Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L.-K. (No. 4)

v.

ILO

120th Session **Judgment No. 3544**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr C. L.-K. against the International Labour Organization (ILO) on 1 February 2013 and corrected on 18 March, the ILO's reply of 8 July, the complainant's rejoinder of 9 September and the ILO's surrejoinder of 3 December 2013;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the practice followed in granting appointments without limit of time ("titularization") to officials in the Director and Principal Officer category (hereinafter "category D").

At the material time, the complainant, who holds an appointment without limit of time at grade P.3, was Chairperson of the Staff Union Committee of the International Labour Office ("the Office"), the ILO's secretariat. He was also Joint Chairperson of the Joint Negotiating Committee established pursuant to the Recognition and Procedural Agreement concluded between the Office and the Staff Union on 27 March 2000.

In accordance with Circular No. 452 (Rev.1), Series 6, of 8 April 1993, entitled "Rules and Procedures for Titularization", every year the Joint Negotiating Committee draws up the list of officials to be considered for titularization. Responsibility for drawing up the list may be delegated to a joint working party of that committee comprising representatives of the Human Resources Development Department (HRD) and members nominated by the Staff Union Committee. Once the list has been drawn up and submitted to the directors of the departments concerned for their opinion, the working party examines the opinions expressed and submits recommendations to the Joint Negotiating Committee.

In November 2011 certain members of the working party, having noticed that no category D officials appeared on the list of staff to be considered for titularization during the current exercise, enquired as to the position of the HRD on this matter. They were then informed that this was due to a practice, applied for more than ten years and based on Article 4.2 of the Staff Regulations, whereby the list of category D officials was submitted directly to the Director-General for decision, without prior consultation of the Joint Negotiating Committee. This practice had never been called into question by any official in the category concerned.

In a grievance lodged on 5 June 2012 the complainant contended that this practice was unlawful as it contravened the provisions of the above-mentioned Circular No. 452. On 3 September 2012 the Director of HRD questioned the receivability of the grievance, as the complainant did not appear to be acting on behalf of any director or raising any particular difficulties relating to a specific case during the current exercise. As the Director of HRD assumed that the complainant was acting in his capacity as Chairperson of the Staff Union Committee, he pointed out that the Staff Union had always accepted the practice in question and stated that it would continue to apply.

The complainant lodged a grievance with the Joint Advisory Appeals Board (JAAB) on 24 September 2012 asking it to recommend that the Director-General cancel the decision of the Director of HRD, draw all the appropriate consequences from that cancellation and,

subsidiarily, redress the moral and material injury sustained. The ILO argued that the grievance was irreceivable. In its report of 23 October 2012, the JAAB unanimously recommended that the Director-General should dismiss the grievance as irreceivable on the grounds that the complainant had no cause of action. It further considered that, since the grievance did not seek to obtain redress for "an individual decision" adversely affecting one or more officials, but to ensure the Administration's respect for the Joint Negotiating Committee's prerogatives in the titularization procedure established by Circular No. 452, it was not competent to hear collective disputes between the Administration and the Staff Union Committee. The Director-General approved this recommendation in a letter of 13 December 2012, which constitutes the impugned decision.

The complainant requests the quashing of the impugned decision, redress for the injury suffered and costs in the amount of 2,000 Swiss francs.

The ILO asks the Tribunal to dismiss the complaint as irreceivable or, in any event, unfounded in its entirety.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 13 December 2012 by which the Director-General dismissed the grievance he had lodged during an annual titularization exercise, challenging the Office's practice of not submitting the files of category D officials to the joint body which is consulted on this matter.

2. The ILO objects to the receivability of the complaint on the grounds that the complainant has no cause of action and has not exhausted the available internal means of redress.

3. The Tribunal will not dwell on the ILO's submission that the complainant has no cause of action in his personal capacity. It is true that, as an official holding an appointment without limit of time at grade P.3, he is not affected in that capacity by the titularization of

staff members in category D, which comprises Directors and Principal Officers. However, the complainant, who was Chairperson of the Staff Union Committee at the material time, has clearly indicated in his complaint, as indeed he did during the internal appeal proceedings, that in this case he is acting exclusively as a staff representative. The ILO's submission in this regard is therefore irrelevant.

4. It is unnecessary to determine whether the complainant's status as a staff representative in itself gives him a cause of action on the complainant to challenge the administrative practice at issue in this case. Indeed, the Tribunal notes that, at the material time, the complainant was Joint Chairperson of the Joint Negotiating Committee, and in his complaint he alleges a breach of the Office's duty, under Circular No. 452 (Rev.1), Series 6, of 8 April 1993, to consult that committee – or the working group acting by delegation of authority from it under paragraph 11 of the circular – on the titularization of officials. Insofar as he thus alleges a failure to respect the prerogatives of a body of which he himself was a member, the complainant has a cause of action which gives him standing to bring this complaint (see, for example, Judgment 2036, under 4, and Judgment 3053, as well as the analysis thereof in Judgment 3291, under 7).

5. The ILO's argument that, in the past, Staff Union representatives had never thought it necessary to challenge the practice in question and had apparently even implicitly acquiesced to it cannot negate the complainant's right to rely on the cause of action thus recognised.

