

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

## FIFTY-FIFTH ORDINARY SESSION

In re ALI KHAN (No. 4)

Judgment No. 649

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Bahauddin Ali Khan on 27 April 1984, the ILO's reply of 1 August, the complainant's rejoinder of 24 November 1984 and the ILO's surrejoinder of 1 February 1985;

Considering Articles II, paragraph 1, and VII, paragraph 2, of the Statute of the Tribunal and Chapter 6 and Article 13 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. Information on the complainant's career in the ILO and on his first three complaints is given in Judgments Nos. 564, 565 and 614, under A. At the material time he held a P.4 post in the Manufacturing Industries Branch of the Sectoral Activities Department. The head of the branch was Mr. Abate, the head of the department Mr. Milne. In Judgment 565 the Tribunal noted the ILO's offer to delete comments made without the complainant's knowledge from his performance report for 1980-81 and to put a copy of the judgment in his personal file. That was done on 27 January 1984. But difficulties had arisen over his report for 1981-82. On 14 October 1982 Mr. Abate had asked him to approve an entry for Part II of the report form, which lists the work done in the period under review. The complainant made a draft and after discussing it with him Mr. Abate made changes. As for Part III, the appraisal by the supervisor, on 19 November Mr. Abate handed him a draft and asked him to comment. He at once objected that it was false and malicious. On 28 December Mr. Abate, without further discussion, completed and signed the form, summing up his performance as "fully satisfactory". On 7 January 1983 the complainant wrote a minute to the Reports Board setting out his objections at length. Mr. Milne signed it on 24 January. On 4 February Mr. Abate wrote a minute to Mr. Milne and the Board rejecting the complainant's objections. The complainant addressed a further protest to the Board in a minute of 2 May explaining why he could not sign. In comments attached to the report and dated 19 May the Board said that he and Mr. Abate got on so badly the guidelines on appraisals could hardly be complied with and that it could only note the report and the comments. The Director-General approved the report on 28 June. Another protest came from the complainant in a minute of 21 November. In further comments dated 16 December 1983 the Board said it hoped that next time the guidelines would be strictly followed. The Director-General gave his endorsement on 16 January 1984. The complainant states under point 6 of the complaint form that that is the final decision he is challenging and that it was notified to him on 1 February 1984. But on 3 February he submitted further observations on the Board's comments of 16 December 1983; the board took note of those observations on 13 April 1984; and the Director-General approved the Board's further comments on 2 May 1984.

B. The complainant submits that out of malice his supervisors are intimidating him in many ways, which he explains. He believes the charges of harassment he made in earlier complaints to be borne out by the further evidence he adduces. The 1980-81 report, as altered after Judgment 565, should have been sent to him for visa. The report for 1981-82 is prejudiced and unsubstantiated. Mr. Abate missed the two-month deadline set in the guidelines on performance appraisal. He refused to alter his false allegations despite the cogent evidence the complainant put to him. Since the report was done piecemeal the complainant had no chance to see the whole. Mr. Milne interfered in the drafting and against the evidence he too refused to make any change or corrective comment. The Reports Board admitted that the guidelines had not been followed; yet it did nothing. It forwarded comments to the Director-General without letting the complainant see them first. It disregarded the evidence and even refused him a hearing. The report falsely alleges that the complainant failed to write a paper on the subject of the textile industry and another on industrial development in Africa. He invites the Tribunal to order (1) the full and immediate execution of Judgment 565; (2) the deletion of two sections of Part III of his report for 1981-82; (3) referral of the report to the Director-General for review; (4) the imposition of penalties on officials responsible for

"continuous victimisation", or else referral of the matter to the Director-General for action; (5) an end to the ILO's policy of harassment, victimisation and discrimination; (6) that the ILO "undo all harm" inflicted on him; and (7) to award him exemplary damages for professional, moral and material injury. He also applies for a provisional order for the production of various documents and information.

