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

NINETY-SEVENTH SESSION

Judgment No. 2334

The Administrative Tribunal,

Considering the complaint filed by Ms S. B. against the International Labour Organization (ILO) on 25 April 2003 and corrected on 4 August, the ILO's reply of 7 October 2003, the complainant's rejoinder of 8 January 2004 and the Organization's surrejoinder of 27 February 2004;

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

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

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

A. The complainant, a French national born in 1943, joined the International Labour Office, the ILO's secretariat, in 1982. In December 1991 she was appointed as a Pensions Clerk at grade G.5. She is now retired.

On 14 March 2001 the Office and the ILO Staff Union signed the Collective Agreement on Arrangements for the Establishment of a Baseline Classification and Grading (hereinafter referred to as the "Baseline Agreement"), which entered into force that same day. The Agreement provides for initial grading of jobs on the basis of generic job descriptions. Any staff member may request a review of his/her job's initial grading by the relevant Senior Director and, if appropriate, a re examination by the Independent Review Group (IRG) established under the Agreement. A timetable for those three stages is set in the Agreement, which also provides for the subsequent conclusion of a Collective Agreement on a Procedure for Job Grading, which was duly signed on 19 February 2002 and amended on 11 June 2003.

The complainant's job was initially graded in accordance with the terms of the above-mentioned Baseline Agreement, and she was informed on 19 April 2001 that her job had been confirmed at grade G.5. By a minute of 14 May she requested a review of her initial job grading on the grounds that, following a redistribution of tasks in her section and the departure of a colleague, she had taken on duties previously performed by G.6 and G.7 staff members.

Meanwhile, the complainant had entered a competition for a G.6 post as Senior Pensions Clerk and had been informed by letter of 11 May 2001 that she had been appointed to that post with effect from 1 May 2001. The post in question did not undergo initial grading pursuant to the Baseline Agreement.

Having received no reply to her request for review, on 14 August 2001 the complainant requested a re-examination by the IRG of the G.5 grading of the job she had held prior to 30 April 2001 as well as of the G.6 grading of the job she had held since 1 May 2001.

On 30 November 2001 the complainant submitted the matter to the Joint Panel, on the grounds that a procedural flaw had arisen from the fact that she had not received the IRG's decision within the time limit stipulated in the Baseline Agreement. In its recommendation of 19 March 2002, the Joint Panel proposed that a date should be set for a re-examination of the complainant's case by the IRG as soon as possible and within not more than ten working days of the decision to be taken by the Director-General, who in essence accepted the proposal.

In a minute dated 12 June 2002, the complainant, while reminding the Secretary of the IRG that she had asked for her previous job to be upgraded to G.6 and her current post to P.3, complained at the "arbitrary and inequitable" manner in which her case had been handled. Under cover of a minute dated 27 June 2002, the IRG filed its report, in which it recommended that the complainant's position be upgraded to the G.6 level on the grounds that she had

been performing some G.7 duties since January 2000 and G.6 duties since September 2000. In accordance with that recommendation, the complainant was promoted to grade G.6 with retroactive effect from 1 January 2000.

On 9 August 2002 the complainant again appealed to the Joint Panel, challenging the IRG's decision to the extent that the latter had not considered the upgrading of her current position to P.3, as she had requested. In a letter of 7 October, the Joint Panel stated that it was not competent to consider the complainant's regrading request. It subsequently agreed, however, to hold a hearing "[i]n the interest of transparency and to clarify the issues raised". In its report of 17 December 2002, which constitutes the impugned decision, the Panel observed that the complainant had made use of the procedure operating under the Baseline Agreement in order to request and obtain reclassification of her "old post" from G.5 to G.6. It added that, even though the Baseline Agreement did not say that it applied only to posts which were occupied, it did not give staff members the right to an initial grading procedure relating to posts other than their own. As that possibility was not covered by the Baseline Agreement, the Panel considered that the process prescribed by that Agreement had been exhausted and that the procedure the complainant should follow for a review of the grading of her new post was that provided for in the Collective Agreement of 19 February 2002. It concluded by stating that it was unable to allow the matter to proceed before it.

