FORTY-FIFTH ORDINARY SESSION

In re HAGHGOU

Judgment No. 421

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Centre for Advanced Technical and Vocational Training (International Labour Organisation) by Mr. Mojtaba Haghgou on 21 May 1979, the Centre's reply of 25 September, the complainant's rejoinder of 31 October and the Centre's surrejoinder of 20 December 1979;

Considering Article II, paragraph 2, of the Statute of the Tribunal and Articles 0.7, 12.1, 13.4 and 13.5 of the Staff Regulations of the Centre;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. On 15 December 1978 the Board of the International Centre for Advanced Technical and Vocational Training of the ILO, which is situated in Turin, decided to reduce expenditure by abolishing 52 posts. The complainant, who had joined the staff in 1975, held one of them, in the Research and Studies Department. On 23 February 1979 he was informed that no other assignment could be found for him and that his appointment would not be extended beyond the date of expiry, 31 May. On 1 March he informed the chairman of the internal appeals body, the Staff Relations Committee, that he intended to submit an appeal. The chairman answered that the Committee was not competent to hear appeals against a decision not to extend a fixed-term contract of employment and that he should appeal to the Director of the Centre. The complainant did so on 23 April and, having received in reply nothing but an acknowledgement of receipt, on 21 May he appealed to the Tribunal against the decision of 23 February 1979 not to extend his appointment.

B. The complainant holds Iranian nationality. There were, he points out, only two Iranians on the staff of the Centre, and each of them has had his post abolished and lost his employment. He contends that the decision not to renew his appointment - although other staff members whose posts were abolished had their contracts renewed - is due mainly: (a) to his "open criticism of the Centre's management responsibility for the crisis"; (b) to discrimination against Iranians. That there was prejudice against him is clear, in his view, from the Director's refusal to appoint a joint committee to review his case and give him a hearing. On 6 March 1979 the chief of his department stated that his services would not be required after 6 April; yet a Mr. Kheir had his short-term contract extended after 1 April. Mr. Kheir is performing the same duties as was the complainant, as an "automobile training area supervisor". Having always had very good performance reports, the complainant takes the view that he has suffered a measure which takes no account whatever of his competence, efficiency and length of service. Moreover, although the Centre had promised to show "the greatest possible objectivity, equity and humanity", it took no account of the serious situation in Iran, which meant that he would never find employment there. He argues that the decision is not really a decision not to extend his appointment - for which he is not entitled to compensation - but a decision to reduce the staff - for which he is. Seen as a decision of the former kind it is arbitrary and contrary to standard labour practices, to the spirit of ILO Recommendation No. 119, and to all normal principles of labour legislation, which expressly forbid the use of fixed-term contracts to fill permanent posts. According to Article 0.7 of the Staff Regulations (Service under successive contracts), he ought to have benefited under Article 13.5 (Termination on reduction of staff).

C. The complainant asks the Tribunal: (1) to quash the impugned decision; (2) to blame the Director of the Centre for breach of the rules on internal appeals; (3) to order that his contract be renewed from 31 May 1979; (4) to invite the Director to convert his appointment into an appointment of indeterminate duration; (5) to order payment to him of salary and allowances from 31 May 1979; (6) to award him compensation for the material and moral prejudice suffered by him on account of the Administration's refusal to review the decision and to renew or extend his contract; and (7) to award him costs.

