

## EIGHTY-FIFTH SESSION

*In re Feistauer*

### Judgment 1779

The Administrative Tribunal,

Considering the complaint filed by Mr. Gerhard Feistauer against the International Labour Organization (ILO) on 22 November 1996 and corrected on 2 January 1997, the ILO's reply of 14 April, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 4 November 1997;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

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 German who was born in 1940, joined the staff of the ILO in 1987 under a fixed-term appointment as a senior subcontracting officer at grade P.3. He was in the Technical Cooperation Equipment and Subcontracting Branch (EQUIPRO) of the Department of Technical Cooperation. The ILO upgraded his post to P.4 as at 1 October 1993 and at the same time promoted him to that grade.

On 1 December 1994 EQUIPRO became part of the Internal Administration Bureau (INTER). Because of a deficit in 1994-95 the Organization had to cut back and by staff circulars of 27 June and 18 July 1995 gave notice of measures of retrenchment. In September 1995 it reviewed the staffing of EQUIPRO and came to the conclusion that for want of funding several posts in the Professional category would have to go. On 7 December 1995 the chief of the Personnel Planning and Career Development Branch (P/PLAN) offered to redeploy the complainant, with the possibility of promotion to P.5, to a post for a senior specialist in employment development on the ILO's East Asia Multidisciplinary Advisory Team (EASMAT) in Bangkok. By a minute of even date the complainant told the chief of P/PLAN that, though he preferred to stay put, he would think about the offer.

On 20 December 1995 the Director of the Personnel Department offered him the post of deputy director of the ILO's office in Moscow. By a minute of 21 December a personnel officer asked him to make up his mind by 26 January 1996 and told him that for budgetary reasons his contract, which was to expire at 31 December 1995, would be extended by only three months. After further talks the complainant sent the chief of INTER and the Director of Personnel a minute dated 26 January 1996 asking the former to say which duties were "to be maintained" and which posts it would be reasonable to keep in EQUIPRO. After two reminders from him the Director of Personnel replied on 15 February that the Administration could not yet answer.

On 16 February the complainant got notice from the secretary of the Selection Board that the Director-General had approved his transfer to Bangkok and that his briefing would begin on 26 February. He protested and by minute of 21 February asked the chief of P/PLAN to suspend the transfer. In a reply dated 23 February the Administration agreed to put off the briefing until he had spoken to senior staff of INTER and Personnel.

On 11 March 1996 he filed an internal "complaint" under Article 13.2 of the Staff Regulations against the abolition of his post in EQUIPRO, the assignment of his duties to someone else and what he saw as discriminatory treatment. In a minute dated 29 March the Director of Personnel told him, in reply to the questions he had raised on 26 January, that the reasons for his proposed transfer to Bangkok were "professional and management ones"; since his 13.2 "complaint" did not have suspensory effect his contract would be extended by 25 months and he was transferred to Bangkok with a special post allowance at grade P.5. The complainant's briefing started on 15 April 1996 and on 1 August he took up duty in Bangkok.

By a letter of 23 August 1996 the Director of Personnel informed him of the Director-General's decision to reject his complaint. That is the decision he is challenging.

B. The complainant submits that the impugned decision is unlawful. His objections are procedural and substantive.

He contends, first, that it was improper for the reply to his internal "complaint" to come from one of the very officials, the Director of Personnel, who had mistreated him. The ILO should not have put the matter of his transfer to the Selection Board before he had a written decision on his minute of 26 January 1996, which he describes as a request for review under Article 13.1 of the Staff Regulations.

On the merits he challenges both the abolition of the post of senior subcontracting officer and his transfer to Bangkok. Abolition, he contends, was unwarranted: the post that the ILO should have done away with was a P.5 one, the structure of EQUIPRO being "top-heavy". How, he asks, could the Organization plead lack of funds when its management practices were so "profligate"? In any event the deficit was "to a large extent" of its own making and the measures it took were not the most "cost effective".

His transfer was not, he contends, in the Organization's interests: it would have been more sensible to put him on a vacant post in another department. The transfer was not in his own interests either.

He has seven claims: (1) restoration of the post of senior subcontracting officer in EQUIPRO at the cost, if need be, of abolishing some other post; (2) reinstatement in his former duties and the quashing of the "decision" to assign them to someone else; (3) the quashing of the transfer to Bangkok and an award of material damages; (4) "redress" for "massive and substantive pressure"; (5) the grant of "a contract corresponding the merits of years of service etc." if his first three heads of claim succeed; or (6) awards of material and moral damages if they fail; and (7) costs.

C. The ILO replies that his complaint is devoid of merit. It rebuts his procedural and substantive pleas. Delegation is the "normal" method of exercising authority, and it was proper for the Director-General to have the Director of Personnel act on his behalf. The Organization denies that his minute of 26 January 1996, which made no mention of Article 13.1, was a request for review within the meaning of that provision. In any event he got a written answer to his questions from the Director of Personnel.