B. The complainant notes that, even though the Joint Panel clearly recognised in its report of 17 December 2002 that the Baseline Agreement applies to both occupied and vacant posts, it rejected her request for a review of the grading of the G.6 post she alleges she occupied from September 2000. She objects to the Joint Panel's position for two reasons: firstly, it appears contrary to the spirit of the Baseline Agreement, the purpose of which, according to its Preamble, is "to establish a baseline classification and grading based on principles of fairness and equity and aiming at ensuring consistency, timeliness, efficiency, objectivity and transparency"; the complainant therefore feels that her post should have been reviewed like all the others. Secondly, the procedure she initiated cannot be said to concern a post with which she was unconnected, since she actually occupied the post from September 2000 to April 2001 on an unofficial basis and from May 2001 onwards officially. She finds it "odd", to say the least, that she should be penalised on the grounds of purely formal considerations, whereas she did her best at her supervisors' request to hold two successive posts during the grading exercise.

The complainant asks the Tribunal:

"[…] to set aside the Joint Panel's decision of 17 December 2002 (deemed to be a final decision failing a decision by the Director General, in accordance with Article 13.2.2 of the Staff Regulations) insofar as it expressed the view that staff members do not have the right to request a review of the grading of posts other than their own during the initial grading exercise.

[…] to order a review, under the terms of the Collective Agreement on Arrangements for the Establishment of a Baseline Classification and Grading of 14 March 2001, of the initial grading of the last post she occupied.

[To grant her] material and moral damages for the excessive time taken by the procedure and the stress caused by the arbitrary and inequitable handling of her case.

[To award her] costs."

C. In its reply the ILO draws attention to the fact that the complainant has not submitted a request for a review of her (last) post in accordance with the terms of the Collective Agreement of 19 February 2002.

The ILO points out that there is no implicit final decision by the Director-General, within the meaning of Article 13.2.2, paragraph 3, of the Staff Regulations, which may be challenged before the Tribunal, but does not object to the receivability of the complaint on that account. In the defendant's view, it was the Joint Panel's intention, in its report to the Director-General, to find the complainant's request concerning the grading of her last post irreceivable, while referring her to the job grading procedure established under the Collective Agreement of 19 February 2002.

The ILO denies that it was ever under an obligation to undertake an initial grading of vacant posts and that a staff member is entitled to request the initial grading of such a post.

It argues that the Staff Regulations make no provision for a post being held unofficially. If an official is assigned on a temporary basis to the duties and responsibilities of a vacant job in a higher grade, he or she may apply for a special allowance in accordance with Article 3.7 of those Regulations.

The ILO rejects what it views as the complainant's application for initial grading pursuant to the terms of the Baseline Agreement, of a second post, namely that of Senior Pensions Clerk at grade G.6, to which she was promoted by competition. Firstly, her position is not supported by the wording of Article 3.3 of the Baseline Agreement, which refers to "a job" in the singular. Secondly, in her request for review of 14 May 2001, the complainant objected only to "the classification of [her] post at grade G.5", i.e. that of her old job, which was the only one submitted for initial grading, and it was only in her request for re-examination of 14 August 2001 that she apparently decided to extend her request to the G.6 post to which she had just acceded by competition. Thirdly, the Baseline Agreement has another objective and is based on another logic. From the above arguments, the ILO draws the conclusion that the complainant is not entitled to request an initial grading of her last job.

The defendant contends that the complainant has produced no specific evidence of her alleged material loss, nor does she spell out what moral injury she has suffered. The ILO is prepared to admit, however, that the procedures applied under the Baseline Agreement suffered significant delays in a number of cases, for which it offers a range of explanations.

D. In her rejoinder the complainant argues that the Baseline Agreement contains no mention of the possibility of "non grading exceptions" in the case of posts which happened to be vacant at the time the "regrading" exercise was initiated.

As far as the Collective Agreement of 19 February 2002 is concerned, the complainant explains that the circular which gave effect to it appeared only on 11 June 2003, stipulating that effective dates could not be earlier than July 2003. Since she took retirement on 1 July 2003, the benefits of that Agreement as far as her own situation was concerned were entirely hypothetical.

According to the complainant, on 21 February 2003 she applied for a review of her last post under the terms of the Collective Agreement of 19 February 2002, following a similar request submitted by her supervisor on 29 January 2003. It was clearly impossible for her, in her minute of 14 May 2001, explicitly to request a grading review for a post to which she had been officially appointed only three days earlier.

She argues that, if a post were left out of the initial grading procedure because it was vacant, it might eventually end up at a grade below that of occupied posts which were actually ranked lower in the job hierarchy, and that this is precisely what happened in the case of her last post. She also asserts that, in the Human Resources Development Department, at least two staff members had succeeded in having two successive posts they had occupied reclassified.