6. Neither does the Organization have any grounds for submitting that, before filing a complaint with the Tribunal, the complainant should have initiated the collective dispute settlement procedure under Article 7 of the Recognition and Procedural Agreement concluded between the Office and the Staff Union on 27 March 2000.

Although that article does provide that "disputes over collective issues between the Office and the [Staff] Union" must be submitted to a review panel responsible for finding a solution acceptable to both

parties, it also stipulates that "[i]ndividual grievances shall be dealt with under the recognized grievance procedures". Hence, even if this dispute, presented in a different form, might have been subject to the method of collective dispute settlement procedure provided for in the Agreement, there was nothing to prevent the complainant, acting in his capacity as a member of the Joint Negotiating Committee and on the basis that that body had not been consulted, from initiating the individual grievance procedure provided for in Articles 13.2 and 13.3 of the Staff Regulations (see in this connection Judgment 3449, under 4).

The objection to receivability predicated on the complainant's alleged failure to exhaust internal means of redress as required by Article VII, paragraph 1, of the Statute of the Tribunal will therefore likewise be dismissed.

7. Although the Director-General's decision of 13 December 2012 was confined to dismissing the complainant's grievance as irreceivable, as recommended by the JAAB, the Tribunal considers that, since the parties have addressed the substance of the complainant's claims, it should rule on the merits of the case.

8. The complainant contends that no provision of Circular No. 452 exempts the Office from consulting the Joint Negotiating Committee, or its working party, with regard to the titularization of category D officials.

9. While there is no need to determine whether, as the complainant submits, this practice results in a lack of transparency which has made it possible to titularize some directors "in what might be described as strange circumstances", it is clear that this plea is well founded.

Indeed, paragraph 3 of Circular No. 452, which, as its title indicates, defines the circular's "[s]cope", sets out a precise and exhaustive list of the categories of officials who, for various reasons, are excluded from that scope. It is ascertained that Directors and Principal Officers are not among the categories mentioned in this list. The procedure instituted

by the circular, in particular the requirement to consult the Joint Negotiating Committee, does therefore apply to them.

10. The Tribunal is not persuaded by any of the ILO's submissions to the contrary.

11. First, the ILO points out that examining the eligibility of category D officials for titularization without consulting the Joint Negotiating Committee is not incompatible with Article 4.6(c) of the Staff Regulations, which defines the criteria governing appointments of ILO officials without limit of time. Although, strictly speaking, this statement is true, the fact remains that the practice in question is in breach of Circular No. 452, which is sufficient to render it unlawful.

12. Secondly, in defence of its case, the ILO cites paragraph 8 of the Circular, which provides that the list of officials drawn up by the Joint Negotiating Committee "is [...] submitted to each departmental director concerned inviting his/her opinion on the proposed titularizations with regard to the capacity of officials [...] under his/her authority to pursue a career". According to the ILO, that provision "suggests" that this circular was not meant to apply to category D officials, as they themselves are often directors of departments. However, apart from the fact that the variety of departmental structures within the Office means that there is far from a complete overlap between those two groups of senior managers, the fact that the provision in question may not generally apply to category D officials does not, in itself, enable it to be inferred that they are excluded from the Circular's scope in its entirety, since, as stated above, paragraph 3 of the Circular does not provide for such exclusion.

13. Thirdly, it is to no avail that the ILO submits that the disputed practice is justified because it is consistent with articles 4(2)(d) and (e) of the Staff Regulations, which provide that vacancies in the Director and Principal Officer category are normally filled by direct selection by the Director-General. The fact that those posts are filled at the discretion of the Organization's executive head does not by any means

signify, in the absence of an explicit provision to that effect, that the same applies to the subsequent titularization of the officials so appointed. Moreover, given the significant legal effects of titularization, it would appear appropriate that such appointments should be decided according to a more stringent procedure requiring, inter alia, the consultation of a joint body.

14. Lastly, the ILO maintains that the disputed practice has been consistently applied for more than 15 years without demur from the Staff Union Committee until now – as has already been said – and without it giving rise to any objections from the officials concerned. However, as the Tribunal has consistently held, a practice cannot be become legally binding if it contravenes a written rule that is already in force (see, for example, Judgments 1390, under 27, 2259, under 8 and 9, 2411, under 9, 2959, under 7, or 3071, under 28). The inconsistency demonstrated above between the disputed practice and the provisions of Circular No. 452 is sufficient reason to dismiss that argument.

15. It follows from the foregoing that the impugned decision must be set aside.

16. The complainant seeks redress for the injury that he allegedly suffered as a result of that decision. However, the complainant does not explain anywhere in his submissions what that injury consists of. This claim will therefore be dismissed.

17. Neither is it appropriate in the circumstances of this case to grant the complainant's claim for costs.

DECISION

For the above reasons,

1. The Director-General's decision of 13 December 2012 is set aside.
2. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

GIUSEPPE BARBAGALLO PATRICK FRYDMAN MICHAEL F. MOORE

DRAŽEN PETROVIĆ