SEVENTY-SEVENTH SESSION

In re LI

Judgment 1351

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Zhisuo Li against the International Labour Organisation (ILO) on 6 December 1993, the ILO's reply of 4 March 1994, the complainant's rejoinder of 27 March and the Organisation's surrejoinder of 6 May 1994;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.2, 4.6, 6.7, 13.1 and 13.2 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 the People's Republic of China who was born in 1955, joined the staff of the International Labour Office on 1 October 1990 as an "audio-typist" at grade G.4 under a fixed-term appointment for two years. He was assigned to the Chinese unit of the Typing and Text- Processing Section (DACTYL), which is part of the Printing and Typing Services Branch (PROTEXT) of the Office.

In the report, written on 9 April 1992, appraising his performance from 1 July 1991 to 31 March 1992 his supervisor said that the quality and quantity of his work had shown "remarkable improvement". The ILO extended his appointment by one year from 1 October 1992.

At the material time the Organisation employed the complainant and three other typists in the Chinese unit: one acted as head of unit; another joined the staff in 1988; and a third typist, like the complainant, took up duty on 1 October 1990.

The chief of the Personnel Planning and Career Development Branch (P/PLAN) told the complainant at a meeting on 12 July 1993, which the chief of DACTYL also attended, that unless the Office found another assignment for him his appointment would expire at the scheduled date, 30 September. In a minute of 22 July the chief of P/PLAN confirmed for budgetary reasons the decision not to extend his contract and said that since Chinese was his only language the Office had no other post to offer him.

He objected in letters of 12 August 1993 to the Director of the Personnel Department and 20 August to the Director- General. On 25 August and 1 September he discussed his situation with the chief of P/PLAN.

In his performance appraisal for the period 1 April 1992 to 30 June 1993, completed on 7 September, the chief of DACTYL said:

"Mr. Li Z. has been with us for almost three years. He is familiar with all aspects of work in the Chinese pool. He works conscientiously and carefully. So as to do well he often comes in early and leaves late. The quality and quantity of his work are very good, particularly in transcription. He is good at checking, can work without supervision and is always willing to help. ..."

In a letter to the Director-General of 8 September he protested that the decision not to extend his contract was "unfair".

By a letter of 24 September the Director of the Personnel Department informed him that the Director-General had decided to treat his letter of 20 August as a request for review under Article 13.1 of the Staff Regulations and the one of 8 September as a "complaint" under 13.2.

In a letter of 29 September he asked the Director-General to extend his contract by a few months on compassionate grounds. On 30 September, his last day under contract, he saw the Director of the Personnel Department, the chiefs

of P/PLAN, PROTEXT and DACTYL and the staff counsellor and entreated them for an extension.

In a note of 3 October the head of the Chinese unit told the complainant that she had passed over some shortcomings in appraising the typist who had joined the unit in 1988 because "she was at a very critical juncture at the time as her contract awaited renewal and she was pregnant" and because "she should be given an opportunity to correct them and improve her performance"; moreover, the abolition of posts in the unit had not been mooted when the appraisal was completed.

The Director of the Personnel Department said in an undated letter he got on 2 November 1993 that the Director-General did not consider the workload of the Chinese unit to warrant extending his contract but was willing to consider "transitory measures" to help him to meet the costs of removal.

By a letter of 3 November 1993, which he impugns, the Director informed him that the Director-General had rejected his charge of "unfair" treatment.

B. The complainant submits that the decision not to extend his appointment is unfair in that it rests on considerations of seniority and not of competence. That is in breach of Article 4.2(a) of the Staff Regulations, which says that "the necessity to obtain staff of the highest standards of competence, efficiency and integrity" is "the paramount consideration" in filling vacancies.

In his submission the Administration's treatment of him was discriminatory, the chief of DACTYL having misrepresented the other typist's performance in 1992 to make sure she was "treated leniently". He failed to get an extension while the same colleague, though her post was to have been abolished, did get one. Lack of funds did not keep the Organisation from offering others in his branch fixed-term appointments. The refusal to extend his contract till the end of 1993 - despite a promise from the chief of PROTEXT so to extend the contract of anyone affected by retrenchment of staff - was "a sort of retaliation".

There were also procedural flaws. Having based his decision entirely on performance appraisals for the period from July 1991 to March 1992 the Director-General drew mistaken conclusions from the evidence. The Administration refused to take account of his last appraisal, for the period from April 1992 to June 1993, because it came out late and overlooked the "performance summary" that the supervisor of the unit wrote in May 1993 about the three typists in the Chinese unit on the pretext that it was an informal report. Instead of acting on a petition that he and two of his colleagues signed on 7 September 1993, the ILO rejected it out of hand.

He seeks the quashing of the Director-General's decision of 3 November 1993, reinstatement and awards of material and moral damages and costs.

