

SIXTY-EIGHTH SESSION

In re EBEL

Judgment 1004

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Karl-Heinrich Ebel against the International Labour Organisation (ILO) on 22 December 1988 and corrected on 5 January 1989, the ILO's reply of 22 February, the complainant's rejoinder of 18 April, the ILO's surrejoinder of 2 June, the Organisation's communication of 28 August and the complainant's letter of 31 August 1989 to the Registrar of the Tribunal;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.11, 11.5, 13.2 and 14.6 and Annex I 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. The complainant, who was born in 1932, joined the ILO in 1962 on an appointment without limit of time. In 1975 he reached grade P.4.

The Regulations of the United Nations Joint Staff Pension Fund, to which he belongs, provide for determining a member's pension rights when he retires even if the organisation later reappoints him. Pensionable remuneration being lowered at 1 April 1987, pension benefits were expected to fall thereafter. But the ILO was willing to let a staff member aged 55 or more retire early and so secure his pension benefits at the then rates; if reappointed he would have his pension suspended until he left for good and further pension entitlements would accrue in the new period of employment. Staff circular 380 (Series 6) of 3 March 1987 announced the scheme. New contracts, to start after a break of at least a month, were to be for a short or fixed term only.

In a minute of 5 March 1987 the complainant said that he wanted to retire early at the end of April but would like "another contractual arrangement". The ILO agreed, and on 24 April the Chief of the Personnel Development Branch (P/DEV) offered him a new appointment from 1 June, still at grade P.4, and listed the "service-accrued" benefits he would keep under his new contract by way of exceptions to the Staff Regulations allowed under Article 14.6. ("No exception may be made to these Regulations unless the official concerned consents and only if such exception does not prejudice the interests of any other official or group of officials. ...")

In a minute of 29 April he protested at losing eligibility for "personal promotion", which his seniority at P.4 put him in line for in 1987; he asked for straight reappointment at P.5 if his eligibility could not be carried over. The Chief of P/DEV answered on 16 June that it could not and that, his duties being graded P.4, he could not have a higher grade.

He accepted the offer of reappointment and returned it with a minute of 25 June to P/DEV. He now holds a fixed-term contract.

Being dissatisfied with the terms of his appointment, he asked the Director-General in an undated letter to take a "more understanding" view, but in a minute of 28 October the Chief of P/DEV answered that his eligibility for personal promotion and his right to enter internal competitions, which required two years' unbroken service, had lapsed: carrying them over would "prejudice the interests" of other staff and so offend against Article 14.6.

The complainant entered an internal competition for a P.5 post. In its report of 2 August 1988 the Selection Board rejected him on the grounds that he did not have the two years' service. On 5 October he lodged a "complaint" under Article 13.2 of the Staff Regulations objecting to the loss of eligibility for personal promotion and of the right to enter internal competitions. In a letter of 21 November 1988 the Director of the Personnel Department told him that before accepting the "package" of early retirement he had fully known the conditions of reappointment; his appeal was rejected.

B. The complainant submits that the purpose of the scheme was to protect not just some staff against a drop in pensions but also the ILO against the sudden loss of many experienced officials. So it gained from the scheme. Moreover, the complainant and others continued work even during the break in contract, when they were paid pensions, so that the ILO got their services for nothing. It never published the fine print of the scheme, but preferred oral explanation, so that it could be strict with some and indulgent towards others. The ILO is indeed tougher with him than with others: he wonders, for example, whether the vice-chairman of the Selection Board in the competition he entered, who had also resigned, had been reappointed to the staff so as to qualify for membership of the Board.

The only article of the Staff Regulations about reappointment is 4.11: "A former official, on reappointment, shall be regarded, for the purpose of these Regulations, as becoming an official for the first time ...". But 4.11 cannot have been applied because some terms of his new contract do take account of the seniority he acquired under his old one. There being no "reappointment" under the Staff Regulations but mere continuation of his old appointment under fixed-term contracts, he keeps his right to enter internal competitions and his eligibility for personal promotion. That he does so causes others no "prejudice" within the meaning of 14.6. It is not the Staff Regulations but the Selection Board itself that requires two years' service of entrants. Since Annex I to the Regulations allows the Board to admit officials who are not eligible, such an exception is presumably not prejudicial to others, else it would not be allowed. Since the real purpose of the requirement is to disqualify probationers, barring long-serving staff like the complainant is pointless.

