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

SEVENTY-FIFTH SESSION

In re OIGA

Judgment 1273

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Abdoulaye Oïga against the International Labour Organisation (ILO) on 23 September 1992 and corrected on 15 October, the ILO's reply of 21 December 1992, the complainant's rejoinder of 30 January 1993 and the Organisation's surrejoinder of 15 April 1993;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal and Articles 2.3, 4.6, 5.1, 5.5, 6.7, 13.2 and 14.7 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a citizen of Mauritania, was recruited by the ILO for one year starting on 1 February 1989 as a P.5 regional adviser on social security in Dakar. He had his appointment extended by one year to 31 January 1991. In September 1990 he was transferred to the ILO's Regional Office for Africa in Abidjan.

In accordance with Article 5.5 of the Staff Regulations his supervisors made two reports on his performance, one for the period from 1 February 1989 to 31 October 1989 and the other covering 1 November 1989 to 31 July 1990. They were forwarded to the Reports Board, which advises the Director- General on whether to extend an appointment at the end of the probation period. In accordance with the procedure set out in a memorandum that the Personnel Development Branch (P/DEV) sent on 10 May 1990 to directors of field offices the reports were supplemented with an assessment by the competent technical branch at headquarters, in this case the Social Security Department (SEC SOC). In the assessment, put to the Reports Board in a minute of 26 November 1990, the Director oF SEC SOC explained that the complainant's performance and initiative were not up to the standard required of a regional adviser but, since he might have found work in Dakar difficult because of tension between his own country and Senegal, suggested granting him an exceptional extension of probation by six months to 31 July 1991. The Reports Board so recommended on 12 December 1990 though it added that any further extension would depend on assessment by the technical department as well as the Regional Office.

In a memorandum of 2 April 1991 the Director of SEC SOC told the complainant that he was not yet satisfied and on 30 April he wrote to the Assistant Director-General to whom the Regional Office was answerable advising against further extension. On 17 June he sent the Personnel Department his appraisal of the complainant's performance for the period from August 1990 to May 1991, which pointed out shortcomings. The Regional Office's appraisal for the same period was, however, good. On 31 July 1991 - the date of expiry of the complainant's six-month extension - the Assistant Director-General wrote to the Personnel Department at headquarters asking for a one-year renewal. Pending a reply the Regional Office gave the complainant two appointments, one from 1 August to 15 September and the other from 16 September to 31 December 1991. On 17 October the Assistant Director-General sent a memorandum to the Personnel Department proposing that his appointment should expire at 31 December 1993. Headquarters changed the date to 31 March 1992.

After looking at all the appraisal reports the Reports Board recommended on 6 December 1991 that his appointment should not be extended after 31 March 1992. The Director-General accepted the recommendation and the head of P/DEV informed the complainant of the decision in a letter of 27 January 1992. The Regional Office had meanwhile given him a further extension to 31 December 1992.

By a letter of 14 May 1992 the complainant addressed a "complaint" to the Director-General in accordance with Article 13.2 of the Staff Regulations. On 12 June the Director of the Personnel Department told him that his appointment had been extended by mistake but confirmed that it would not be renewed after 31 December 1992. In

a letter of 6 August 1992, the impugned decision, the Director informed him that the Director-General's decision not to extend his appointment after 31 December 1992 was final.

B. The complainant submits that the Director-General's decision - on the Reports Board's recommendation of 6 December 1991 - not to extend his contract after 31 December 1992 is unsound because it disregards the appraisal made by his chief in accordance with Article 6.7 of the Staff Regulations.

He further submits that the decision to extend his appointment by six months - on the recommendation made by the Reports Board on 12 December 1990 at the proposal of the Director of SEC SOC - offends against Article 4.6 of the Staff Regulations, which says that fixed-term appointments must be of not less than one year. The decision is the more wrongful for his having already been "confirmed" as regional adviser.

In his submission the decisions he is challenging came about because the Reports Board based its recommendations on SEC SOC's adverse assessment of him. Yet it had no cause to do so because he works in a field office and neither the Director of SEC SOC nor his staff, who are at headquarters, may be regarded as his responsible chiefs within the meaning of Article 2.3 of the Staff Regulations. Furthermore, P/DEV's memorandum of 10 May 1990 on the technical assessment of regional advisers is just a working document and would be valid in law only if approved by the Governing Body of the International Labour Office in accordance with Article 14.7 of the Staff Regulations and incorporated in those Regulations.

He asks the Tribunal to quash the Director-General's decision of 6 August 1992, order the extension of his appointment to 31 December 1993, as the Regional Office for Africa proposed, and award him damages.

