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

FIFTY-NINTH ORDINARY SESSION

In re BONNEAU (No. 2)

Judgment No. 757

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Daniel Maurice Bonneau against the International Labour Organisation (ILO) on 16 August 1985, the ILO's reply of 1 November, the complainant's rejoinder filed on 30 November 1985 and the ILO's surrejoinder of 28 February 1986;

Considering Articles II, paragraph 1, and VII, paragraph 3, of the Statute of the Tribunal, Article 11.40 of the Financial Rules and Articles 3.16, 12.1 and 12.9 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 facts of the case and the pleadings may be summed up as follows:

A. This case is the sequel to the complainant's first complaint. Judgment 671 dismissed that complaint but held that once the ILO took a final decision the complainant might challenge it and even before might seek review on the strength of some change of the position in law or in fact.

On 30 May 1984 a civil court of Cotonou, in Benin, ordered Métozounvé, once administrative assistant in the ILO's office in Yaounde, to pay the Organisation some 128 million CFA francs the amount of which it had been defrauded. The ILO applied for seizure of his assets in a Cotonou bank and on 17 January 1985 recovered, after deduction of costs, some 66 million CFA francs.

As is recounted in Judgment 671, under A, the ILO Property Survey Committee found the complainant guilty of at least gross negligence. At its suggestion the Director-General decided in accordance with Article 11.40(c) of the Financial Rules, pending the outcome of the criminal proceedings in Yaounde and subject to any material ruling by the Tribunal in the meantime, to confiscate the equivalent of two months' pay from the complainant's end-of-service entitlements and release the balance only in return for security. Mr. Trémeaud, the head of the Director-General's office, so informed him by a letter of 27 March 1985 and he acknowledged receipt of it on 19 April. On 5 June he wrote to Mr. Trémeaud asking that the decision be quashed. Having got no answer he filed the present complaint.

B. The complainant submits that he has taken account of paragraphs 5 and 7 of Judgment 671. Dating back as it does to 30 May 1983, the decision to withhold part of his entitlements can no longer be treated as a temporary measure of distraint. His complaint is receivable because he got no answer to his letter of 5 June 1985 within the sixty days' time limit prescribed in Article VII(3) of the Statute of the Tribunal.

As to the confiscation of two months' salary, he submits that it constitutes an unlawful form of penalty. Article 3.16 of the Staff Regulations cannot apply. It empowers the Director-General to deduct "from the total monthly payment due to an official ... sums due to the International Labour Office". Thus it covers only serving officials, it allows only deductions from monthly pay, and it may be relied on only when sums are due: in this case sums are due only on the ILO's misinterpretation of the facts. Besides, he has not been told how the amount was arrived at.

He puts forward in defence of his behaviour in Yaounde the pleas summed up in Judgment 671, under B. In particular he contends that he complied, as he understood them, with the rules on financial transactions in field offices and was not bound to check the delivery of goods he had approved payment for. He explains how he came to be signing the cheques in payment and affirms that he carried out conscientiously his only duties, which were to check that each cheque matched the invoice and that the right papers were attached.

He asks the Tribunal to quash the decision to confiscate two months' salary, to order payment of the 30,000 United States dollars he is entitled to and to award him interest on the sum due, 10,000 dollars in damages and 100 dollars

in costs.

C. In its reply the ILO observes that the complainant may at any time secure the sums withheld by providing security to protect the ILO's interests, an offer he evades allusion to.

The ILO submits that the complaint is time-barred. Since he had got the impugned decision by 19 April 1985 and it was plainly final he missed the 90-day deadline. It was not open to him to lodge an internal appeal, and besides, his letter of S June, which merely repeated earlier objections, could not be treated as such. Nor has there been any material new fact which would satisfy the requirements the Tribunal set in Judgment 671. As to the withholding of the balance of his entitlements there has been no change in the position in fact and in law. All the civil court in Benin ruled on was the amount of Métozounvé's debt, and the criminal proceedings in Cameroon have got no further. However regrettable the delay the distraint is still just a temporary precaution. The ILO stands nothing to gain from it since it does not lay claim to the sums withheld: it would do so only if the complainant were convicted in Yaounde. In the interests of both sides the ILO will nevertheless release the sums if the criminal proceedings make no headway by expiry of the period of limitation for prosecuting criminal offences. As to the confiscation of two months' salary, there is a new fact, but only in that the ILO has put into effect a measure the complainant was informed of as early as 30 May 1983. The complainant did not then challenge the ILO's right to confiscate. True, he protested later and does now. But Judgment 671 dismissed as time-barred his challenge to the decision of 7 June 1984 on the grounds that it merely confirmed the one of 30 May 1983, and the decision of 27 March 1985, too, is mere confirmation.

