

FORTY-FIFTH ORDINARY SESSION

In re SACIKA

Judgment No. 436

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Labour Organisation (ILO) by Mr. Sketchley Diamond Sacika on 10 March 1980 and brought into conformity with the Rules of Court on 14 April, the ILO's reply of 30 July, the complainant's rejoinder of 23 September and the ILO's surrejoinder of 27 October 1980;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 11.16 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written evidence, 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. The complainant, a citizen of Zambia, was appointed as an Assistant Director-General of the International Labour Office in May 1977 and as such was responsible for advising the Director-General on international labour affairs and the ILO's programme and activities in Africa. He soon had differences of opinion with the Director-General over the nature of his duties and as to whether or not he should be stationed in Addis Ababa. At the end of 1978 the Director-General proposed to the complainant that an attempt should be made to work out some agreement on the termination of his appointment, and over the next few months there were talks and correspondence about the terms of the settlement. The Director-General set out the terms in detail in a letter which he addressed to the complainant on 2 March 1979. In his reply of 4 April the complainant agreed in principle to the offer but raised several points on which he hoped to obtain the Director-General's agreement, one being that the Director-General should "withdraw" a letter written to the complainant on 21 December 1978. By a letter dated 19 April 1979 the Director-General agreed to withdraw the letter and consented to several other suggestions from the complainant. On 21 April 1979, during a visit to Lusaka, one of the Deputy Directors-General was received by the President of the Republic of Zambia and gave him an assurance that the proposed settlement would cast no discredit on the complainant. That was confirmed by the Director-General in a letter he wrote to the President on 4 May 1979 and in a telephone conversation with the Zambian Ambassador in Geneva. On 16 May 1979 the complainant stated that he accepted the terms of the settlement as set out in the Director-General's letter of 19 April. The intended date for the actual termination of his appointment was 1 December, but it was agreed that he should use up his leave credit and go earlier. The Director-General wrote again to the President of Zambia on 1 June to tell him how things stood and sent a copy of the letter to the complainant. On 30 October the complainant wrote to the Director-General protesting against the terms of the letter. He maintained that it nullified the agreement and he applied under Article 13.2 of the Staff Regulations for convocation of the Joint Committee to look into the circumstances which had led to the termination of his appointment. On 19 December the Director-General replied pointing out that he had not made his application within the statutory time-limit of six months and that the matter could therefore not be referred to the Joint Committee. He added that in his view the treatment the complainant had received had been neither unfair nor in breach of the Staff Regulations. It is the decision in the letter of 19 December 1979 which is now impugned.

B. The complainant contends that he is bound to object to some points raised by the letter which the Director-General wrote to the President of Zambia on 1 June 1979 because those points materially altered the basis for his consent to the termination of his contract. He accordingly asks the Tribunal:

- (1) to order an investigation into the circumstances surrounding his employment with the ILO and those leading to his premature departure from the Organisation;
- (2) to order the payment of adequate compensation for the unlawful termination of his appointment by the Director-General;
- (3) to investigate the Director-General's conduct in the matter and determine whether it was consistent with his

mandate under the ILO's Constitution or the Staff Regulations.

