The Tribunal therefore exercises the discretion vested in it by Article VIII of its Statute and instead awards the complainant damages for the breach of procedure. It sets the amount at the equivalent of one year's salary and allowances. It also awards the complainant 10,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Organisation shall pay the complainant the equivalent of one year's salary and allowances in damages.

2. It shall pay her 10,000 Swiss francs in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

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