Turning to the merits, the ILO submits that the construction the complainant puts on Article 3.16 is unsound since it would be tantamount to denying the Organisation's inherent right to withhold from pay, subject to review by the Tribunal, any sums an employee may owe it. The confiscation is fully in keeping with Article 11.40(c) of the Financial Rules. The complainant's pleas in defence of his behaviour in Cameroon misinterpret the nature of his duties and are at odds with the facts. His posture is, to say the least, implausible.

Lastly, the ILO submits that for someone in the complainant's position the amount confiscated was reasonably proportionate to what it itself lost.

D. In his rejoinder the complainant maintains that his complaint is receivable. He has met the conditions the Tribunal set for his filing a new complaint.

He develops his submissions on the merits and presses his claims.

E. In its surrejoinder the ILO observes that the rejoinder is little more than an amalgam of unsupported allegations, inconsistencies and oft-repeated protestations of innocence, and fails to address, let alone answer cogently, its pleas on receivability and on the merits. It enlarges on its case, concluding, as to the merits, that even on the most favourable construction his gross negligence allowed fraud to recur over many months. The only issue outstanding is whether the amount confiscated was right, and he simply ignores it.

CONSIDERATIONS:

1. This case being the sequel to the one on which the Tribunal ruled in Judgment 671 on 19 June 1985 and the history of the dispute being recounted in that judgment, the facts need not be recapitulated here.

2. The impugned decision is a letter of 27 March 1985 signed by the head of the Director-General's office. Its purpose is twofold.

First, the Organisation states that the complainant was grossly negligent in carrying out his duties and it confiscates two months' salary out of the sums due to him on retirement. It declares the decision to be final.

Secondly, it reaffirms its view that he may be held liable in the event of criminal conviction, but it says it will pay back the sums distrained in return for security.

3. The ILO's main plea is that the complaint is time-barred: the impugned decision was taken on 27 March 1985 but the complaint was not filed until 16 August.

The complainant retorts that he received the impugned decision on 10 May. If so the time limit would run from that

date. But the Tribunal rejects his submission: the ILO has lodged a letter he wrote on 19 April acknowledging receipt of the letter of 27 March, and the Tribunal will therefore take 19 April as the material date for reckoning the time limit.

In support of its objections to receivability the ILO submits that its decision of 27 March was final because it was taken after the internal means of redress had been exhausted; that the complainant was therefore not free to go through yet again the internal procedure set out in Chapter 13 of the Staff Regulations; that he was required under Article VII of the Statute of the Tribunal to file not later than 90 days from 19 April; that since he did not do so until August he is out of time; and that the time limit was not suspended by the letter he wrote to the Organisation on 5 June.

The Organisation has subsidiary pleas: that the decision merely applies and confirms an earlier one; that in any event Judgment 671, though it says the complainant may make a request for review, does not relieve him of observance of the time limit; and that the letter of 5 June 1985 may not be treated as an internal appeal since it merely repeated, though summarily, the same excuses he had offered before.

4. In ruling on the issue of receivability the Tribunal will distinguish the two parts of the decision.

5. The one the Tribunal will take up first is the upholding of the original decision of 30 May 1983. Is the challenge receivable?

The decision of 27 March 1985 is the outcome of internal proceedings and confirms the original decision after advice has been taken from an internal body. The only new fact is that the complainant may have the sums released in return for a guarantee, but he may take the opportunity or not, as he pleases, and it is to his advantage. The ILO's view that he had to file within the 90 days is sound.

The complainant observes that in Judgment 671 the Tribunal authorised him to file a new complaint provided there was some new fact, and he submits that his letter of 5 June constituted a new claim based on the terms of the judgment.

