SEVENTY-SIXTH SESSION

In re EL MAHJOUB (No. 2)

Judgment 1325

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Mohamed El Mahjoub against the International Labour Organisation (ILO) on 19 April 1993, the ILO's reply of 22 July, the complainant's rejoinder of 25 August and the ILO's surrejoinder of 28 October 1993;

Considering Articles II, paragraph 1, and VII, para- graphs 2 and 3, of the Statute of the Tribunal and Articles 4.6 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Libyan citizen born in 1936, joined the staff of the ILO in Geneva in 1985. His career ended on 31 December 1991 in the circumstances described under A in Judgment 1213 of 10 February 1993, which dismissed his first complaint.

Before his appointment ended he went on sick leave from 12 December 1991. On 2 March 1992 he turned up at the office. In the meantime, on 19 February 1992, he had submitted an internal "complaint" to the Director-General under Article 13.2 of the Staff Regulations of the International Labour Office alleging wrongful termination of employment. In a letter dated 18 June 1992 the Director of the Personnel Department rejected his "complaint" on the Director-General's behalf.

On 10 December 1992 he submitted another "complaint" to the Director-General requesting payment of salary since 1 January 1992. By a letter of 28 January 1993 the Director of the Personnel Department informed the complainant, on the Director-General's behalf, that no salary had been paid since the beginning of the year because his contract had expired on 31 December 1991 and that his complaint was time-barred. That is the decision he is impugning.

B. The complainant maintains the pleas he put forward in support of his first complaint. He observes that after joining the ILO his appointment was extended by less than a year at a time; indeed in 1991 he was granted four extensions, three of them for a mere two months each. That, he submits, was in breach of Article 4.6 of the Staff Regulations ("appointments for a fixed term shall be of not less than one year and of not more than five years") and of ILO practice and denied him benefits he would have had under an appointment without limit of time.

The post which - as is recounted in Judgment 1213 under A - the ILO offered him at Tunis was temporary, and the Organisation failed to explain the grounds for such transfer.

He was not treated on a par with others: the previous holder of the Tunis post had been promoted to P.5, and three other officials were granted fixed-term appointments as regional advisers on labour administration in Africa and the Arab States. He has been victimised.

The complainant further observes that for no valid reason the ILO stopped his salary in January 1992, while he was on sick leave, so as to force him out of his job.

He asks the Tribunal to quash the "unlawful actions" blocking his salary from January 1992 and order that he be allowed to perform his duties. He seeks an award of material damages in an amount corresponding to his "salaries" for the period from 1 January 1992 up to the date of his reinstatement and, "for the period subsequent to the date of the Tribunal's judgment", in an amount that takes account of the salary he would have been paid had he been kept on until retirement.

C. In its reply the ILO submits that the Tribunal already dismissed his claims in Judgment 1213 on his first

complaint. His pleas are nearly all a rehash of his objections to the lawfulness of the proposed transfer to Tunis. So his complaint is irreceivable under the res judicata rule.

Though his challenge to the decision not to extend his appointment may be something new, his complaint is still irreceivable under Article VII(2) of the Statute of the Tribunal because he failed to file it during the ninety days after the notice of the final decision he got in the letter of 18 June 1992. The letter of 28 January 1993, which he impugns, merely confirmed the earlier decision.

D. The complainant presses his case in his rejoinder. He contends that res judicata cannot apply because this case is the outcome of facts subsequent to Judgment 1213, namely his internal "complaint" of 10 December 1992 and the Organisation's reply of 28 January 1993.

His answer to the ILO's other plea is that its letter of 18 June 1992 was "irreceivable and nil": he lodged his internal "complaint" on 15 February 1992; Article VII(3) of the Statute's Tribunal does not allow the Organisation to remain silent for more than sixty days; and it missed that deadline. So its final decision is not that letter, but the one of 28 January 1993, and he filed this complaint in time.

E. In its surrejoinder the Organisation contends that the complainant's rejoinder raises no new issue but is merely an attempt to state the same pleas more clearly. It presses its objections to the receivability of his arguments about his proposed transfer to Tunis, a matter that is res judicata, and about non-renewal. His rejoinder betrays a misunderstanding of the term "irreceivable" and of Article VII(3) of the Tribunal's Statute. Having failed to take his case to the Tribunal within the prescribed time limit, he may not go on lodging internal appeals under Article 13.2 of the Staff Regulations in the hope that the Organisation's reply will open the way for further action before the Tribunal.

CONSIDERATIONS:

1. The complainant joined the ILO in January 1985 under a one-year fixed-term contract at grade P.4. He got several extensions. As Judgment 1213 recounts in A, the Organisation offered him transfer to Tunis in 1991 under a two-year appointment at the same grade but with payment of a special post allowance at grade P.5. After some discussion the Organisation decided that he should take up duty on 1 November 1991. Though he did not object to the transfer as such, he wanted an appointment without limit of time at grade P.5.

2. Since the ILO regarded the conditions he raised as tantamount to rejection of its offer it decided not to extend his appointment beyond 31 December 1991. On 17 January 1992 he filed his first complaint, which gave rise to Judgment 1213. The Tribunal held that the complainant's conditions were not warranted and that it was proper to treat them as refusal of transfer.

3. After 1 January 1992, although he made attempts to resume work, the Organisation did not let him, nor did it pay his salary. It rejected several protests he made on the grounds that he had not been dismissed but his contract had simply expired and that his grievances were the same as those he had already put in his first complaint.

4. In this complaint he is alleging that the Organisation unlawfully froze his salary from January 1992, that it forced him out of his office in July/August 1992 and that its motive for doing so was a desire to end his employment, and he is claiming reinstatement and material damages.

5. The decision not to renew the complainant's contract was the direct consequence of his refusal of transfer to Tunis and so he has only himself to blame for it. His complaint being devoid of merit, there is no need to rule on the Organisation's objections to receivability and his claims therefore fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

William Douglas
E. Razafindralambo
Mark Fernando
A.B. Gardner

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