He was not so fully aware of the terms of the "package" as the ILO makes out. Its offer of 24 April 1987 neither mentioned the loss of the rights he claims nor gave any grounds for inferring his agreement to forfeiting them, an exception to the Regulations to which 14.6 required his consent.

He seeks the disclosure of the records of the Board proceedings. He asks the Tribunal to quash the impugned decision, declare the competition void and have it reopened, order the ILO to respect his "seniority rights", and award him 2,500 Swiss francs in costs.

C. The ILO replies that the complainant's claim to eligibility for personal promotion is irreceivable. The minute of 28 October 1987 from the Chief of P/DEV refused it, he failed to appeal under 13.2 within six months, and so he has not tried all the internal means of redress.

Besides, his claims are unfounded. The Chief of P/DEV had amply warned him that he would lose the "seniority rights" and advised caution. Yet he resigned and accepted reappointment. His minutes of 29 April and 25 June 1987 show that he knew full well what his new status would be and that if he pressed the point the ILO would not reappoint him. He cannot have the best of both worlds by getting the package changed now.

He misunderstands how 14.6 relates to 4.11. The basic rule is in 4.11 and did not require his consent: it is that someone who is reappointed is deemed to become an official for the first time. The Director-General made no exception to 4.11 to carry over so-called "seniority rights". And though he did, with the complainant's consent, make exceptions under 14.6 to preserve other entitlements that did not harm anyone else's interests, he refused the carry-over of the seniority rights under that provision. Letting him enter internal competitions would have lessened others' hopes of winning, and considering him for personal promotion would have reduced others' chances too because there is a quota for such promotions.

Those who retire early to secure financial advantage may not have the same career prospects as those who do not. Early retirement gave the complainant the financial security he wanted, and he is estopped by acceptance of it from objecting to any disadvantages it may have brought him.

Annex I to the Staff Regulations provides that the notice of vacancy may state the "qualifications required of applicants" and, as is standard practice, the notice approved by the Selection Board in this case stated the condition of two years' continuous service. It is immaterial that the Board may sometimes admit otherwise ineligible staff because in this case it did not. Even if allowed to enter he would not have won the competition since the Board recommended transfer of a P.5 official. The membership of the Board was unobjectionable since according to the Staff Regulations it was in any event not confined to serving staff members.

D. In his rejoinder the complainant discusses in detail the arrangements for early retirement. He iterates that the scheme was in the ILO's own interests, was never properly explained and was a mere fiction riddled with

inconsistency. Though he had a break in contract the identity card of the kind the Swiss Federal authorities issue to international officials was not withdrawn. The ILO misreads his minute of 25 June 1987: what he accepted was the offer of 24 April 1987, which said nothing of the loss of seniority rights. The fiction of reappointment could not destroy those rights. He got no "financial advantage" from early retirement but was just protecting his pension.

He did have two years' continuous service at the time of the competition since he had gone on working after his old contract ended. It is wrong to argue that letting him enter would have made no difference; by that token anything goes so long as it has no effect on the outcome.

E. In its surrejoinder the ILO points out that the complainant ignores its objections to the receivability of his claim to eligibility for personal promotion.

As to the merits, he merely reaffirms his reading of the rules. The Organisation discusses several issues of fact raised in his rejoinder, enlarges on its pleas and seeks to refute his arguments on issues of law. The work he did between contracts was voluntary: since he held no appointment at the time continuity of service was broken. His minute of 25 June 1987 shows that he signed his new contract in full awareness of its terms, and indeed he does not deny having known since March 1987 what would happen to his seniority rights. His consent to the arrangements estops him from later challenging some features not to his liking.

CONSIDERATIONS:

1. Because of decisions the General Assembly of the United Nations had taken in 1986 about the United Nations Joint Staff Pension Fund and a new scale of pensionable remuneration the Organisation faced the possibility of resignations by senior ILO staff. It introduced a scheme whereby officials aged at least 55 - the minimum age for payment of a retirement benefit - might take early retirement before 1 April 1987 so as to determine their entitlements in local currency and receive benefits according to the higher rates that had obtained until that date. According to the scheme anyone who was reappointed to the staff would have the payment of his pension benefit suspended until he retired for good and pension entitlements would start to accrue again for the new period of service.

