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

TWENTY-THIRD ORDINARY SESSION

In re FRANK (Nos. 1 and 2)

Judgment No. 154

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint (No. 1) against the International Labour Organisation (ILO) drawn up by Mr. André Gunder Frank on 30 December 1968 and brought into conformity with the Rules of Court on 4 March 1969, the Organisation's reply of 10 April 1969, the complainant's rejoinder of 28 November 1969 and the Organisation's reply thereto of 20 January 1970; and considering also the complaint (No. 2) against the International Labour Organisation drawn up by Mr. Frank on 12 March 1969 and the Organisation's reply of 16 April 1969;

Considering Article II, paragraph 1, and Article VII, paragraph 2, of the Statute of the Tribunal and Staff Regulations 1.9, 12.8 and 13.1 of the International Labour Office;

Having heard in oral proceedings on 25 May 1970 Mr. James Becket, counsel for the complainant, and Mr. Blaise Knapp, agent of the Organisation;

Considering that the material facts of the case are as follows:

A. Mr. Frank, an economist of German nationality, joined the staff of the International Labour Office on 12 August 1968 and was assigned to Santiago de Chile as a member of a team responsible for overseeing the implementation in the South American region of the Human Resources Development Plan, known as the Ottawa Plan, adopted by the Conference of American States Members of the ILO in 1966. The ILO claims that when it appointed Mr. Frank it knew only that he had stayed in Chile several times, had taught in Canada and had recently applied for a teaching post in Chile, although the negotiations had fallen through. The Office also knew that the complainant was married to a Chilean national. On his arrival in Chile on 26 August 1968, although he held a visa from the Chilean embassy in Berne, the Chilean immigration authorities refused him admission because of his political activities during earlier visits. On the personal intervention of the President of the Senate, however, the complainant was provisionally admitted to Chilean territory. Shortly afterwards the Chilean Government decided to authorise him to remain in the country, on the understanding that it did so out of respect for its international obligations concerning the admission to Chile of ILO staff members on official mission, but only after the complainant had signed a statement promising to observe strictly the requirements of ILO Staff Regulation 1.2, which lays down that staff members "shall not engage in any political ... activity".

B. The Director-General of the ILO considered that in view of what had occurred it was unlikely that the complainant would be able to discharge his duties as successfully as might have been expected and informed him on 26 September 1968, through the Director of the ILO Office in Santiago, that he had decided to transfer him to Geneva pending re-assignment. The complainant was instructed to report to ILO headquarters in Geneva not later than 7 October 1968. When informed of this decision by the Santiago Office, he asked for clarification of the reasons for it and for further information about his transfer. He also requested postponement of his departure from Chile pending a reply and asked the ILO not to inform the Chilean authorities of its decision; in fact, however, it had already been notified to them by the resident representative in Santiago. A few days later, on 30 September 1968, the complainant submitted an official complaint, in accordance with Staff Regulation 13.1, which was transmitted to the Director-General by telex. In his complaint he claimed that a transfer after an assignment lasting only one month was in violation of his terms of appointment, and that under Staff Regulation 1.9(a) an official's assignment must be subject to his terms of appointment and must take account of his qualifications, and he protested against the unfair treatment to which he alleged he had been subjected. On 2 October 1968 he was informed in reply that he must return to Geneva for re-assignment, Staff Regulation 1.9 empowering the Director-General to order such a transfer in the interests of the Organisation without the prior consent of the official concerned. However, he was also told that the date by which he must report to Geneva had been postponed and would be fixed by the head of the Santiago Office. The date set was 21 October 1968.

C. Mr. Frank had not left Chile by that date, however, and the Director-General therefore informed him on 23 October 1968 that he proposed to dismiss him in accordance with Staff Regulation 12.8 (discharge or summary dismissal of fixed-term officials) and allowed him eight days to submit his observations. The complainant submitted his observations by letter of 25 October 1968. He stated that the nerves of his family had been severely affected by the whole case and offered to produce medical certificates to prove this (thus confirming the terms of an earlier letter of 19 October to the Director of the Santiago Office in which he had referred to a "nervous crisis" in his family), and asked for an extension of time to enable him to obtain expert advice before replying to the administrative, legal and procedural points arising out of the Director-General's communication. Meanwhile the ILO Staff Union made representations on his behalf at headquarters, while strongly advising him, in a cable dated 4 November 1968, to report in Geneva. On 6 November 1968 the Director-General took his decision to discharge Mr. Frank, who was so informed on the same day. Later Mr. Frank produced a certificate dated 7 November 1968 of the Neurosurgical and Brain Research Institute of the Faculty of Medicine of the University of Chile stating that he was suffering from depression and needed rest. On 3 December 1968 he submitted a complaint to the Director-General against the decision to discharge him, referring to Staff Regulation 13.1 (complaints). In reply he was informed that the article in question (which provides, in particular, for reference to a Joint Committee) was no longer applicable to him because he had ceased to be a staff member of the ILO. He was further informed that the dispute could be referred to the Administrative Tribunal.