C. In its reply the ILO observes, as to claim (1), that the sums awarded by the Tribunal have been at the complainant's disposal for some time, but he refuses to accept them. If dissatisfied with the steps taken to put Judgment 565 in his personal file he ought to have appealed under Article 13.2 of the Staff Regulations: he has failed to exhaust the internal means of redress. As to the 1981-82 report, the Director-General approved it on 28 June 1983, that was the final decision, and he was informed of it not later than 21 November: claims (2) and (3) are time-barred. Claims (4), (5), (6) and (7) are too imprecise; besides, (4) is not one the Tribunal is competent to allow; nor, as they ought, have these claims formed the subject of an Article 13.2 appeal. The ILO confines its arguments on the merits to (2) and (3). It denies there is evidence of malice or discrimination. It describes how the report was drafted and contends that there were no procedural flaws. Under Article 6.7.1 of the Staff Regulations the supervisor "has the final responsibility for appraising performance", even though required to consult the official. The complainant was given ample opportunity to state his views and the correct procedure was followed. The delay was due to the absences on leave or on mission of Mr. Abate and the complainant. It is for the supervisor to decide whether or not an official should do work, and it was in the proper exercise of his discretion that Mr. Abate said the complainant had not done work assigned to him. Besides, the complainant's comments on the point are appended to the report and went both to the Board and to the Director-General. The Board need not give an official a hearing when all the relevant material is before it. The ILO invites the Tribunal to reconsider its conclusion in Judgment 565 that the Board's comments need to go to the official before the Director-General approves the report in fact under Chapter 6 of the Staff Regulations the Board is the competent body to take decisions on reports. Even if there was a procedural flaw, the complainant shows no material or moral injury. The ILO objects to his application for a provisional order.

D. In his rejoinder the complainant develops his submissions at great length. He seeks review of Judgment 565 on three points. He contends that his complaint is receivable: neither the Director-General's decision of 28 June 1983 nor that of 16 January 1984 was the final decision: that was the decision of 2 May 1984, notified to him after he had filed the present appeal, and so his complaint is not time-barred. As to the merits, he enlarges in detail on the allegations of unfair and discriminatory treatment in his original brief and invites the Tribunal to review its findings in that respect. He again alleges fatal flaws in the challenged report. He invited the Tribunal to confirm its ruling in Judgment 565 that the Reports Board's comments too have to go to the official before the report is approved by the Director-General. He presses his claim to substantial damages for professional, material and moral injury and his applications for oral proceedings and for a provisional order.

E. In its surrejoinder the ILO contends that the submissions in the rejoinder are irrelevant, illogical, inconsistent or repetitive. It does not answer them in detail, but enlarges on its earlier submissions on receivability and the merits. As to the former, it observes that if the final decision was that of 28 June 1983 or 16 January 1984 the complaint is time-barred; if it was that of 2 May 1984 the complaint is premature. As to the merits, it observes that there is not a shred of evidence to support his allegations of harassment and discrimination, which spring from his sense of frustration at the lack of promotion. It again invites the Tribunal to reconsider its ruling in Judgment 565, which is of consequence not just to the complainant's case, but to the whole reports procedure.

## CONSIDERATIONS:

The application for oral proceedings

1. The Tribunal sees no need to order oral proceedings under Article 12 of its Rules of Court. The ILO's reply gives enough information to shed full light on the matters on which the evidence the Tribunal is invited to hear would have had a bearing.

Receivability and competence

2. The complaint puts forwards seven claims:

(1) the full and immediate execution of Judgment No. 565 concerning the complainant's appraisal report for 1980-81;

- (2) that entries (b) and (c) in Part III.3 (Appraisal of performance) be expunged from the report for 1981-82;
- (3) that the report be sent back to the Director-General for review of the appraisal of his performance in the light of the Tribunal's findings, especially the performance rating in III.5 and the "general recommendations" in VI;
- (4) the imposition of "appropriate penalties on officials responsible for continuous victimisation of so many of their hard-working subordinates, contrary to ... provisions of the ILO Constitution, Conventions and Recommendations and the Staff Regulations", or referral of the matter to the Director-General for "appropriate action";
- (5) an end to such "victimisation, harassment and discrimination";
- (6) that the ILO "undo all harm inflicted on an official with 'a perfectly honourable career'" in his 24 years of service; and
- (7) exemplary damages for "the professional, moral and material harm suffered over a long period by an honest and hard-working official".

