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

FORTY-NINTH ORDINARY SESSION

In re MARTIN ERBINA

Judgment No. 517

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Jaime Martin Erbina on 24 August 1981 and brought into conformity with the Rules of Court on 1 October, the ILO's reply of 1 December 1981 and the letter of 28 January 1982 from the complainant's counsel to the Registrar of the Tribunal stating that he did not wish to file a rejoinder;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Articles 4.3(a), (c) and (f), 4.4(a), 11.15, 11.16 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a citizen of Spain, joined the General Service category of staff of the International Labour Office in 1953. He was given an appointment without limit of time in 1956 and his home was determined to be Madrid. As a non-locally recruited official he was entitled to several benefits, including repatriation grant. On 7 November 1969 he became a naturalised Swiss citizen and on 19 November the ILO informed him that under Article 4.3(f) of the Staff Regulations[(1)] he had ceased from 7 November to be entitled to the benefits mentioned in the article. In 1972 he obtained a divorce from his first wife, a Spanish citizen, and in 1973 married a Swiss citizen. A decree of divorce from his second wife, issued in 1978, became absolute in May 1981. On 8 May 1980 he had resumed Spanish citizenship. By a minute of 20 June he so informed the Chief of the Personnel Department and applied for restoration of the rights he had acquired between 1953 and 1969. In a letter of 30 June 1980 the ILO refused his claim. On 28 October he asked to have the definition of his home changed back to Madrid. In accordance with Article 4.4(a) of the Staff Regulations his request was referred to the Administrative Committee and was in due course granted, as he was informed by a letter of 17 December 1980. In a minute of 22 December he asked that his change of nationality should be retrospectively considered to have had no effect on his entitlements as a non-locally recruited official. On 4 February 1981 the Personnel Department rejected his claim. On 30 March he appealed under Article 13.2 of the Staff Regulations, but his appeal was rejected in a letter of 25 May from the Chief of the Personnel Department, which is the decision impugned, and which said that he held non-local status only from 8 May 1980, the date of reacquisition of Spanish citizenship. On 12 May 1981 he resigned, and he left the ILO on 30 June. He was paid repatriation grant under Article 11.15(a) of the Staff Regulations for the period from 8 May 1980 to 30 June 1981.

B. The complainant argues that Article 4.3(f) comes into play only where the official acquires the nationality of the country of the duty station voluntarily and for a reason other than marriage. His purpose in acquiring Swiss citizenship was to obtain a divorce from his first wife since the proper law was the law of nationality, that of Spain, and it did not countenance divorce. His acquisition of Swiss citizenship was voluntary but it was not made for a reason other than marriage. Moreover, the ILO's letter of 19 November 1969 wilfully misled him since it did not quote the article in full. Article 4.3(f) was therefore misapplied. Even if the period of his Swiss citizenship were discounted, the ILO has wrongfully overlooked the fact that for 16 out of his 27 years of service he was a Spanish citizen with non-local status. He accordingly claims the full amount of repatriation grant which he believes to be due to him under Article 11.15(a) of the Staff Regulations.

C. The ILO contends that the complaint is time-barred under Article VII of the Statute of the Tribunal since it was not filed until 24 August, or 91 days after the date, 25 May, on which the complainant says the impugned decision was notified to him. The complaint is, moreover, devoid of merit. The Staff Regulations do not provide for change of a staff member's status from local to non-local. Article 4.3(c)(iii) stipulates that an official shall be classified as

locally recruited if at the time of appointment, whatever his nationality, he has been living for one year within 25 kilometers of Geneva. By 1980 the complainant had been living in Geneva with local status for over ten years. The Director-General nevertheless agreed to determine his home to be Madrid in accordance with Article 4.4(a), and this change was interpreted as having the effect of restoring his non-local status, thereby entitling him to various benefits, including repatriation grant, with effect from 8 May 1980. It did not, however, revive rights which had been extinguished in 1969 by his acquisition of Swiss citizenship. He was not, as he maintains, misled by the ILO in 1969; in any case he could have consulted the rule for himself. The Organisation acknowledges that his purpose in taking out Swiss citizenship was to obtain a divorce, but the facts do not fit Article 4.3(f), which envisages the acquisition of citizenship as the consequence, not the cause, of marriage. That is clear from the background of the rule, which the ILO recounts in detail. Had the complainant stayed on in the ILO until he reached retirement age, in 1986, his repatriation grant would have been much larger. He did, however, receive a termination indemnity under Article 11.16 equivalent to 18 months' pay, as well as home leave expenses to which he was not strictly entitled. in the circumstances his claim to a larger repatriation grant is excessive.