C. In its reply the ILO concedes that insofar as the complainant seeks the quashing of the Director-General's final decision of 6 August 1992 not to renew his appointment his complaint is receivable under Article VII of the Tribunal's Statute. But according to the same article he may not now challenge the decisions to extend his appointment by periods of less than a year between 1 February and 31 December 1991 because he failed to lodge internal appeals against them.

On the merits the Organisation points out that the impugned decision refuses confirmation of appointment at the end of probation; so the complainant is wrong to say that he held a "confirmed" appointment as regional adviser.

Though it presses its objections to receivability the Organisation submits that the extensions of less than one year were consistent with Article 4.6(d) of the Staff Regulations, which simply provides that a fixed-term appointment must be of not less than one year. It says nothing of the Organisation's discretion to extend an appointment or the length of such extension.

The evidence refutes the complainant's allegation that the impugned decision disregarded the appraisal by his chief. In accordance with Articles 5.5 and 6.7 of the Staff Regulations all his performance reports for the probation period - which was extended on grounds of exceptional circumstances - were put to the Reports Board, and it was on the Board's recommendation that the Director-General took his decision. The Organisation was right to demand that the appraisals by his supervisors be supplemented with an assessment from the technical branch at headquarters, a practice embodied in P/DEV's memorandum of 10 May 1990. Indeed the sort of work he was doing made such assessment essential. Contrary to what he seems to make out, a regional adviser's performance matters almost as much to the technical branch at headquarters as to the Regional Office. Besides, it is not, as the complainant thinks, a matter of choosing between his supervisors' appraisal and the technical assessment. In making his final decision the Director-General has to take account of the staff member's whole record and in this case could not overlook SEC SOC's opinion that the complainant's work was unusable.

D. In his rejoinder the complainant expresses surprise at the Organisation's statement that "the impugned decision refuses confirmation of appointment at the end of probation" and that probation was extended owing to "exceptional circumstances". That is quite mistaken in his view. His appointment was extended at the end of the probation period and the decision to extend it makes no mention of exceptional circumstances. Under Article 5.1(c) of the Staff Regulations probation may be extended only if the official is absent on special or sick leave. He was never absent on either account.

How can the Organisation maintain that what he challenges is a decision not to confirm an appointment at the end of an eighteen-month probationary period (from 1 February 1989 to 31 July 1990) when it told him in January 1992

that his appointment which was to expire at 31 July 1992 would be terminated as at 31 March 1992, twenty months after the end of probation?

E. In its surrejoinder the Organisation again states that

the complainant's appointment could not be extended because the officer empowered to assess his technical competence, the Director of SEC SOC, found his performance far below par.

It submits that there was only one real extension of his probation - from 1 February to 31 July 1991 - after the two-year period provided for in Article 5.1(a) of the Staff Regulations. He may not say he was unaware that the Reports Board would allow him an extension only of the probation period and that he got another chance only because of special difficulties he might have had in Dakar.

Article 5.1 refers only to automatic extension. There is no provision for exceptional extension for the simple reason that it is unforeseeable.

In any event whether or not the extension of his probation was allowed by the Staff Regulations is immaterial because he did not challenge the relevant decision when it was made and extensions are provisional in the nature of things. His position in law would have been much the same even if he had held a fixed-term appointment.

CONSIDERATIONS:

1. The ILO appointed the complainant for one year as from 1 February 1989 as a regional adviser on social security in Dakar. It extended his appointment by one year to 31 January 1991 and, on a recommendation by the Reports Board, by six months to 31 July 1991. He was then granted two extensions on the proposal of the ILO's Regional Office for Africa in Abidjan, one of one-and-a-half months to 15 September 1991 and the other of three-and-a-half months to 31 December 1991. In October 1991 the Regional Office proposed that headquarters grant him an extension of two years to 31 December 1993, but headquarters took the view that he should have an extension of only three months, to 31 March 1992, pending a decision by the Director-General. By a letter of 27 January 1992 the Chief of the Personnel Development Branch told him that his appointment would not be extended beyond the date of expiry, 31 March. By then, however, the Regional Office had already thought fit to extend it by one year, to 31 December 1992. He lodged an internal "complaint". The Director of the Personnel Department told him in a minute of 12 June 1992 that, though the one-year extension was "a mistake by the Office", the date of expiry would still be 31 December 1992. By a letter of 6 August 1992, the decision impugned, the Director- General upheld the refusal to extend his appointment beyond 31 December 1992.