The complainant does not deny the need for abolition. What he challenges is the choice of the post to be abolished, and he may not properly contest a decision that the Director-General took in the exercise of his discretion. The case law says that an organisation is free, so as to move with the times, to take whatever decisions it thinks fit on the restructuring or redeployment of staff for reasons of economy or efficiency. That the ILO gave some of the complainant's former duties to another official was in line with the need for redeployment, and he has failed to show any fatal flaw in the abolition of his post.

In the ILO's submission it had either to find him a job he could do or to let his contract run out. It had no duty to find him the post that best matched his qualifications. It did not ignore his interests: its "paramount concern" was to safeguard his employment by giving him work he could do well. True, he would have preferred a post at headquarters; but the one he wanted was frozen for budgetary reasons.

His claims are "misconceived" insofar as he would have the Tribunal act as an "administrative overseer": under Article VIII of its Statute it may not order the abolition of a post or quash an "imaginary" decision to assign the complainant's duties to his supervisor.

D. In his rejoinder the complainant enlarges on his earlier pleas. What he objects to is the Administration's "selfish and repressive" wielding of authority. He sees the impugned decision as poor management. It caused him financial loss. He asks for the production of "all documents" on the abolition of his former post and his "imposed transfer".

E. In its surrejoinder the ILO points out that the rejoinder contains no legal arguments that counter those in the reply. As to his alleged financial losses, it contends that an international civil servant has a "special duty" to accept that transfer may cause loss "or" gain. There being no *prima facie* case of misuse of authority, there is no call for the production he claims.

## CONSIDERATIONS

1. The complainant seeks review of the International Labour Organization's decision to abolish his former post in Geneva and to redeploy him to a new post in Bangkok. The complainant formerly held the post of senior subcontracting officer, at grade P.4, in the Technical Cooperation Equipment and Subcontracting Branch (EQUIPRO). His post was abolished as of 31 March 1996, at which time he was transferred to the post of senior specialist in employment development, at grade P.5, on the East Asia Multidisciplinary Advisory Team (EASMAT)

in Bangkok.

2. Following lengthy correspondence with the Organization, the complainant formally appealed the decision to the Director-General under Article 13.2 of the Staff Regulations by a letter dated 11 March 1996. The Director of the Personnel Department dismissed the appeal on the Director-General's behalf by a letter to the complainant dated 23 August 1996. The complainant is appealing against that decision to the Tribunal.

3. The issues raised by his pleadings are:

(a) whether the decision to abolish his post and transfer him was taken in accordance with the Staff Regulations; and

(b) whether the Director had the requisite authority to respond to his "complaint" under Article 13.2 of the Staff Regulations.

*Whether the decision to abolish the complainant's*

*post and transfer him to Bangkok was taken*

*in accordance with the Staff Regulations*

4. The complainant submits that the EQUIPRO management structure was 'top-heavy' and that, if the Organization was sincerely interested in cutting costs, there were several more reasonable alternatives to the abolition of his post, including the abolition of one supervisory position, or the merger of EQUIPRO and the Equipment and Office Supplies Section (ECONOM), or both. The complainant invites the Tribunal to consider the cost-effectiveness and justification of the Organization's decision to keep two supervisory posts in EQUIPRO for one Professional staff member and five General Service staff and, in so doing, to determine whether the abolition of his post, and not some other cost-saving measure, was in the Organization's best interests.

5. On such questions of policy the Tribunal will not substitute its opinion for that of the Administration. As it has often said, an international organisation must have the ability to adapt to changing circumstances. The Tribunal will not review policy decisions taken by an organisation on such matters as restructuring and redeployment of staff. It will interfere with such a decision only if it was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or neglected some essential fact, or constituted an abuse of authority, or drew mistaken conclusions from the factual evidence: see, for example, Judgment 1131 (*in re Louis*) under 5.

6. The complainant submits (i) that, indeed there was an abuse of authority; (ii) that there were several procedural flaws; and (iii) that the Organization did not take into account essential facts.

(i) *Abuse of authority*

7. According to the complainant, there was abuse of authority because the person who decided to abolish his post was directly threatened by the cuts to EQUIPRO and therefore decided to abolish the complainant's post rather than his own. This submission, however, is not supported by the facts.

8. The complainant has asked the Tribunal to obtain documentary evidence from the Organization on who initiated and proposed the abolition of the complainant's post. The answer to the complainant's request is contained in the Director of Personnel's minute of 15 March 1996 to the Treasurer and Financial Comptroller of the ILO. In her minute the Director states that it was the chief of EQUIPRO who decided in 1995 that two posts had to be abolished. She then states that it was the chief of the Internal Administration Bureau (INTER) who discovered, through the Personnel Planning and Career Development Branch (P/PLAN), that the vacant post in Bangkok might fit the complainant. She concludes that the proposal to abolish the complainant's post and transfer him to Bangkok was the result of a "joint process among EQUIPRO, INTER and P/PLAN."