3. In his rejoinder the complainant seeks review of Judgment 565 as to three points: (a) correction of paragraph A of the summary of the facts; (b) review of the findings in the light of the submissions in the present proceedings; and (c) review of the interpretation in paragraph 7(b) of a statement by the complainant's first-level supervisor.

In other words the Tribunal is being asked to review these issues on the evidence presented in this case.

4. A preliminary question is whether the new claims in the rejoinder are receivable.

In that they seek review of the earlier judgment they do not come within the ambit of the original claims. But they may be treated as an application for review and the Tribunal will entertain them as such.

A judgment carries the force of *res judicata* from the date on which it is handed down. Though it is subject to review thereafter, the Tribunal will review it only in exceptional circumstances. Some pleas in support of an application for review, such as misappraisal of evidence, are inadmissible. Others, such as material error or the discovery of new facts, are not; but for the application to succeed they must be such as to affect the decision.

In point (c) in 3 above the complainant is alleging misinterpretation of a statement by a supervisor. That would amount to misappraisal of evidence, and the plea is inadmissible.

In (a) he is saying that paragraph A of the summary was not quite accurate: in other words he is relying on a material error. But the plea fails because plainly the error alleged can have had no effect whatever on the Tribunal's decision.

In (b) the complainant submits that new facts are revealed by evidence produced in the present case. Again the plea fails since the facts are subsequent to the date of Judgment 565 and therefore can have had no effect on that decision.

The claims in the rejoinder therefore fail.

5. The Tribunal will now consider whether the claims in the actual complaint are receivable and whether it is competent to hear them.

Claim (1) is for immediate performance of Judgment 565.

The ILO pleads that the claim is irreceivable on the grounds that the complainant has failed to exhaust the internal means of redress provided for in Article 13.2 of the Staff Regulations.

This plea is unsound.

Failure to execute a judgment does not constitute breach of the Staff Regulations or of the contract of employment

or unjustifiable or unfair treatment and therefore cannot come under 13.2.

What the complainant is asking for is neither more nor less than execution of a decision by the Tribunal on a matter within its competence, and the Tribunal may determine whether due effect has been given to that decision.

It nevertheless disallows claim (1). In Judgment 565 it held that, the complainant's report for 1980-81 having been improperly established, he was entitled to 2,000 Swiss francs in damages for moral injury and 1,000 francs in costs. It also took note of an undertaking by the ILO to expunge from the report the comments made without the complainant's knowledge and to put a copy of the judgment in his personal file.

What the complainant is saying is that the ILO has failed not to keep its promise to alter the report and put it in his file, but to communicate it to him beforehand for approval. Although the Tribunal said nothing on that score it appears from the evidence that the ILO did communicate the text of the report to him for visa by a minute of 10 May 1984.

Claim (1) has therefore been satisfied.

6. Claims (2) and (3) are for deletion from his report for 1981-82 of entries (b) and (c) in Part III.3 and the sending back of the report to the Director-General.

The ILO submits that the claims are time-barred and therefore irreceivable: the report was approved by the Director-General on 28 June 1983 and notified to the complainant not later than 21 November 1983. The ninety-day time limit in Article VII(2) of the Statute of the Tribunal for challenging that decision expired on 19 February 1984. Since the complaint was not filed until 27 April 1984 -- so the argument runs -- the claims are time-barred.

The complainant demurs: after the Director-General had approved the Reports Board's comments he himself was entitled to put further observations to the Board. The Board's comments were dated 16 December 1983 and the Director-General endorsed the report on 16 January 1984. His appeal against that decision was filed in time and is receivable.

