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

EIGHTY-FIFTH SESSION

In re Drouet

Judgment 1754

The Administrative Tribunal,

Considering the complaint filed by Mr. Pierre Drouet against the International Labour Organization (ILO) on 24 April 1997 and corrected on 15 May, the ILO's reply of 27 August, the complainant's rejoinder of 30 October 1997 and the Organization's surrejoinder of 13 February 1998;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written evidence and disallowed the complainant's application for the hearing of witnesses;

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

A. The pay of United Nations staff in the Professional category includes, besides basic salary, a post adjustment allowance calculated to give parity of purchasing power, whatever the duty station may be.

The complainant, a French citizen who was born in 1940, joined the staff of the International Labour Office in October 1966 under a short-term appointment. He was granted a fixed-term appointment and, as from 1 October 1973, one without limit of time. When he left he was at grade P.5.

In 1992 he had talks with the Office about voluntary termination of his appointment. He and the ILO concluded an agreement on 20 October 1992 on the strength of a minute of 1 October 1992 to him from the chief of the Personnel Development Branch (P/DEV). The minute said that his appointment would end at 31 March 1995 under Article 11.16 of the Staff Regulations and he would be on special leave with pay from 1 November to 31 December 1992 and without pay from 1 January 1993 to 31 March 1995. When he left he was to be paid under Article 11.16 an indemnity equivalent to 18 months' pay at the figure prescribed in Article 3.1(d), which is about basic salary, less an amount for contributions to the United Nations Joint Staff Pension Fund. That indemnity is commonly known as the "golden handshake".

On 31 March 1993 the ILO published a personnel circular, No. 6/487, under the heading "Temporary personnel and administrative measures to deal with the financial situation of the Office". The circular said that the Office was -

"reviewing conditions that will be applied to agreed terminations. These include the terms of the agreement in order to ensure, as far as possible, that the more favourable conditions applicable to the calculation of indemnities for the staff in the General Service category are extended to officials in the Professional and higher categories ..."

On 12 April 1995 the ILO paid the complainant the indemnity. The sum did not include the post adjustment allowance. By a letter of 12 July 1995 he put to the Director of the Personnel Department a request for review of the decision under Article 13.1 of the Staff Regulations on the grounds that someone in the Department had promised that circular 487 would apply in reckoning his indemnity. The Director answered one year later, in a letter of 16 July 1996, that the Director-General had rejected his request. On 21 August 1996 he filed with the Director-General a "complaint" against that decision under Article 13.2 of the Staff Regulations. By a letter of 24 January 1997 the Director told him that the Director-General took the view that the only issue was the application on 12 April 1995 of the agreement concluded in 1992. Her letter pointed out the time limit of six months in Article 13.2 and said that "without prejudice ... to the issue of receivability" which his case raised it was devoid of merit. That is the decision he is impugning.

B. The complainant is asking the Tribunal to reject the objections to receivability implied in the defendant's decision of 24 January 1997.

He argues that according to a precept of civil procedure such objections cannot succeed unless raised at the outset. The defendant decided on the merits before challenging the receivability of his claim.

In his submission he has met the obligation of exhausting his internal remedies before coming to the Tribunal. He duly made an Article 13.2 "complaint" against the rejection of his request of 12 July 1995 for review. His right to make such a request under Article 13.1 does not impair his right to act under 13.2, the only way of getting a case to the Tribunal.

On the merits he contends that his indemnity ought to have been reckoned in line with circular 487, which came before he left. He says that he spoke to a member of the Personnel Department both before and after signing the agreement in 1992 about paying him also the post adjustment allowance. Those talks led him to expect it and "greatly swayed" him in giving his consent.

He asks the Tribunal to order the ILO to produce all the evidence relating to his request of 12 July 1995, to pay him 53,700 United States dollars, the amount due in post adjustment, plus interest at 10 per cent a year from 31 March 1995 in damages. He claims 6,000 dollars in costs.

C. In its reply the Organization contends that his complaint is irreceivable. In its submission his 13.2 "complaint" of 21 October 1996 was out of time. What is at issue is the payment of his termination indemnity on 12 April 1995 in pursuance of the agreement of 1992. By the time he filed his "complaint" the time limit of six months in Article 13.2 had long gone by. The Director-General's reply did raise the objections to receivability and only then rejected his claim on the merits. A request for review under 13.1 is to be distinguished from a "complaint" under 13.2. Making a request does not stop the time limit of six months under 13.2, which in this instance started to run on 12 April 1995.

On the merits the ILO observes that the agreement of 1992 was stated to be in "full and final settlement" of the complainant's termination. The payment made to him on 12 April 1995 complied with the terms of the agreement, which did not prescribe inclusion of the post adjustment allowance in reckoning his indemnity. He can have had no talks about including the allowance before the agreement was signed since only at the session its Governing Body held in February and March 1993 did the Office first moot a more generous reckoning of "golden handshakes". And any talks he may have had after signing the agreement are irrelevant. Termination by common consent must abide by the terms of the agreement concluded and allows of no payment beyond what they prescribe.