2. A circular published on 3 March 1987 - No. 380 in Series 6 - explained the scheme in general terms. At the same time guidelines were issued to the Personnel Department setting out the procedures which were to be followed in implementing the scheme and to be clearly indicated to each official at an interview. While some benefits that had accrued under the previous contract would be transferred to the new one by way of exception to the Staff Regulations it was expressly stated that qualification for entering internal competitions and eligibility for personal promotion were to be strictly determined on the strength of the new appointment in accordance with the Staff Regulations. The complainant does not allege failure to tell him of those arrangements.

3. Article 4.11 of the Staff Regulations reads:

"A former official, on reappointment, shall be regarded, for the purpose of these Regulations, as becoming an official for the first time ..."

Provision is made for exceptions which do not apply in this case.

4. Having already been told of the arrangements that were to be published in circular 380, on 5 March 1987 the complainant tendered his resignation as from 30 April, and it was accepted on 24 March. The next day the Chief of the Personnel Development Branch explained to him orally the arrangements for putting the scheme into effect. In a letter of 24 April he was offered reappointment at grade P.4 in the form of a short-term contract from 1 June 1987 to be followed by a ten-month extension. That meant that there would be a break in employment in May. The letter specified the entitlements to be carried forward. In a minute of 29 April the complainant acknowledged receipt of the offer and queried one point: he said that he was given to understand that because of his resignation he would forfeit his eligibility for personal promotion. He asked that, if that right could not be carried over to his new contract, the ILO should consider offering him a fixed-term appointment at an appropriate step in grade P.5 instead of P.4. He addressed his minute both to the Director of the Personnel Department and to the Director-General.

5. On 25 June 1987 he returned the signed offer of reappointment. He said that he had got no reply yet from the Director-General to his minute of 29 April and hoped to have the matter cleared up soon. The Personnel

Department had in fact answered by a minute of 16 June but he did not see it until 3 August 1987, on his return from mission and leave. That minute reminded him that he had been told that under Article 14.6 of the Staff Regulations eligibility for personal promotion could not be transferred from his old contract to his new one, that his post was confirmed at P.4 and that he could not be reappointed at a higher grade. His short-term contract was replaced by a fixed-term appointment for the period from 1 June 1987 to 31 May 1988 which he signed on 3 August 1987.

6. He sent the Director-General an undated reminder about his minute of 29 April 1987. On 28 October the Chief of the Personnel Development Branch wrote him a minute on behalf of the Director-General referring to the correspondence about his eligibility for personal promotion and his right to enter internal competitions, refusing his request and confirming that neither right could be transferred to his new contract.

7. On 24 June 1988 the complainant entered a competition (No. V/ALIMOND/33/88) for a P.5 vacancy. The notice of vacancy said that applications might come from established officials and from officials holding a fixed-term contract provided that by the closing date for entry they had completed at least two years' continuous service in the ILO.

8. The Selection Board eliminated the complainant's candidature because he did not have two years' continuous service. In doing so it applied paragraph 12 of Annex I to the Staff Regulations, which lays down the procedure selection boards are to follow in internal competitions: in the first category of candidates to be eliminated are those who do not have the qualifications specified.

9. Having learned that he had been declared ineligible the complainant wrote to the chairman of the Selection Board on 18 August 1988. The chairman answered on 29 September that, as he understood it, staff who chose to take early retirement according to the arrangements in circular 380 had been warned of their loss of the right to enter internal competitions until they had again acquired two years' service.

10. On 5 October 1988 the complainant lodged an internal "complaint" under Article 13.2 of the Staff Regulations. He contended that the true purpose of circular 380 was not to provide for early retirement but to reconcile the interest of long-serving officials in protecting their pension entitlements with the ILO's interest in keeping the services of experienced staff; that he had de facto continuity of service since he had gone on working without pay in the one-month break between contracts; and that to deny him for want of seniority the right to enter internal competitions like V/ALIMOND/33/88 and eligibility for personal promotion constituted unjustifiable and unfair treatment and was against the spirit of the Staff Regulations.