For the reasons given below the complainant's plea fails.

7. He submits that the Board's comments of 16 December 1983 and the Director-General's decision of 16 January 1984 approving them were not confirmation of an earlier decision. He is mistaken.

In its first set of comments, dated 19 May 1983, the Board said: "(c) in the situation that seemed to prevail, it would hardly seem possible to follow the guidelines to the letter"; and "the situation reflected by the report and the minutes seemed so bad that the Personnel Department should be asked to consider ways and means of dealing with it, including the possibility of a transfer". The Director-General approved the report on 28 June 1983.

Protesting that the report for 1981-82 was "highly inaccurate and irregular", the complainant appealed against the Director-General's decision to the Board. In its further comments of 16 December 1983 the Board merely said it "trusts that on the occasion of the next appraisal ... the guidelines will be strictly followed". The further comments were approved by the Director-General on 16 January 1984.

Quite plainly, the Board's further comments and the Director-General's further approval did not alter a whit the previous comments and decision. Being mere confirmation, they set off no new time limit for filing a complaint. The complaint is irreceivable because the latest date for filing it was 19 February 1984.

8. But it is irreceivable on other grounds as well.

The procedure for appraisal of performance as prescribed in Article 6.7 of the Staff Regulations and the relevant guidelines is a special one in that it brings in several planes of the hierarchy and affords both sides the safeguards of an adversary exchange of comment. It culminates in the Director-General's approval. This final decision by the executive head is not subject to review within the Organisation since once it is taken all the internal means of redress will have been exhausted. And the time limit in Article VII(2) of the Statute will start on the date on which it is notified to the official.

The complainant pleads that the comments he submitted to the Board on 21 November 1983 may be treated as a

request for review. They may not.

For one thing, neither Staff Regulations nor guidelines provide for any such procedure. For another, a request for review must be addressed to the maker of the challenged decision. In this case the complainant asked the Reports Board to reconsider its comments of 19 May 1983, and that was tantamount to challenging the Director-General's decision of 28 June 1983.

His challenge was misconceived in law and could not impair the finality of the decision.

9. Nor does the Tribunal allow the ILO's request that it reconsider its ruling that Article 6.7 and the guidelines require communication of the Board's comments to the staff member for visa before the Director-General approves the report.

In its reply the ILO invites the Tribunal to "review its conclusion in re Ali Khan No. 2"; in its surrejoinder, to "reconsider its ruling" and uphold the established ILO procedure on reporting.

Whatever terms the ILO may choose, it cannot succeed on this point. What it is really saying is that the Tribunal misapplied the rules, and an allegation of a mistake of law does not constitute admissible grounds for review since it is an attack on the principle of res judicata.

10. Claim (4) is for the imposition of penalties on officials responsible for unlawful behaviour towards subordinates.

In cases coming under Article II of its Statute the Tribunal is competent, by virtue of Article VIII, only to "order the rescinding of the decision impugned or the performance of the obligation relied upon", except that if such rescinding or execution "is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him". The Tribunal may not entertain claim (4), which is dismissed.

11. Claims (5) and (6) amount to a demand that the ILO stop acting in breach of its obligations under the Staff Regulations. The formulation of the obligations is so vague and general that their performance cannot be subject to judicial review.

The claims are irreceivable.

12. There remains claim (7).

It is for damages for professional, moral and material prejudice sustained by the complainant "over a long period". Again it is too widely framed to be receivable. Moreover insofar as it can be brought under the claims considered above and particularly the objections to the processing of the report for 1981-82, it fails on the same grounds.

Those claims having been held irreceivable, so too is claim (7).

13. The Tribunal need not go into the merits of the allegations of irregularities by the ILO.

The application for a provisional order

14. The complaint being dismissed as irreceivable, there are no grounds for ordering production of the items of evidence applied for, which have no bearing on the question of receivability.

The application for a provisional order is disallowed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

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