D. In his first complaint Mr. Frank prays the Tribunal to quash the decisions of 26 September and 2 October 1968 as constituting an infringement of the basic contractual provisions of his contact of service, an infringement of the provisions of Staff Regulation 1.9 and of paragraph 2 of the written terms of his contract of service; and misuse of authority. In his second complaint, he requests that the decisions dated 6 November and 13 December 1968 relating to his discharge should be quashed, principally because they are a direct consequence of the decision to transfer him, which he has impugned, and subsidiarily because they are an infringement of Staff Regulation 13.1. Failing his reinstatement by the Organisation, he claims damages amounting to US$45,000 and reimbursement of the costs incurred on his appeal, estimated at 7,000 Swiss francs.

E. The Organisation prays the Tribunal to dismiss the first complaint as without foundation and the second as not receivable, since it was not filed within the time-limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal, and subsidiarily as without foundation.

CONSIDERATIONS:

1. As to the joining of the two complaints:

The two complaints relate in part to the same facts and impugn decisions one of which is consequential to the other. In these circumstances the Tribunal must order the joining of the two complaints as proposed by the complainant.

2. As to the transfer of the complainant (complaint No. 1):

Article l.9(a) of the Staff Regulations provides that the Director-General shall assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications; and Article l.9(b) provides that the Director-General may second an official, with his consent, for temporary duty outside the service of the Office. While referring to Article 1.9, the offer of appointment submitted to the complainant specifies that fixed-term officials are appointed initially for service to a particular programme and post and at a particular duty station, but that they may be transferred by the Director-General to other posts or duty stations. Whether based on the Staff Regulations or on the terms of appointment, decisions to transfer an official lie within the discretion of the authority making them, and are therefore subject to review by the Tribunal only within certain limits. Specifically, the Tribunal will not interfere with any such decision unless it was taken without authority, is in irregular form or tainted by procedural irregularity, or is tainted by illegality or based on incorrect facts, or essential facts have not been taken into consideration, or there has been misuse of authority, or again, if conclusions which are clearly false have been drawn from the documents in the dossier. Insofar as the Tribunal judges itself competent to hear the complaints filed by the complainant against the decision to transfer him, they do not justify the quashing of the decision or the award of damages.

(a) Irregularities of procedure

The complainant finds fault with the Director-General for not having informed him either of the reason for his transfer or of the particulars of the post to which he was to be re-assigned. While it would no doubt be proper that before transferring an official, and in particular before moving him from one country or continent to another, the Organisation should give him at least some indication of the reasons for the transfer, in the present case it appears from the submissions in the Organisation's reply, which have not been contested, that two officials gave the complainant oral explanations, which he might indeed have deduced for himself from the general circumstances, and in particular from the incident which occurred on his arrival in Chile. As for the complainant's assignment to a new post, the Organisation could not decide upon this without consulting him, that is to say before he had arrived in Geneva in compliance with the transfer order.

The complainant further alleges that too little time was allowed him to comply with the instructions he had received. It is true that in instructing the complainant on 26 September 1968 to leave Chile by 7 October 1968 the Organisation was not allowing him much time to release himself from any commitments he might have undertaken with a view to a long stay in Chile. However, as the original time-limit was extended to 21 October 1968 the complainant finally had nearly four weeks to make his arrangements for departure, a period which was adequate.

It is not necessary to consider whether it was proper to inform the Chilean authorities of the complainant's re-assignment before it had actually taken place. In any event, the fact that this was done was not in any way damaging to the complainant, since on 12 December 1968 the Chilean authorities granted him a residence permit valid for one year.

(b) Illegality

The complainant cannot maintain that under Article l.9(b) of the Staff Regulations his own consent was necessary for his re-assignment. That article applies to ILO officials assigned to duty outside the service of the Office and so did not apply to the complainant.

Furthermore, the complainant is mistaken in relying on the clause in his contract specifying that fixed-term officials "are appointed initially for service to a particular programme and post, and at a particular duty station", subject to the Director-General's discretion to transfer them "to other posts or duty stations". The wording of this provision does not mean that in every case an official must perform the duties of the original post for a certain period of time before being required to accept re-assignment. If the first assignment appears straight away to be unsuitable there is nothing to prevent his immediate re-assignment. Any other solution might be as damaging to the official as to the Organisation.

(c) Failure to take essential facts into consideration

The Director-General was not obliged to postpone the complainant's re-assignment because of his alleged ill health. The letter of 19 October 1968 in which the complainant referred to "a nervous crisis" in his family did not afford sufficient proof that he was unable to comply with the order to leave Chile. Moreover, the medical certificate of 7 November 1968 is later than the date when the complainant was supposed to have left Chile, and therefore did not afford any grounds for a postponement. In any event, it was not incumbent on the Organisation to carry out automatically any inquiry into the complainant's state of health. Similarly, the residence permit issued to the complainant by the Chilean authorities on 12 December 1968 is irrelevant to the case, since the decision impugned was to become effective on 21 October 1968 at the latest. Moreover, although the complainant is at present resident in Chile and performing the duties of a teaching post with the consent of the Chilean authorities, it does not follow that he would have won the confidence of the South American governments to the extent required for implementation of the ILO Plan. Yet that criterion alone is decisive.