C. In its reply the ILO contends that the complaint is devoid of merit.

The ILO says that it complied with Article 4.2. A comparison was made of the appraisal reports of three typists including the complainant. The report on the typist who had been recruited at the same time was better than the complainant's while the third, who had been recruited in 1988, had consistently good reports. What is more, the other two typists had followed language courses, whereas the complainant speaks only Chinese and needs an interpreter at meetings. Since 4.2(a) requires that "every official shall be required to possess a fully satisfactory knowledge of one of the working languages of the Organisation" the complainant's lack of a working language was a serious weakness.

If he thought the appraisal procedure was unfair he should have said as much in the space for his comments on the report form. The ILO did not have to take account of the "performance summary" or of the petition. The only official records of performance are in the appraisal reports provided for in Article 6.7 of the Staff Regulations and ILO circular 6/392 of 4 September 1987

Even if the Organisation had taken stock of his final appraisal report he would have fared no better than the typist he says got preferential treatment: it was only his second report, while she had had three "very satisfactory" ones.

The ILO contends that reinstatement is out of the question since non-renewal does not infringe any contractual right. Under Article 4.6(d) of the Staff Regulations a fixed-term appointment carries no expectancy of renewal or of conversion to another type of appointment. According to the case law non-renewal, if improper, will warrant an award of damages for loss of expectation, reinstatement being an exceptional remedy. There was nothing

exceptional about the decision the complainant is objecting to: it was discretionary and shows no fatal flaws. In keeping with the principle known as "last in, first out" the post to be abolished had to be either the complainant's or the one held by the typist who joined the unit when he did. However commendable the complainant's performance may have been, his ignorance of the ILO's official languages was an "obvious" disadvantage.

D. In his rejoinder the complainant seeks to correct what he sees as factual mistakes in the Organisation's reply and enlarges on his pleas.

He has been studying English since 1991 and can now communicate in the language; but for the discussion of matters vital to his future it was only natural for him to seek the help of an interpreter. In any event circular 392 does not make "communication" the main yardstick of performance.

Article 6.7 of the Staff Regulations and circular 392 afford no grounds for neglecting his supervisor's "performance summary" and the petition. Besides, as the head of his unit acknowledged in the note dated 3 October 1993, the appraisal of one colleague's performance failed to reveal her shortcomings.

He points out that his last performance report was not his second one, as the ILO says, but his third and it was "much better" than his colleague's. Under Article 6.7.3 of the Staff Regulations the ILO had until 30 June 1993 to draw up his appraisal for 1992-93, i.e. before deciding whether to extend his appointment. Since the head of the Chinese unit was on leave the report was held up until late August. The ILO's refusal to take account of his performance over his last eighteen months is a gross breach of procedure.

The provisions of 4.6(d) on fixed-term appointments notwithstanding, Judgment 1317 (in re Amira) held that "a contract of service, even if for a fixed term, creates in law a relationship of employment ... and there may therefore be requirements or consequences that go beyond the bounds of the contract as such". So 4.6(d) does not afford adequate grounds for the impugned decision.

E. In its surrejoinder the ILO enlarges on its pleas. It acknowledges that the complainant's last report was his third but maintains that it caused him no injury by failing to take account of it since it did not rely on his colleagues' latest reports either.

CONSIDERATIONS:

1. The ILO employed the complainant in the Chinese unit of the Typing and Text-Processing Section of the International Labour Office from 1 October 1990 under a fixed-term appointment for two years. It extended his contract once, until 30 September 1993, and he is objecting to its refusal of further renewal.

2. At the material time the Chinese unit had four typists. One was a supervisor, Mrs. Liu. The other three, who were all at grade G.4 and held temporary appointments, were the complainant, Mrs. Li, who had been recruited in 1988, and Miss Xu, who had joined on 1 October 1990, the same day as the complainant. Mrs. Li and he are not related.

3. Cuts in the Organisation's Programme and Budget for the 1994-95 biennium entailed doing away with one post in the Chinese unit by the end of 1993.

4. Article 4.6(d) of the Staff Regulations of the Office states:

"While a fixed-term appointment may be renewed, it shall carry no expectation of renewal or of conversion to another type of appointment, and shall terminate without prior notice on the termination date fixed in the contract of employment."

In keeping with practice, however, the chief of the Personnel Planning and Career Development Branch (P/PLAN) sent the complainant a minute dated 22 July 1993 giving two months' notice: because of budgetary "constraints" the ILO could not renew his contract, which would be ending on 30 September 1993, and attempts to re-deploy him had failed because he had no "language qualification other than Chinese". On 8 September 1993 he lodged an internal appeal with the Director-General against the non-renewal, but by a letter of 3 November the Director of the Personnel Department told him that the Director-General had rejected it. The Director explained that the decision not to extend his contract had been taken on comparison of appraisals of his performance and that of the other two typists and that seniority had not been "the primary criterion" in determining who was to be kept on. The complainant asks the Tribunal to quash that decision and seeks reinstatement, awards of damages for material and

moral injury and costs.