CONSIDERATIONS:

The receivability of the complaint

According to Article VII of the Statute of the Tribunal a complaint shall not be receivable unless it has been filed within ninety days after the decision impugned was notified to the complainant and unless it is final, the internal means of redress having been exhausted.

The decision impugned in this case was notified to the complainant on 25 May 1981, and the ninety days accordingly expired on 23 August 1981. The complaint was not filed until 24 August, but since 23 August was a Sunday, it is receivable.

The lawfulness of the impugned decision

(a) The decision of 25 May 1981 is in two sections, both of which the complainant is challenging.

(b) Article 4.3(f) of the Staff Regulations had been declared applicable to his case in a minute addressed to him on 19 November 1969 by the Employment Branch of the Personnel and Administrative Services Department and in a minute of 4 February 1981. The first section of the impugned decision confirmed the application of the article and accordingly rejected his claims.

In the Tribunal's view Article 4.3(f) was correctly applied, and the impugned decision was therefore in no respect unlawful.

The words "other than by marriage" relate solely to a situation where a staff member acquires the citizenship of the country of the duty station as a result of marriage. But the complainant did not become a Swiss citizen as a result of marriage but because he wanted to get a divorce and remarry.

This construction of Article 4.3(f) is clear from the wording of the French and English versions. The Spanish text too ("por una razón que no sea el matrimonio"), though not identical to the French ("sauf en cas de mariage") and English ("other than by marriage"), leads to the same conclusion when it is interpreted in the context of Article 4.3(f). It is, moreover, confirmed by the preparatory work on the drafting of the rule (Report of the 12th Session of the Consultative Committee on Administrative Questions, CO-ORD/R.124, 14 May 1952, p. 15; GB.167/FA/D.13/11, 167th Session, p. 6).

It is immaterial that the letter which the ILO sent the complainant on 19 November 1969 quoted Article 4.3(f) of the Staff Regulations incompletely by leaving out the words "other than by marriage". The omission was not such as to mislead the complainant, who had been naturalised on 7 November 1969, i.e. before the minute of 19 November. Moreover, several months earlier, on 19 August 1968, the complainant had sought advice on the effects of acquiring Swiss nationality and had been informed by the Chief of the Administrative Branch of the Personnel and Administrative Services Department in a minute of 27 August 1968 that the material rule was Article 4.3(f).

The complainant accordingly knew from a much earlier period that Article 4.3(f) would apply in his case. He also formally stated on 24 November 1969 that he agreed with the application of the article: "I acknowledge the receipt of your minute of 19 November 1969 relating to the provisions of the Staff Regulations [Article 4.3(f)] concerning

change of nationality for General Service category staff. I am entirely in agreement with those provisions".

(c) The second paragraph of the challenged decision merely confirms the ILO's view that the complainant's resumption of Spanish citizenship on 8 May 1980 had the effect of putting him in a new situation and did not restore him, without interruption, to the position which he had originally acquired by virtue of his Spanish citizenship and which he had held until he became a Swiss citizen, on 7 November 1969.

The action accordingly taken in the complainant's case complied with the material provisions of the Staff Regulations. Moreover, when he retired at the age of 55 on 30 June 1981 he received the repatriation grant payable under Article 11.15(a) of the Staff Regulations for the period from 8 May 1980 to 30 June 1981, as well as a termination indemnity amounting to 18 months' salary under Article 11.16. The latter he had himself requested and it was provided for under an agreement of 13 June 1980, which he expressly accepted on 16 June 1980 and which was followed by his formal resignation on 12 May 1981.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

1. The provision reads:

A non-locally recruited official of the General Service category who acquires voluntarily other than by marriage the nationality of the country of the duty station shall be reclassified as locally recruited, and his entitlement to any of the following allowances benefits shall thereupon cease:

non-resident allowance, education grant, home leave travel expenses, repatriation grant, travel expenses upon termination (including removal of household goods and personal effects).

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