C. In its reply the ILO contends that the Tribunal is not competent to hear the complainant's third claim. In the ILO's view the complainant puts forward two pleas which are mutually exclusive: first, he wants investigation of several subjects in dispute relating to events prior to the agreed settlement; secondly, he contests the validity of the settlement itself. On 16 May 1979, when he accepted the agreement, he agreed to settlement of the dispute and chose to forgo the filing of a "complaint" under Article 13.2 of the Staff Regulations. The only matter still in dispute is the validity of the settlement. The complainant is both contesting its validity and alleging breach of it. In alleging breach of it he acknowledges that it is valid, and the whole dispute therefore turns on that allegation. Besides, any challenge to the validity of the settlement is time-barred since the complainant failed to appeal within six months. Subsidiarily, the ILO argues the merits. In its submission the agreement was valid, being based on Article 11.16 of the Staff Regulations, which reads: "The Director-General may terminate the appointment of an official if such action would be in the interest of the efficiency of the work of the Office, provided that the official concerned consents to the action." Since relations between the Director-General and the complainant were strained, it was in the interest of the Office's efficiency to terminate the complainant's appointment. Under the settlement the complainant obtained generous material benefits. His consent to it was freely given. The ILO seriously doubts whether it is admissible for him to contend, so long after the settlement was concluded, that it was violated. In any event the letter which the Director-General wrote on 1 June to the President of Zambia added nothing whatever to what he had said before the settlement. The letter was quite explicit: the agreement "should in no way be construed as a reflection on [the complainant's] personality or integrity". The passage which the complainant found especially objectionable reads: "... it is my view that Mr. Sacika could perform many important functions for which his aptitudes and personal qualities would be more suited than they were for working in the context of an international organisation where, it should be emphasised, qualifications of a special character are necessary". The purpose of that passage was actually to safeguard the complainant's career. Besides, he has since been appointed to a very senior position in his own country, and that shows that the letter caused him no harm. The Director-General's sending a copy to him is evidence of good faith. Lastly, having accepted payments under the agreement the complainant is estopped from challenging it.

D. In his rejoinder the complainant observes that the ILO has failed to rebut his allegation that his duties were properly defined neither in the official letter of appointment nor in later conversations with the Director-General. It is surprising to hear the ILO plead divergence between "the complainant's conception of his role and that of the Director-General" since his duties had never been determined. Besides, if they had been the Director-General failed in his duty under the Staff Regulations to draw attention in writing to aspects of the complainant's performance which he found unsatisfactory. The complainant therefore submits that the termination of his appointment was unlawful and he invites the Tribunal to order an inquiry into the circumstances leading up to it since none was made by the Joint Committee. The ILO's allusions to the benefits prescribed under the settlement and to his appointment to a very senior position in Zambia are immaterial. The point is that the letter of 1 June 1979 put matters on a quite different footing and warrants payment of compensation for the prejudice he has sustained on account of the unfair termination of his appointment.

E. In its surrejoinder the ILO points out that the complainant says nothing to rebut any of its pleas in favour of declaring the complaint time-barred and the third claim for relief irreceivable. He has abandoned his contention that he accepted the settlement under duress: he concedes that he accepted the inevitable. Had he so wished, he might have addressed a "complaint" to the Director-General under Article 13.2 of the Staff Regulations. He does not answer to the ILO's arguments bearing out the good faith of the Director-General's letter of 1 June 1979 and its contention that by continuing to accept payments under the settlement from 1 June 1979 he was estopped from challenging it in October. The Director-General acted for the best, his sole aim being to safeguard the Organisation's interests. The ILO again urges the Tribunal to dismiss the complaint as irreceivable and unfounded.

CONSIDERATIONS:

Essential Facts

1. The complainant was appointed an Assistant Director-General of the defendant Organisation for a period of five years from 15 May 1977. The appointment was not a success. On the one hand, the complainant had many criticisms of and complaints against the Director-General which he has set out at length in narrative form. On the other hand, as it is put in the Organisation's reply at paragraph 4: "Within a relatively short time, it became apparent that there were divergences between the complainant's conception of his role and that of the Director-General". On

15 December 1978 the Director-General told the complainant that he "would like to seek the basis of an arrangement (mutual agreement) which would enable you to be released from your obligation with the ILO in the best possible conditions". Such an arrangement could be made under Article 11.16 of the Staff Regulations. This Regulation empowers the Director-General to "terminate the appointment of an official if such action would be in the interest of the efficiency of the work of the Office, provided that the official concerned consents to the action" and provides for the payment of certain indemnities. Lengthy negotiations followed and on or about 21 May 1979 an arrangement was concluded where under the complainant's appointment was to be terminated on 1 December 1979 and payment was to be made of entitlements and indemnities amounting in all to 153,062.30 Swiss francs. Payment of this sum was completed on 10 September 1979 and the Organisation also paid 66,237 Swiss francs for the transportation to Zambia of the complainant's effects.