The purport of the impugned decision

2. Before the complainant's pleas are taken up it must be made plain just what the impugned decision means.

3. He is wrong in saying that it terminated his appointment. The letter of 27 January 1992 might indeed have given that impression by stating 31 March 1992 as the date of expiry when the Regional Office had extended it to 31 December 1992. But in fact the impression was mistaken: by its letter of 12 June 1992 the Organisation conceded that 31 December 1992 was the date of expiry. So the decision was not termination but refusal of renewal.

4. The ILO too is mistaken in contending that the decision was a refusal to confirm a probationary appointment. The complainant may be deemed, even though there is no clear evidence to that effect, to have been on probation in accordance with Article 5.1 of the Staff Regulations in the two years following appointment as regional adviser. What is more, in granting him the six-month extension to 31 July 1991 the Organisation may be deemed to have acted on the recommendation by the Director of the Social Security Department, which the Reports Board endorsed, that he get that extension on probation. Although Article 5.1 sets a limit of two years and in special cases like this there may be an exceptional extension, the period may never be indefinite. The conclusion is that the complainant was no longer on probation by 1 August 1991.

5. Yet he is not right to say that his appointment had been confirmed or become one without limit of time. By a letter of 14 May 1990 the Director of the Personnel Department did tell him that regional advisers might qualify for an appointment without limit of time on meeting the usual conditions; but that letter did not in itself alter in law the contractual relationship between regional advisers and the ILO, and the complainant never held an appointment without limit of time.

6. In sum he was no longer on probation; he held fixed- term appointments; and the last of them expired at 31 December 1992. Those are the basic facts against which his pleas will be considered.

Non-renewal

7. In support of his claim to the quashing of the decision of 6 August 1992 not to extend his appointment he argues that the performance appraisal report on which the decision was based was improper, that his experience and the good assessments of him were overlooked and that it was wrong to grant him appointments for under a year at a time.

8. A decision not to renew an appointment, though discretionary, must be taken for proper reasons that are notified to the staff member. It will be unlawful if it was not taken by the competent authority and in line with the set rules of procedure, if there was a mistake of law or of fact or abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

9. First comes the complainant's main plea, that the procedure of assessment that led to the refusal of extension was wrong. He cites Articles 6.7 of the Staff Regulations: "The appraisal shall be carried out by the official's responsible chief", and 2.3: "Each official shall be responsible to a chief who shall supervise his work and be responsible for such functions in relation to the official as are prescribed in these Regulations". He contends that "neither the Director of the technical department nor his staff in Geneva" were to be regarded as his responsible chiefs since as the regional adviser on social security he came under the Assistant Director-General who was in charge of the Regional Office, not the Director of the Social Security Department.

10. The impugned decision was taken on the strength not only of good assessments of him by the Assistant Director-General but also of bad ones by the Director of the Department, and it was the bad ones that swayed the Reports Board and the Director-General. But the complainant was aware of that since the letter of 6 August 1992 was explicit on the point:

"The Director-General has taken into account the highly favourable comments in the reports on your performance by the Regional Office in Abidjan. Unfortunately there were no grounds for querying the objectivity of the assessment by the technical department over a long period and we cannot keep you on when the technical department finds you unusable. So despite the favourable comments by others the Director-General could not but endorse the Reports Board's recommendation against extension."

11. The ILO did not act in breach of the provisions of the Staff Regulations on the appraisal of performance by taking account of comments by officers who were not the complainant's "responsible chiefs". As regional adviser he was required to lend the Assistant Director-General and the Social Security Department "technical support for planning and carrying out ILO activities in the area of social security", and how he performed was obviously a matter of direct concern to the Social Security Department. A memorandum of 10 May 1990 said that on the Reports Board's recommendation reports on regional advisers were henceforth to comprise an assessment by "the technical branch concerned". But, contrary to what the complainant makes out, that memorandum does not depart from the rule in Article 6.7: it merely allows completion of the assessment by the responsible chief and so gives the Director-General the full information he needs on which to base his decision.

12. In his second plea the complainant expresses surprise that the Reports Board and the Director-General took account of the unfavourable comments by the technical department and discounted the favourable ones by his responsible chiefs and his long experience of social security. Though there is a very odd inconsistency in the assessments of his qualifications and performance, they were plainly all taken into account. In the end it was the technical department's unfavourable, but highly detailed and substantiated, assessment that prevailed, and he has not shown any mistake of law or of fact or any wrong conclusion that the Director-General drew from the evidence.

13. The complainant's third plea - that he ought not to have been given appointments of less than one year - is rejected. For one thing, as the ILO points out, he failed to address timely challenge to those who were competent to hear it; for another, any flaw there may have been was immaterial to the lawfulness of the decision he is impugning.

DECISION:

For the above reasons,

The complaint is dismissed.

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 14 July 1993.

(Signed)

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

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