9. Under the reorganization the head of Operations in EQUIPRO assumed the complainant's responsibilities over and above his own. It is therefore apparent that the head of Operations made little or no input into the decision to abolish the complainant's post, or indeed into the decision to transfer him to Bangkok. However, even if he had participated in the decision to abolish the complainant's post, that would not in itself have constituted abuse of authority. There is not a jot of evidence to support the complainant's allegation that the choice was to abolish the

post of head of Operations or the complainant's.

(ii) *Procedural flaws*

(a) *Abolition of post*

10. The complainant asks the Tribunal to comment on whether the restructuring of EQUIPRO was in line with established ILO procedures and with norms applicable to international organizations. According to the complainant, a normal procedure for restructuring would be (i) a neutral description of new posts; (ii) a call for candidacies; (iii) unbiased selection; and (iv) assignment.

11. For the complainant to plead a procedural flaw is to misunderstand the Tribunal's power of review. The Tribunal will review the process insofar as it may involve personal prejudice, abuse of authority or similar defects. But it is not for the Tribunal to decide what a 'normal procedure' for restructuring might be.

12. In the case at bar, the Organization determined that two posts needed to be abolished within EQUIPRO. It then found a potential position for the complainant in Bangkok and determined that responsibilities within EQUIPRO could be shifted to merge two posts into one. The complainant was at all times kept informed of the process, particularly of decisions affecting him directly, and he was given the opportunity to object, which he did. As for the abolition of his post, there is nothing to suggest that an improper or unfair procedure was followed.

(b) *Transfer*

13. With respect to the complainant's transfer to Bangkok, the Organization had every right to transfer him and to decide to abolish his post as a result. However, because it was established practice to consult an employee on a proposed redeployment, the Organization had a duty to consider the complainant's objections to redeployment before deciding to abolish his post on that basis.

14. The evidence establishes that the Organization first approached the complainant on 7 December 1995 about the proposed transfer. His contract was renewed for a further three months at the end of December 1995 and, on 16 February 1996, the Selection Board made the final recommendation to transfer him. In the meantime, although it became increasingly clear that the Organization was going to abolish his post and transfer him, he was given ample opportunity to express his objections. There can be no doubt that, by the time the final decision was made, everyone involved was fully aware of his personal and professional objections. The conclusion must be that the Organization considered his objections but made its decision in spite of them, which it was entitled to do.

15. The complaint raises various objections to the procedure before the Selection Board. As the Organization explains, the submission of the case to the Board was required merely because the complainant was being put on a post at a higher grade. Since it was the Board's role to determine simply whether there should be a competition for the post or not and since it found in the complainant's favour, the objections are without substance.

(iii) *Disregard of essential facts*

16. The complainant submits that work for subcontracting was growing and that the Organization disregarded an essential fact when it decided to keep the senior procurement post but abolish the senior subcontracting one.

17. The complainant himself ensured that the Organization knew that subcontracting was growing and constituted an important part of EQUIPRO. His minute of 29 June 1995 could not be clearer, and indeed the Organization agreed. The Organization did not disregard these facts, but rather decided that it could maintain subcontracting within EQUIPRO by amalgamating his post with that of the head of Operations. Similarly, the fact that the chief of INTER had requested the extension of his contract was not ignored either; the request was refused because of the Organization's decision to abolish his post and transfer him.

18. Again, such decisions are the Organization's to make, and the Tribunal will not review them.

19. In conclusion, there was no misuse of authority in the Organization's decision to abolish the complainant's post and redeploy him. This decision was taken without discrimination and with due regard to the circumstances, including his objections.

*Whether the Director of Personnel had the requisite*

*authority to respond to the complainant's formal*

*complaint under Article 13.2 of the Staff Regulations*

20. The reply by the Director of Personnel to the complainant's appeal states that "the Director-General has instructed me to reply to you in the following terms". There is thus a quite explicit delegation of authority. Moreover, it is quite clear from the letter that it was the Director-General who made the decision. For example, nearly every paragraph refers to the Director-General's review of the decision-making process. There is nothing in the letter or in the context of the review to indicate that such references are a mere pretext.

21. Finally, contrary to the complainant's submission, there is no evidence to suggest that the Director was in this case biased against him or had a personal interest in the decision.

22. For these reasons, the fact that the Director wrote and signed the reply to the Article 13.2 complaint constitutes neither a flaw in the procedure nor an abuse of authority.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll  
Mark Fernando  
James K. Hugessen

A.B. Gardner