2. On 1 June 1979 the Director-General wrote to President Kaunda of Zambia a letter which included the following paragraph:

"I have already stressed in my previous letter to you, and orally to Ambassador Lubinda and to Mr. Sacika himself, that the mutual agreement that has been reached should in no way be construed as a reflection on Mr. Sacika's personality or integrity. This was also stressed in my message transmitted to you by Mr. Bolin. Indeed, it is my view that Mr. Sacika could perform many important functions for which his aptitudes and personal qualities would be more suited than they were for working in the context of an international organisation where, it should be emphasised, qualifications of a special character are necessary."

It is alleged by the Organisation, and not denied by the complainant, that during the meeting on 21 May 1979 between the Director-General and the complainant at which the settlement was concluded the Director-General agreed to write to the President so as "to make it clear that the mutual agreement in no way reflected upon Mr. Sacika's professional qualifications and integrity". A copy of this letter was sent forthwith to the complainant.

3. On 30 October 1979 the complainant wrote to the Director-General a long letter in which he alleged that the letter of 1 June to President Kaunda constituted "a very serious breach of faith" in that it reflected on the complainant's capabilities. He said that the Director-General had never had any intention of utilising him (the complainant) in any meaningful way and that the agreement of 21 May had been extorted from him under a false pretence. He contended that the agreement was thereby nullified and formally lodged a complaint under Article 13.2 of the Staff Regulations charging:

"1. that I have been treated inconsistently with the provisions of the Staff Regulations and with the terms of my appointment;

2. that I have been subjected to unjustifiable and unfair treatment by you;

3. that my contract of employment has been unlawfully terminated by you."

By letter of 19 December 1979, constituting the decision impugned, the Director-General rejected this complaint.

Jurisdiction

4. The complainant asks the Tribunal to:

1) order an investigation into the circumstances surrounding my employment with the ILO and those leading up to my premature departure from the Organisation;

2) order the payment of adequate compensation for the unlawful termination of my contract with the ILO by the Director-General;

3) investigate the conduct of the Director-General in this matter and determine whether his conduct was consistent with his mandate under the Constitution of the ILO or the staff regulations.

Under Article II.1 the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials of the International Labour Office, and of such provisions of the staff regulations as are applicable to the case; and if satisfied that the complaint is well founded to award under Article VIII to the complainant compensation for the injury caused to him. For this purpose the Tribunal may under Article II of its

Rules order such measures of investigation as it considers desirable. But it will not order an investigation merely for the sake of ascertaining the facts; the investigation must be in aid of some relief, such as reinstatement or compensation, which it is within the jurisdiction of the Tribunal to grant. The only relief of this sort, which is claimed, is in the second head. Under that head there is no doubt that the contract of appointment was apparently terminated by the agreement of 21 May and the only question of fact therefore is whether the latter agreement can be nullified for the reasons given in paragraph 3 above. This is a matter which the Tribunal can decide in the ordinary way without ordering any special investigation under Article 11. Accordingly the Tribunal will consider in the first instance the second head of the relief sought. If that relief is denied and the agreement of 21 May is not reopened, it must be taken as settling all the specific complaints that had been made by that date.

Receivability

5. The Organisation objects to the second head of relief on the ground that the complaint of unlawful termination is out of time, the complaint being made on 30 October 1979 and the contract whereby the termination was agreed being made on 21 May. This, however, appears to be within the six months allowed under Article 13.2. Moreover, it is doubtful (for reasons which will appear in the next paragraph) whether "the treatment complained of" within the meaning of the Article is the conclusion of the contract of 21 May. The objection is overruled.

The merits

6. To understand the charge of bad faith it is necessary to examine a little more closely the negotiations which led to the agreement of 21 May. The agreement was made under Article 11.16 which requires that it should be "in the interest of the efficiency of the work of the Office". Since the professional competence of the complainant was admitted, it is difficult to see how his departure could be in the interest of efficiency unless it was that, as the Director-General was to put it in the letter of 1 June, his "aptitudes and personal qualities" were not entirely suited to the work of an international organisation. The complainant has, however, throughout maintained that he was perfectly well suited to the work of an international organisation and that the impasse was created entirely by the failure of the Director-General to use him properly. Holding this view, he would naturally be concerned to have established not only his competence but also that it was not any deficiency on his part that caused the breakdown. He made himself quite clear about this.