The ILO asks the Tribunal to reject the complainant's application for the disclosure of evidence on the grounds that there is no other item of any relevance to his request for review.

D. In his rejoinder the complainant points out that according to Article VII(1) of the Tribunal's Statute a complaint is receivable only if the staff member has "exhausted such other means" of appeal as are open to him under the staff regulations. So the ILO may not hold it against him that he awaited a reply to his 13.1 request before acting under 13.2. In his submission the two provisions are like rules of municipal law that require administrative before quasi-judicial review.

On the merits he contends that it is unfair to refuse him a benefit he may not have been entitled to when he signed the agreement in 1992 but would have been shortly afterwards, and especially unfair since he was one of the first officials to apply for early retirement on account of the Organization's troubles over money.

Minutes that the Personnel Department and he wrote while his request for review was pending would reveal what an official in the Department had said to him.

E. In its surrejoinder the ILO presses its objections to receivability. Citing Judgment 977 (*in re* Ratteree), it submits that filing a 13.1 request for review does not stay the time limit of six months for lodging a 13.2 "complaint".

On the merits the ILO maintains that mere talks which engendered no promise cannot confer a right. Since

the agreement of 1992 was plain, there is no call for a ruling in equity. Besides, no plea of equity the complainant offers is material.

The defendant says it cannot tell what further evidence the complainant has in mind.

CONSIDERATIONS

1. The complainant joined the staff of the International Labour Office in October 1966. On 1 October 1973 he got an appointment without limit of time. On 20 October 1992 he concluded with the Organization an agreement on voluntary termination. The terms included:

agreed termination under Article 11.16 of the Staff Regulations at 31 March 1995;

special leave without pay from 1 January 1993 to 31 March 1995;

payment upon separation under Article 11.16 of 18 months' pay according to Article 3.1(d) less deductions.

The agreement constituted "full and final settlement" of the complainant's entitlements and both parties accepted it without reservation or qualification.

2. On 12 April 1995 the ILO paid the complainant the agreed amount. By a letter of 12 July 1995 he applied under Article 13.1 of the Staff Regulations for review of the reckoning on the grounds that "he had got less than he should have according to a minute that [the chief of the Personnel Development Branch] had written him on 1 October 1992". On 16 July 1996 the Director of the Personnel Department confirmed that the amount he had been paid was in line with the agreement. On 21 August 1996 he lodged a "complaint" under Article 13.2 of the Staff Regulations.

3. By a letter dated 24 January 1997 the Director told him on the Director-General's behalf that "without prejudice ... to the issue of receivability that the case raises no challenge to the terms of the 1992 agreement or to the execution of it in 1995 is sound in law or in fact". That is the decision he is impugning.

4. The ILO submits that his complaint is irreceivable and in any event devoid of merit. In support of its objections to receivability it points out that under Article 13.2 an official must file his "complaint" with the Director-General "within six months of the treatment complained of". What the complainant is challenging is the amount of the 11.16 indemnity that the Organization paid him on 12 April 1995 under the agreement of 20 October 1992. Since he took until 21 August 1996 to file his 13.2 "complaint" it is out of time and therefore irreceivable. So the present complaint is irreceivable too under Article VII(1) of the Tribunal's Statute.

5. The complainant submits that his complaint is receivable. For one thing, he says, the ILO failed to raise its objections before going into the merits. In any event he filed his internal "complaint" in time since the six-month time limit in Article 13.2 started at the date of notification of the decision of 16 July 1996 to reject his 13.1 request. He says he met the limit in 13.2 by lodging his "complaint" on 21 August 1996; he got on 27 January 1997 the Director-General's decision of 24 January; and the time limit in Article VII for going to the Tribunal therefore started on 27 January 1997.

6. He is quite mistaken in pleading that the ILO should have objected to the receivability of his claims. It did take up the issue of receivability in the letter of 24 January 1997; which said that according to Article 13.2, under which the complainant was challenging the ILO's application of the agreement, he had to act within six months. The letter said, too, that the reply was made "without prejudice ... to the issue of receivability" his case raised. So the material issue is whether his 13.2 "complaint" was in time.

7. Article 13.2 reads:

"Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of. The Director-General may refer any such

complaint to the Joint Committee for observations and report."

Article 13.1(a), which is about a request for review, says:

"without prejudice to the right to submit a complaint in accordance with article 13.2 within the time limit specified in that article, an official who considers that he has been treated inconsistently with the provisions of these Regulations or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official, may request that the issue in question be reviewed with a view to its settlement."

How are the provisions to be read? Even though the complainant had made a 13.1 request, he still had to comply with 13.2 by filing his "complaint" within six months of the "treatment" he was objecting to. The six months began at the date at which he learned that the amount of the indemnity would not include the post adjustment allowance. According to a fax he himself produces that date was 12 April 1995. Not until 21 August 1996 did he lodge his 13.2 "complaint". So, despite his request of 12 July 1995 for review, he failed to exhaust his internal remedies under the Staff Regulations and his complaint is irreceivable: see Judgment 654 (*in re* Biswas).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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