D. The Centre observes that the complainant filed his complaint before the 60 days specified in Article VII,

paragraph 3, of the Statute of the Tribunal had expired. Since, however, the 60 days have now elapsed and he has not yet had a decision taken on his claim, the Centre will not contest the receivability of his complaint. As to the merits, the Centre observes that there was no obligation under the Staff Regulations to give reasons for the decision not to renew the complainant's contract. The Centre nevertheless did explain to him that the decision formed part of a set of economy measures which included the abolition of several posts. There is nothing illicit about engaging staff on fixed-term contracts since the instructors have to be able to work in the same language as the trainees. At one time the complainant was a highly valuable member of the faculty because he knew Persian and there were many young Iranian trainees. But later there was not the same need for his services. Mr. Kheir, the instructor who has the same technical qualifications, teaches in Arabic, not a language which the complainant knows. The authority to abolish the post was properly exercised and the procedure for deciding which officials should not have their contracts renewed was strictly followed. There is no substance in law to the complainant's plea that refusal to review a contract that has already been renewed several times is tantamount to dismissal. Article 0.7 of the Staff Regulations is immaterial: it relates to service under successive contracts and means that service shall be deemed to be continuous from the date of the original short or fixed-term contract. Again, Articles 13.4 and 13.5 relate to termination, not to non-renewal of appointment. The Staff Regulations make no provision for establishing a joint committee to hear an appeal against a decision not to renew a fixed-term contract. Besides, there was no need to establish such a committee to review a case which had been considered by a joint body known as the Working Party on the Staffing Consequences of the Economy Measures and Reorganisation. Article 12.1 provided the only means of redress and it was in accordance with that Article that the complainant eventually appealed to the acting Director, on 23 April 1979. Lastly, the Centre emphatically denies that its decision was influenced in the slightest by the complainant's staff union activity or tainted with discrimination against Iranians. The complainant cannot adduce a shred of evidence in support of such allegations. Indeed there is evidence to belie them: the Centre got in touch with six organisations to try to find the complainant other employment and then gave him two short-term contracts, which brought him an income until 30 September 1979, when he left to do further studies in England. The Centre therefore asks the Tribunal to dismiss the complaint as unfounded.

E. In his rejoinder the complainant contends that the Working Party mentioned in D above was not a joint body since the staff representatives had no part in it. It failed to give his claim a fair hearing and showed bias towards him and favouritism towards a Mr. Piva, although it was Mr. Piva's post, and not his own, that ought to have been abolished. Moreover, the Working Party did not invite him to give evidence. In ending the appointment of someone whom it had employed for years under successive contracts, the Centre failed to afford the most elementary safeguards. When the Centre has to refuse to renew contracts of officials of several years' standing, it should apply to them the same rules that protect holders of permanent appointments who have their posts abolished in a reduction of the staff. Be that as it may, since the Director saw fit to appoint the Working Party to consider whether it was Mr. Piva or the complainant whose appointment should terminate, the subsequent decision was not only a refusal on financial grounds to renew his appointment but also an endorsement of the Working Party's recommendation. Hence the many flaws in the Working Party's proceedings also taint the impugned decision. Moreover, the grounds given by the Centre for its decision - a comparison of the linguistic attainments of the members of the teaching faculty - are unsound since the complainant can teach in English and even in Italian as well as in Persian. It is not true to say that Mr. Kheir teaches in Arabic; he teaches in English, as the complainant himself could have done. The impugned decision is therefore tainted with mistakes of law and of fact and essential facts were overlooked. The complainant states once again that only three officials lost their employment because of the so-called economy measures and they are all Iranians. That proves the discrimination practised against Iranians. Lastly, the complainant contends that, although, after the decision not to renew his fixed-term contract, he was given two short-term contracts and has since been pursuing studies in England, that is immaterial to the subject of the dispute. He therefore maintains his seven claims for relief and adds an eighth, which he bases on evidence in the Centre's reply: he invites the Tribunal to "blame the Working Party ... for failing to conform to adequate rules of procedure and for the irregularities committed in connection with" his case.

F. In its surrejoinder the Centre utterly denies the complainant's allegations about flaws in the Working Party's proceedings, discrimination, the extension of Mr. Kheir's appointment and the appeals procedure. The Working Party was a joint body and, there being no rules on the quorum, there was nothing to prevent it from continuing its work after the members representing the staff had resigned. As for the decision not to renew the complainant's contract, the Working Party was not bound to respect the criteria set out in Article 13.5(b) of the Staff Regulations, which relate to "termination on reduction of staff". It was free to set its own criteria, and that is what it did, although it did draw on Article 13.5(b). The grounds which the Working Party gave for preferring Mr. Piva to the complainant show that it was not prompted by bias: it took the view that Mr. Piva scored more highly than the complainant on grounds of competence, efficiency, official conduct, length of service, age and family

responsibilities. In reply to the complainant's allegations of discrimination the Centre observes that officials who were not Iranians - a Belgian, a British subject and a Cypriot - also had their posts abolished and did not have their appointments renewed. There is still an Iranian on the staff, whereas several nations are no longer represented at all. As for Mr. Kheir, although he does sometimes teach in English, for the most part he taught and still teaches in Arabic. Lastly, there is no substance to the complainant's plea that the internal appeals procedure was not followed in his case: for one thing, the Staff Regulations do not authorise appeal to a joint committee against non-renewal of contract and, for another, he filed his complaint before the expiry of the 60 days which the Director-General was allowed for a reply.