7. In a letter of 21 December 1978 confirming a discussion and starting the negotiations which ended with the agreement of 21 May, the Director-General had said that a fruitful association "could only have developed if your experience and contribution had corresponded to the special requirements of the post to which you have been appointed". The complainant on 4 April demanded that this letter should be withdrawn "on the grounds that it contained a misrepresentation of the events that have led to the present situation". He set out the wording of Article 11.16 and said: "I find myself in some difficulty to accept this wording because, in my view, it implies that I am partly responsible for the events that have led to the present situation. The facts available clearly indicate that you are entirely responsible for what has happened and I cannot, therefore, bring myself to accept any share of the blame. However, if the use of Article 11.16, as you hinted in our discussions, is merely intended to find a suitable basis, technically speaking, for the termination of my contract, I would be grateful to receive from you written confirmation stating that our mutual agreement under this Article does not in any way, reflect on my professional competence and integrity". In his reply on 19 April the Director-General agreed to the withdrawing of the letter of 21 December and said: "the use of Article 11.16 of the Staff Regulations in this context is merely intended as a suitable basis for the termination of your contract, and I confirm that our mutual agreement under this Article in no way reflects on your professional competence and integrity".

8. It might have been better if in his letter to President Kaunda the Director-General had not gone beyond this formula of confirmation. The passage in the letter of 1 June to which the complainant objects refers to personality instead of professional competence. The Director-General had previously on 4 May 1979 written to the President that "Any agreement reached as regards the termination of his contract in no way reflects upon his professional competence and integrity". But the letter of 1 June, looked at by itself, does suggest (what was the Director-General's view but not the complainant's) that he was not well suited to the working life of an international organisation. This might be harmful to him if the President had any occasion in the future to consider whether or not to use him for an international post or to recommend him for one. The Tribunal does not conclude that it was with this sort of object that the letter was written. On the contrary, looking at the text by itself, the object of the offending passage would seem to be to reinforce the fact that there was no question about his personality and integrity.

9. In the opinion of the Tribunal the charge of bad faith is unfounded. At the worst the passage objected to was an error of judgment, falling far short of bad faith (bad faith cannot be other than deliberate) and so offering no ground for nullification. If the letter had been deliberately written to harm the complainant, it is inconceivable that a copy of it would immediately have been sent to him. It seems also to be unlikely that it struck the complainant at the time as an act of bad faith; the text of the letter may have disappointed him, but if he had seen it then as bad faith he would surely have protested immediately.

10. The charge of false pretences consists in putting the same point in another way and is likewise unfounded. The complainant had asked for the letter of 21 December to be withdrawn since it was a misrepresentation of events; he wanted the Director-General to accept the whole blame. When the Director-General agreed to withdraw the letter, the complainant supposed, somewhat optimistically, that this was what the Director-General would do. When he found out from the letter of 1 June that it was not what the Director-General was doing, he allowed himself (after considerable delay) to conclude that he had been deceived into making the agreement.

11. The Director-General seized, perhaps too readily, on the fact that what the complainant was asking for in form was the confirmation of his professional competence and integrity. But there is nothing from which any deliberate deceit can be inferred. The truth is, that, given the attitude which the complainant was clearly expressing, Article 11.16 was not altogether "a suitable basis for the termination of your contract". A compromise under which each side preserved its position would have been better. But the Director-General was doubtless advised that Article 11.16 offered the best way out and it certainly offered the way that was financially most advantageous to the complainant. Both sides were anxious to escape from a disagreeable situation. Hence the attempt to fit the agreement into the framework of Article 11.16 and the resulting misunderstandings.

12. The Tribunal has dealt with these charges on the facts because they are serious charges against the Organisation and it is undesirable that they should be left unresolved. But even if the complainant had succeeded on the facts, he would fail in law in his plea of nullification. By 1 June he knew all the matters which have led him now to conclude that he was the victim of deception and bad faith. If what he believed was true, it probably would have entitled him to rescind the agreement. But he chose instead to affirm it by accepting payment of all the sums which the agreement secured for him and he cannot now refuse to be bound by it.

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