11. In a letter of 21 November 1988 the Director of the Personnel Department replied on the Director-General's behalf rejecting the "complaint". He observed that when the complainant had decided to take advantage of the circular he had been told how the Staff Regulations and other relevant rules would be applied and what conditions applied to reappointment and he had agreed to the package in full awareness of what it comprised.

12. There are two decisions the complainant objected to in his "complaint" of 5 October 1988: refusal of his right to enter internal competitions, and his ineligibility for personal promotion.

The latter formed the subject of a decision the Director-General took on 28 October 1987 on a request he had made on 29 April 1987. Since he did not appeal against the decision of 28 October 1987 at the time his objections are irreceivable because he has failed to exhaust the internal means of redress.

As regards the other matter, he did object within the time limit in the Staff Regulations to his exclusion from the internal competition, and to that extent his complaint is receivable. Though the Director-General's decision of 28 October 1987 does also mention his right to enter internal competitions, it was not a question he had raised himself: he had asked only for a ruling on his eligibility for personal promotion. In any event the Organisation does not contest the receivability of his complaint as to his right to enter internal competitions.

13. The Tribunal is not competent to rule on whether the arrangements for the complainant's retirement satisfy the Regulations of the United Nations Joint Staff Pension Fund: that is a matter within the competence of the United Nations Administrative Tribunal. This Tribunal is competent to deal only with the matter of the complainant's reappointment in the light of the Staff Regulations and the established facts.

14. Those facts are that the complainant resigned from the Organisation as from 30 April 1987 and was reappointed

as from 1 June 1987; he drew a pension benefit from the Fund; and he actually worked in all but one week of the month of May 1987.

15. The material point is that the complainant took retirement, not that he may have continued working in the month when he was not employed. Once he had retired and been reappointed, Article 4.11 came into play. According to that provision no benefit may be carried over from the previous contract to the new one, so that on reappointment a former official is to be regarded as becoming an official for the first time. The exceptions did not apply. Whenever reappointment may have occurred a reappointed official to whom the exceptions do not apply automatically has to start all over again, and consent to waiver of rights is immaterial since the issue is governed by the Staff Regulations.

16. In this case an exception was made to allow the carry over of certain named entitlements under the authority given in Article 14.6 on the grounds that they did not prejudice any other official or group of officials. The entitlements included annual leave credit, repatriation grant and education grant. Though their continuance was subject to the official's consent, the complainant gave consent on signing and returning the offer of contract.

17. He argues that the Staff Regulations do not make two years' continuous service a condition of the right to enter an internal competition.

The argument is irrelevant. It is clear from the announcement of the competition, which the Selection Board had approved, that such service did constitute a condition of entry. Apparently it is a standard one and of long standing, and the complainant does not allege lack of authority for setting the conditions in the notice.

The reason for the requirement of two years' service is immaterial if the condition is valid.

It is also immaterial whether the exceptional admission of the complainant would have affected other officials' interests since no exceptions were in fact allowed.

18. The complainant alleges that circular 380 was not uniformly applied: one official was offered a contract for two years instead of the one year provided for in paragraph 4 of the circular. But the ILO denies that and says that no-one was given a two-year contract on reappointment. The allegation is not proved.

19. The complainant objects to the composition of the Selection Board, in particular on the grounds that its vice-chairman was in the same position as himself, having retired and been reappointed. The complainant doubts whether he had been duly reappointed to the Selection Board.

The Organisation's answer is that there was no need to reappoint the vice-chairman because membership of the Board was not restricted in law to serving officials anyway.

There is no evidence on the issue. The complainant does not suggest that the vice-chairman submitted a separate resignation from the Board on resigning from the staff of the Organisation. But such resignation would not have been required since G(a) of the guidelines expressly provides that those who have been reappointed will be considered to have had no break in service for the purposes of activities of the Selection Board.

There is no reason to hold that the Selection Board was invalidly constituted.

20. Lastly, since in any event the complaint must fail there is no reason to order the disclosure the complainant seeks of the records of the Board proceedings.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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