Lastly, the complainant points out that while requesting a special allowance is an option of which staff members may or may not avail themselves, the fact that she did not do so in no way calls into question her "de facto occupancy" of her post.

E. In its surrejoinder the defendant recognises that, contrary to what it had stated in its reply, the complainant's supervisor had indeed requested a review of the grading of her G.6 post on 29 January 2003, and it apologises to the complainant for that omission.

The ILO emphasises that, by definition, the grading of a vacant post does not affect any staff member's rights and cannot therefore give rise to any cause of action. In reply to the complainant's argument that the absence of grading of vacant posts would lead to an incoherent baseline which would be contrary to the objectives of the Baseline Agreement, it adds that the matter in any case pertains to its discretionary power to organise its services as it deems fit. It argues, moreover, that the grading of a post which was not graded under the Baseline Agreement owing to the fact that it was vacant cannot on that account be considered obsolete. Before it is opened up to competition, every vacant post is systematically graded on the basis of a job description taking into account the structure of the department to which the post belongs. There is therefore no reason why, after occupied posts have been graded according to the Baseline Agreement, a vacant post should end up, as the complainant suggests, at a lower grade than occupied posts which are hierarchically subordinate to it in the organisational structure.

According to the Organization, the complainant's assertion that she had already "de facto" occupied the G.6 post of Senior Pensions Clerk from September 2000 prior to obtaining the post by competition with effect from 1 May 2001 contradicts her argument that the post should have been graded even though vacant.

According to the defendant, by obtaining the upgrading of her former post of Pensions Clerk from G.5 to G.6, the complainant exhausted her rights under the Baseline Agreement, although the possibility still remains that she may obtain a regrading of the post she occupied after 1 May 2001 under the terms of the Collective Agreement of 19 February 2002. The ILO denies, however, that any staff member has ever managed to have several successive posts reclassified purely under the terms of the Baseline Agreement.

CONSIDERATIONS

1. On 14 March 2001 the International Labour Office and the Staff Union signed the Collective Agreement on Arrangements for the Establishment of a Baseline Classification and Grading, known as the "Baseline Agreement". This provided that jobs would be put through an initial grading process as part of a new baseline, which should in principle be completed by 17 April 2001, and any request for review could be submitted to the Senior Director by 15 May 2001. In the event of disagreement, requests for re-examination could be submitted to the Independent Review Group by 15 August 2001, and subsequently, in the event of continued disagreement, to the Joint Panel. As it proved impossible to meet the stipulated time limits, on 9 May 2001 the contracting parties adopted Annex No. 1 to the Agreement, stipulating that the date within which the initial grading should be notified to staff members was extended to no later than 31 May 2001. Staff members then had one month to request a review of that grading by the Senior Director. On 19 February 2002 the Office and the Staff Union signed the Collective Agreement on a Procedure for Job Grading.

2. The complainant, who was employed as a Pensions Clerk at grade G.5 until 30 April 2001, requested a review of the initial grading of her post in a minute dated 14 May 2001, arguing in particular that some of her current duties had previously been performed by staff at grades G.6 and G.7. Three days previously, on 11 May 2001, she had been informed that, as she had been successful in the competition for the post of Senior Pensions Clerk, the Director-General, on a recommendation by the Selection Board, had decided to promote her to grade G.6 as from 1 May 2001. Having received no reply to her request for review, the complainant filed a request for re-examination with the Independent Review Group (IRG) on 14 August 2001, in which she objected to the G.5 grading of the post she had occupied until 30 April 2001 as well as to the G.6 grading of the post she had occupied since 1 May 2001.

3. The first part of that request eventually met with success, following an initial appeal by the complainant to the Joint Panel, insofar as the IRG recommended on 27 June 2002 that her position be upgraded from G.5 to G.6 and the Director-General, in accordance with that recommendation, promoted her to grade G.6 on 20 September 2002, with retroactive effect from 1 January 2000.