CONSIDERATIONS:

The surrejoinder

1. The Tribunal has taken note of the protest made on 1 February 1980 by the complainant against the use of a particular phrase in the surrejoinder and of the Organisation's reply thereto of 8 February. The Tribunal does not consider that any special order would be appropriate.

The merits

2. In November 1978 it became necessary for reasons of financial stringency for the Organisation to make drastic reductions in its staff. This is not disputed. The Director (to be exact, he was at the time the acting or interim Director, but that is immaterial) was empowered under Articles 13.4 and 13.5 of the Staff Regulations to terminate appointments if the necessities of the service required a reduction of staff. He could however, in the case of staff who held appointments renewable annually, make such reductions by the simpler method of not renewing the appointment. The complainant fell into the latter category and his appointment expired on 31 May 1979. In February 1979 the Director decided to abolish his post and not to renew his appointment. This is the decision impugned. It was a discretionary decision and the Tribunal can interfere with it only if it was taken without authority or violates a rule or form of procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if the decision is tainted with abuse of authority or if a clearly mistaken conclusion has been drawn from the facts.

3. To understand the nature of the complaint it is necessary first to consider the way in which the decision was taken. On 29 November 1978 the Director announced by an Information Note that he was setting up a working party to advise him through the Staff Relations Committee on the staffing consequences of the decision to abolish posts. It was to consist of` four members, two appointed by the Administration and two by the Staff Union Committee. In December 1978 a list of the posts to be abolished, numbering about 50, was drawn up. The list included the abolition of one of the two P.2 posts in the Trainer Training Branch. These posts were held by the complainant and Mr. Piva. On 4 January 1979 the working party met to "establish general rules to ensure equitable treatment to all staff" and agreed upon the criteria, e.g. competence, length of service, to be used. On 31 January the working party was instructed to consider a number of items, the last of which was "Faculty Members (P.2) in the Trainer Training Branch: as a result of the suppression of one post." This is expressed rather cryptically but it is agreed that the working party was being requested to consider which of the two officials, i.e. the complainant and Mr. Piva, had priority for the remaining post available at the P.2 level.

4. On 9 February 1979 the two Staff Union members of the working party resigned on the ground that the Administration "has made it impossible to proceed with positive work aimed at avoiding involuntary terminations". It appears from subsequent discussions that the Staff Union Committee had thought or hoped that the task of the working party would be to promote voluntary termination. When told that its sole function was to cheek that the criteria for the selection of contracts to be terminated were being applied correctly, the Committee decided that it had no role to play in the working party which could be useful to the Staff.

5. The day on which the Staff Union members resigned from the working party, i.e. 9 February, was also the day on which the working party was due to meet to consider the case of the complainant and Mr. Piva. The meeting took place without them and the two administration members recommended in favour of Mr. Piva.

6. The complainant relies in the first instance on procedural defects within the scope of the formula set out in paragraph 2 above. He contends:

(1) that the instruction given to the working party mentioned in paragraph 3 above required them to follow the procedures appropriate to decisions made under Articles 13.4 or 13.5 of the Staff Regulations, which they failed to do;

(2) that the resignation of the Staff Union members with the consequence that they did not participate in the recommendation of 9 February invalidated the recommendation;

(3) that the recommendation was not in proper form and was unsigned.

7. As to these contentions, the first question is whether the Director was under an obligation to comply with any formal requirements at all. The Staff Regulations make no special provisions about the way in which a decision not to renew a contract is to be taken. Contrary to the first contention set out above the instruction to the working party cannot in the opinion of the Tribunal be read as requiring it to apply the procedure appropriate to cases under Articles 13.4 or 13.5.