(d) Misuse of authority and false conclusions

As the complainant's arrival in Chile had given rise to an incident reported in the press and followed by student demonstrations, there was reason to fear that the presence of such an official in South America would be prejudicial to the successful implementation of the project to which he had been appointed. The entry permit granted to the complainant conditionally does not invalidate this view. It follows that in ordering the complainant's transfer the Director-General did not put a false interpretation on the facts brought to his attention. Without finding it necessary to examine the cables exchanged between ILO headquarters and the Santiago Office, the Tribunal does not consider it to have been proved that the Director-General was guided by any consideration other than the interests

of the Organisation. On the contrary, it appears from the written evidence that the impugned decision was motivated not by the complainant's political views as such but by a fear that the success of his mission might be compromised by those views, whether the interpretation put upon them by the South American authorities was right or wrong. The Organisation has rightly adopted a consistent policy whereby it avoids keeping on any staff member in any area where he has become a controversial figure, whatever the merits of the controversy may be, since the activities of international organisations can be effective only if their officials are above all suspicion.

At the most it is regrettable that before assigning the complainant to a post in Chile the Organisation should not have satisfied itself that his assignment would raise no difficulties. However, the complainant could not fail to be aware of the difficulties to which his assignment to South America might give rise, and he cannot therefore properly complain that the Organisation lacked information which according to the normal standards of good faith he himself should have supplied.

3. As to the complainant's discharge (complaint No. 2):

The decision to discharge the complainant was taken on 6 November 1968 and confirmed on 13 December 1968. As the second complaint resists both these decisions its receivability must be considered separately in respect of each of them.

(a) Decision of 6 November 1968

Article VII, paragraph 2, of the Statute of the Tribunal provides that to be receivable a complaint against an individual decision must be filed within ninety days after the complainant was notified of the decision. In the case of the decision of 6 November 1968 the time-limit began to run from 11 November 1968 at the latest, the date on which the complainant acknowledged the receipt of the decision, and it ended ninety days later, i.e. on 10 February 1970. The complaint is dated 12 March 1970 and is therefore time-barred insofar as it seeks the quashing of that decision.

(b) Decision of 13 December 1968

The complainant claims that following the decision of 6 November 1968 he submitted a complaint under Article 13.1 of the Staff Regulations and that in ruling on this complaint on 13 December 1968 the Director-General in fact took a new decision against which the second complaint was filed within the required time-limit. In reply to this argument the Organisation submits that the decision of 6 November 1968 was taken solely in accordance with Article 12.8, paragraph 1, since in principle Article 13.1 applies only to serving officials, and that consequently the decision of 13 December 1968 is merely a confirmatory decision which did not have the effect of opening a fresh time-limit of ninety days. This argument is well founded.

The purpose of Article 13.1 is to avoid reference of a decision to the Tribunal before it has been reconsidered within the Organisation itself. Insofar as it allows an official not attached to an established ILO office, such as the complainant, to submit his observations on a proposal to discharge him, possibly with the assistance of a staff representative of an international organisation, Article 12.8, paragraph 1 has the same purpose. It follows that the application of Article 12.8, paragraph 1 rules out the application of Article 13.1 and that a decision based on the first of these articles cannot be the subject of a complaint under the second. However, in order to prevent any possibility of avoiding the application of Article 13.1, the Tribunal must satisfy itself that a decision to discharge an official under Article 12.8, paragraph 1 was lawful.

In the present case this is so. In the first place, the Director-General followed the procedure laid down by Article 12.8, paragraph 1 for officials not attached to an established ILO office; not only did he ask the complainant on 23 October 1968 to communicate his observations within ten days on the proposal to discharge him of which he was notified on that date, but after noting Mr. Frank's observations of 25 October 1968 he received the representatives who had been asked by Mr. Frank to take up his case. Secondly, the sanction of discharge cannot be regarded as being out of proportion to the complainant's dereliction of duty. As the complainant had clearly shown that he did not intend to comply with the instructions concerning his transfer which it was his duty to obey, the Organisation was not obliged to make use of his services in Chile, where his presence might be prejudicial to the Organisation's work, nor in any other place since he refused to move from Chile.

In these circumstances the decision of 6 November 1968 having been legitimately taken under Article 12.8,

paragraph 1, the decision of 13 December 1968 is not a decision taken on the basis of a complaint within the terms of Article 13.1 and receivable as such by the Tribunal within a time-limit of ninety days; it is rather in the nature of a confirmatory decision which cannot be the starting point of a new time-limit for the filing of an appeal. It follows that the second complaint is not receivable in so far as it impugns the decision of 13 December 1968.

DECISION:

For the above reasons,

1. The complaint concerning the transfer of the complainant is dismissed as without foundation.

2. The complaint concerning the discharge of the complainant is dismissed as irreceivable.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and Mr. A.T. Markose, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 26 May 1970.

(Signed)

M. Letourneur
André Grisel
A.T. Markose
Bernard Spy

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