4. However, as the IRG did not give an opinion on the second part of the request, concerning the upgrading of her new post to P.3, the complainant again appealed to the Joint Panel on 9 August 2002. After considering initially that it was not competent to examine that request, the Joint Panel decided to hold an oral hearing of the matter "[i]n the interest of transparency and to clarify the issues raised". In a report adopted on 17 December 2002, it found that, even though the Baseline Agreement did not say that it applied only to posts which were occupied, that did not give staff members the right to seek an initial grading procedure of posts other than their own. The Panel invited the complainant to apply for a review of her current job grade under the new Collective Agreement of 19 February 2002, which took effect that same day. It concluded that the application could not be pursued any further with the Joint Panel because it related to a process prescribed by the Baseline Agreement which had been "exhausted". As the Director-General did not take an explicit decision further to that report, the complainant brought the matter directly before the Tribunal, impugning the implicit decision of the Director-General, who, according to Article 13.2.2, paragraph 3, of the Staff Regulations, "shall be deemed to have taken a final decision to take the action proposed in the Joint Panel's report".

5. The defendant does not object to the receivability of the complaint, even though the Joint Panel did not strictly speaking propose any action which the Director General could have agreed to take. But it considers that the Panel implicitly proposed that the Director-General should "reject the request for review of the grading of the complainant's last post under the Collective Agreement of 14 March 2001 as irreceivable, while inviting the complainant to follow the job grading procedure adopted under the Collective Agreement of 19 February 2002", an argument which the Tribunal accepts and to which the complainant has not put forward any serious objection.

6. The complainant considers that her last post should have been regraded, despite the fact that the post was

officially vacant from September 2000 to April 2001 and despite the fact that she had submitted a request in relation to the job she occupied prior to 1 May 2001. She adds that she had unofficially occupied the post to which she was appointed on 1 May 2001 since September 2000, and argues that penalising her on purely formal grounds which do not affect the substance of the matter is unjust and runs counter to the objectives of the Baseline Agreement.

7. In rebuttal, the defendant replies that it was in no way obliged to proceed with the initial grading of a job which was vacant at the time the classification exercise was initiated; that the complainant, by obtaining the upgrading of her previous post, had exhausted her rights under the Baseline Agreement; and that it was not until 14 August 2001 that she first submitted a request for review of the grading of her last post, which could not be considered receivable owing to the fact that it had been submitted directly to the IRG. It adds that the Baseline Agreement initiated an exceptional one-time exercise to be conducted once only within prescribed time limits and that the Governing Body of the ILO noted that Agreement when it approved, "on an exceptional one-time basis", whatever derogation from the Staff Regulations was required to implement the Agreement. It points out, lastly, that the post to which the complainant was appointed on 11 May 2001, effective 1 May, was tied to a job description and was clearly classified as G.6, and that the complainant could not reasonably expect the post to be put through an initial grading process at the very time when it was filled on the basis of a job description which she had implicitly approved by accepting her appointment.

8. Some of these arguments, put before the Joint Panel and before the Tribunal, cannot be accepted: it is hard to see why a post which was vacant at the beginning of the classification exercise but filled prior to the expiry of the deadline for notifying the initial grading – that is, 31 May 2001 in accordance with Annex No. 1 to the Baseline Agreement – should not have been covered by the Agreement. Likewise, the fact that the complainant had held a job prior to 1 May 2001 and had availed herself of her right to request a review thereof did not prevent her from also exercising her rights in respect of her new job.

9. Nevertheless, she should still have abided by the procedure stipulated in the Baseline Agreement and she should in particular have submitted her request for review within the prescribed time limits. Yet as was pointed out above, her request for review of 14 May 2001 concerned only the review of the initial grading of the post she had held until 1 May, and it was not until 14 August 2001, that is, after the deadline stipulated in Annex No. 1 to the Baseline Agreement, that she voiced her objection for the first time to the grading of her new post at G.6, and, what is more, by appealing directly to the IRG, without going through the first stage of the procedure. In the circumstances, the Organization is right in arguing that the complainant's request for initial grading of her job as Senior Pensions Clerk could not be dealt with under the procedure provided in the Baseline Agreement of 14 March 2001, but that the grading of that job could be reviewed in accordance with the permanent provisions on job grading established by the Agreement of 19 February 2002. It is plain on the evidence that, contrary to the defendant's initial assertion, the complainant did submit a request on that basis, which "should lead to a decision in the very near future", as the ILO stated in its surrejoinder.

10. Regardless of the outcome of this new request, the resulting decision will not affect the legality of the Organization's implicit refusal to undertake the initial grading of the complainant's last post. Her claim for the Joint Panel's decision to be set aside therefore fails, as do her claims for damages, however regrettable the delay by the Organization in dealing with her problem may be.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.