8. The Director was therefore exercising a power which, if the Regulations alone are looked at, was procedurally unfettered. It is however well settled that the Director can put himself under an obligation to exercise his powers in a particular way. Such an obligation can be created by the establishment of a practice on which the staff come to rely, or by an announcement by Administrative Circular or otherwise that in the exercise of power the Director proposes to follow a specified procedure. If the Director promises expressly or impliedly not to exercise his power except in a particular way, he can bind himself, at least temporarily, not to act except in that way. But the Tribunal has no jurisdiction to enforce such a promise unless it is one which is intended to have a contractual effect as between the Organisation and the complainant: there being no question of a breach of Staff Regulations the jurisdiction of the Tribunal is limited to non-observance of the terms of appointment. Whether or not a statement of intention by the Director is intended to have a contractual effect must be determined in the light of the circumstances in each case.

9. The Information Note, which announced the establishment of the working party, was not addressed to the staff as a body and had a limited distribution. The distribution included the Staff Union Committee, which had been consulted about the terms of reference to the working party and is said in the Note to have agreed with and accepted them. The setting up of a working party was an exceptional measure, doubtless due to the fact that the Director had to consider not a single termination but 50 or more. In addition to his usual obligation to be fair to the individual the Director was in these circumstances under an additional obligation, which indeed he fully accepted, to be fair - and to be seen to be fair - as between all the persons affected. It was natural therefore that he should wish to be advised by a joint body, composed of Administration and staff representatives, who could apply a uniform standard and eliminate the need for a personal judgment. On the face of it, however, it would be inappropriate to achieve this object by conferring contractual rights on the staff as a whole. The Director was not taking a step which would affect the relationship between himself and the staff generally for an indefinite period of time. The working party was an ad hoc body which obviously would have only a brief life. Only a minority of the staff, i.e. those who held posts on the list referred to in paragraph 3 above, could be affected by its deliberations. The Tribunal concludes that the Information Note did not become part of the contractual relationship between the Organisation and the complainant and consequently the Tribunal is not empowered to examine an allegation that was not complied with. The Note may or may not have constituted an agreement between the Director and the Staff Union of the sort that is governed by labour law, but that would not bring it within the competence of the Tribunal.

10. This conclusion makes it unnecessary to consider what the legal position would have been if, for example, the working party had been a committee constituted by the Staff Regulations; the Tribunal has not to consider whether in that event the absence of two of its members would have invalidated its acts. As it is, the working party is to be regarded simply as a group of four persons from whom the Director is openly seeking advice; if two are unable to act, it is for him to decide whether he wishes to have the advice of the remaining two. He can receive their advice in any form he chooses and it is quite immaterial that the recommendation was unsigned.

11. So the complainant, if he is to succeed, must point to defects of substance and not of form. He does not make any allegation against the Director personally, but he will succeed if he can establish faults and flaws in the recommendation on which the Director acted. Although he cannot rely on the Information Note as mandatory, he can use it as illustrative of the behaviour expected from the working party. He has criticised their proceedings and conclusions, but his criticisms are simply statements of disagreement. They give no ground for thinking that the

remaining members did not seek to apply fairly the criteria prescribed and it is not for the Tribunal to say whether their conclusion was right or wrong. There is nothing at all in the allegation that one of the two was biased because he and Mr. Piva were both Italians; the Organisation is situated in Turin and about half of its staff are Italian. Nor is there anything in his complaint that he was not invited to present his case. There is no evidence that anyone else was either; the task of the working party was simply to apply the agreed criteria.

12. The complainant contends that the recommendation on which the Director acted was vitiated by prejudice created against him:

(1) by the fact of his Iranian nationality;

(2) because he had criticised the Administration's responsibility for the crisis; and

(3) because on 8 February 1979 he had been accused (though subsequently his explanation was accepted) of cheating over a travel claim.

There is no reason to think that any of these matters, if and insofar as they were known to the two members of the working party, influenced their conclusions in any way.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, 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 11 December 1980.

André Grisel
Devlin
H. Armbruster

Bernard Spy

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