For his argument to succeed he would at least have to be relying on some new fact. The earlier judgment defined and illustrated what was meant by that, and his present complaint does not cite any such new fact as would warrant review.

Nor is the period of time that has elapsed since the date of the decision to withhold some of his terminal entitlements so long as to constitute a "miscarriage of justice", the term used in Judgment 671.

The Tribunal accordingly upholds the ILO's plea that the complainant's challenge to the withholding of some of his terminal entitlements is irreceivable.

In paragraph 22 of its reply the Organisation states that "if by the time prosecution is barred by prescription in Cameroon no progress has been made in the proceedings there, the ILO will pay back the sums withheld, plus interest (but less the two months' salary)". The ILO invites the Tribunal to record the undertaking.

It is not the Tribunal's function to do so. Instead it merely makes known the ILO's undertaking as such, whatever force it may be given in law.

6. The Tribunal comes to the confiscation of two months' salary. On this score the issue of receivability is rather different.

The original decision of 30 May 1983, impugned in the first complaint, stated that the withholding of the sums was only "a measure of distraint" and without prejudice to any later decision by the Director-General.

On the evidence the Tribunal finds that the actual confiscation was the decision of 27 March 1985 and that the decision was not the culmination of any internal proceedings. The purpose of such proceedings is to enable an international official to seek review of a decision and they must on no account cause him detriment. If some fact to his discredit comes to light in the internal proceedings the disciplinary authority is bound to suspend them and take a new decision which the official may challenge in a new internal appeal. If any other procedure is followed there will be breach of his right to defend himself.

On receiving notice of the decision of 27 March 1985 the complainant was therefore free to lodge an internal "complaint" under Article 13.2 of the Staff Regulations. He did so in his letter of 5 June. The ILO having failed to answer, he correctly lodged his complaint within the sixty-day time limit in Article VII(3) of the Statute.

The letter of 5 June concludes: "I cannot accept the disciplinary sanction and I should like you to ask the Director-General to set it aside". It is therefore mistaken for the ILO to say the letter makes no claim and merely repeats earlier unavailing excuses.

7. What exactly is the nature of the decision to confiscate two months' salary, to be subtracted from the complainant's terminal entitlements?

The reason the ILO gives for the decision is the criticisms of his official conduct, and it observes that "in view of [his] gross negligence the amount confiscated is not disproportionate to that of its own loss". It draws a distinction between the confiscation and the measure of distraint intended to allow of compensation should he be found guilty of fraud or any other wilful act.

Thus the actual text of the decision makes it plain that the reason for the confiscation was not fraud.

The Organisation relies on Article 11.40 in Part XI of the Financial Rules. In any case the impugned decision cannot rest on that article, which relates to circumstances that do not obtain here.

In the Organisation's view he was guilty of gross negligence in the performance of his duties, something that typically calls for disciplinary action.

The procedure for disciplinary action is in Chapter 12 of the 5taff Regulations, and the charges against the complainant if proved, would amount to "misconduct by an official in his official capacity" within the meaning of Article 12.1.2(b).

The provisions of Chapter 12 are therefore applicable in their entirety. Article 12.1.1 says plainly enough that "An official who fails to observe the standards of conduct required of an international civil servant may be subjected to any one of the sanctions provided for in this Chapter, as appropriate to the gravity of the case". The Regulations list the sanctions that may be imposed, and the ILO may choose between them: warning, reprimand, censure, discharge and summary dismissal. There are no others, the list being exhaustive.

It is also plain from Chapter 12 that the sanctions may be imposed only on serving officials. Nor is the idea of a financial penalty in keeping with the general principles of the international civil service. In any event the suspension from duty prescribed in Article 12.9 is not a sanction. The withholding of salary is based on the notion that no services have been rendered. Moreover, suspension applies only to serving officials and means they are relieved of duty.

There being no need to consider the charges against the complainant, the impugned decision must be set aside insofar as it imposes a disciplinary sanction on the complainant.

8. He is awarded 2,500 Swiss francs towards costs and as damages.

DECISION:

For the above reasons,

1. The impugned decision is quashed insofar as it imposes a disciplinary sanction on the complainant.

2. The ILO shall pay him the sum of 2,500 Swiss francs.

3. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

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