5. In its reply the Organisation explains that in deciding which of the three appointments not to renew it took account of both performance and seniority. In choosing between the complainant and Miss Xu, who were of equal seniority, it preferred Miss Xu because her performance was better and she could also communicate to some extent in French. The complainant does not question that preference. The Organisation goes on to say that the reason why it preferred Mrs. Li to him was that, besides having greater seniority, she had good reports on performance and had from the beginning of her stint with the Organisation been following the English classes it provided. Not only was the appraisal of the complainant's performance less favourable, but he spoke only Chinese and on the many occasions when people other than Chinese met him there always had to be an interpreter.

6. The issue is whether the appraisal of the complainant's performance and comparison of it with Mrs. Li's were flawed.

7. The ILO made up its mind about their performance solely on comparison of reports for 1991-92. The complainant objects, first, that those reports failed to reflect actual performance; that the appraisal of Mrs. Li was wrong because the supervisor had deliberately withheld adverse remarks, as she confirmed in a note she sent him on 3 October 1993; and that the appraisal of his own work also failed to reflect his real performance although he had not questioned it at the time. His second objection is that the ILO refused to take into account a note headed "performance summary" which the supervisor of the three typists wrote about them in May 1993. Thirdly, he contends that the Organisation overlooked the latest appraisal of his performance, for the period from 1 April 1992 to 30 June 1993, which he says was "much better" than Mrs. Li's.

8. According to the procedure for the appraisal of performance in the ILO an employee's supervisors comment at the end of the period under review, and the employee may contest their comments if he so wishes. Citing Article 6.7.1 of the Staff Regulations, which says that performance "shall be appraised" on a form prescribed by the Director-General, the ILO contends that the only criterion of performance is the performance appraisal reports which are prescribed in those Regulations, and which respect procedures intended to secure objectivity.

9. In reply to the complainant's argument that it overlooked the appraisal of him for 1992-93 the ILO contends that he suffered no injury because the reports on the other two typists for the same period were also discounted; in any event that appraisal would not have affected the comparison because there was no material difference between it and the previous one, his proficiency in languages being no better.

10. Although the ILO says that Mrs. Li had had three highly satisfactory appraisals and offers to submit the texts to the Tribunal, it does not expressly deny the complainant's assertion that his appraisal for 1992-93 was "much better" than Mrs. Li's for that period. The Organisation is indeed mistaken in claiming that the appraisal of his work in that period was no better than the two earlier ones. Whereas both the earlier ones mentioned areas in which improvement was needed and assessed his work as merely "good", the appraisal for 1992-93 mentioned no weakness and described his performance as "very good". It also spoke for the first time of good performance in many particular respects, such as knowledge of working procedures, a conscientious and careful approach, good time-keeping, the quality and quantity of output, and co-operativeness particularly in the testing of a "Chinese card" for the computer. It made no adverse comment about his English or efforts to learn it.

11. The complainant's contract was extended beyond 30 September 1992 in line with a recommendation in his report for the period from 1 July 1991 to 31 March 1992. It was not that report, but the appraisal of his performance over the next 15 months, that was most relevant to the decision taken in July 1993 not to renew his contract, whether that decision was based on appraisal of his performance in isolation or in comparison with that of others. By ignoring the latest appraisal the ILO overlooked improvements in his performance. Circular 6/392 of 4 September 1987 reaffirms that "the performance appraisal procedure plays a key role in the ILO's system of career service and rewards", including the extension of fixed-term contracts; in the Organisation's own submission performance appraisals are the only criterion of performance; and Article 6.7.3 of the Staff Regulations provides for such appraisals on the completion of 9, 18, 33 and 45 months of service. The timing of appraisal ensures that when renewal is being considered an appraisal of performance in the immediately prior period will usually be available. The conclusion is that the Organisation's failure to have the appraisal of the complainant's performance in 1992-93 available when it decided not to renew his contract was a procedural flaw which had the effect of excluding an essential fact from consideration.

12. The reason why the appraisal was not then available was that his supervisor was on home leave and it was not completed until 7 September 1993, after her return. It is true that if the ILO had waited until the appraisal had been completed it could not have complied with its practice of giving two months' notice of non-renewal. But in the circumstances of this case that affords no excuse. After the complainant had lodged his internal appeal he pointed out to the Director- General that funds were available for the rest of 1993 and suggested extending his contract by a few months until a final decision was taken. Since the appraisal was available on 7 September 1993 the Organisation could have taken it into consideration; but it did not, and the Director-General rejected his appeal on 3 November 1993 without any reference to the appraisal. Since the failure to consider his appraisal caused him prejudice the impugned decision cannot stand.

13. A decision not to renew a fixed-term contract does not interfere with any contractual right but merely disappoints expectation of further employment. The complainant is not entitled to the exceptional relief of reinstatement but only to an award of damages, and the Tribunal sets the amount at 15,000 Swiss francs. It also awards him 1,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 3 November 1993 is quashed.

2. The Organisation shall pay the complainant 15,000 Swiss francs in damages.

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

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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