

The Administrative Tribunal,

Considering the complaint filed by Mr M.D. O. against the International Labour Organization (ILO) on 4 August 2004, the ILO's reply of 15 February 2005, the complainant's rejoinder of 3 May, and the Organization's surrejoinder of 15 July 2005;

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

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

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

A. At the material time Article 13.2.1(1) of the Staff Regulations, concerning the resolution by dialogue process, provided in part as follows:

“Within sixty working days from the date on which the cause of the grievance arose or, if the grievance relates to an ongoing matter, from the last date on which the matter affected him or her, the official shall initiate the Grievance Procedure [...].”

The complainant, an American national who was born in 1946, entered the service of the International Labour Office – the Organization's secretariat – in 1985, at grade P.3, in the Bureau of Information Systems (SYSTEM). On 1 September 2000 he was transferred to the ILO's Regional Office for Asia and the Pacific, in Bangkok, where he held the P.5 position of Senior Administrative and Financial Officer (SAFO) on a three-year assignment.

From 1 May 2002 the complainant was transferred from that position to the position of Advisor to the Regional Director on Structure and Management Issues, still stationed in Bangkok. In that capacity he was due to complete a management report by 30 June 2003. In late May 2003 the complainant was informed that he would be transferred back to Geneva as of 1 July 2003. On 21 May he submitted a grievance to the Regional Director protesting that he had not been given sufficient notice to prepare his departure. It was agreed that he would depart at the end of September 2003 and the complainant withdrew that first grievance.

In September 2003 he received a draft copy of his performance appraisal for the period from 1 May 2001 to 30 April 2003 which was written by the Regional Director and contained negative comments about his performance as SAFO. On 17 September 2003 he submitted another grievance to the Regional Director, alleging unfair treatment since February 2002 and asking, inter alia, to be reinstated as SAFO. He was reassigned to ILO headquarters and left Bangkok on 29 September 2003.

He submitted the grievance to the Joint Panel on 11 November 2003. At the request of the Chair of the Joint Panel, the Secretary of the Joint Panel informed the complainant that while he was alleging unfair treatment it appeared that a substantial part of the grievance concerned harassment, in which case the Joint Panel would require a report from the Ombudsperson. In the absence of that report it would not be competent to examine the harassment-related aspects. The suggestion of the Panel was that he should either submit a revised version of his grievance to the Joint Panel concentrating on the unfair treatment aspects, or submit the entire grievance to the Ombudsperson “with a view to resolving it through dialogue”. The complainant submitted the whole grievance to the Ombudsperson on 23 November 2003.

In a one-page report issued by the Ombudsperson on 15 January 2004, it was said that because of scheduling difficulties, the intended dialogue between the complainant and his former supervisor had not taken place within the 30-day period allotted under the applicable rules, and in the absence of an agreement by both parties to extend the time limits it had not been possible for the Ombudsperson to make a proposal for the resolution of the complainant's grievance.

On 25 February the complainant submitted his grievance to the Joint Panel. In the reply it submitted, the Organization held that the grievance was time-barred and it did not reply on the merits. The Joint Panel wrote to the Organization on 22 April. Citing Article 13.2.1 of the Staff Regulations, it indicated that in its view the grievance was filed against an “ongoing matter” and was receivable; it asked the Organization to respond to the substance of the grievance. It stated that a hearing had been set for 13 and 14 May.

By a letter of 7 May 2004, which is the impugned decision, the Director of the Office of the Director-General notified the Director-General’s final decision to the complainant. The letter gave reasons why the Director-General was unable to agree with the conclusions of the Joint Panel regarding receivability. It was stated therein that the complainant could, if he so wished, pursue the matter before the Tribunal.

The hearing was subsequently cancelled and on 4 June 2004 the Joint Panel issued its “Summary Conclusions” on the complainant’s grievance. The Panel found that it could not issue full recommendations on his case as the Office had “decided not to participate in the procedure”.

B. The complainant, in preliminary argument, asserts that by issuing a final decision before the Joint Panel had made a recommendation to the Director-General, the Organization made a mistake of law. The Joint Panel process was not over, and by cutting it short the Organization denied him the right to a fair hearing. Moreover, to his knowledge there has been no investigation into his allegations, and no response from the administration concerning the substance of his allegations.

Referring to Article 13.2.1(1) of the Staff Regulations, he argues that the issue of receivability hinges on whether the harassment he suffered occurred only at the point when he was removed from his SAFO post on 1 May 2002, or whether it can be considered to have been ongoing up to the point when he left Bangkok in September 2003. In this connection, he claims that he suffered ongoing incidences of harassment which undermined his dignity. He did not submit a grievance alleging harassment when he lost his SAFO post because he did not want to be in “perpetual conflict” with the Regional Director, but the harassment continued throughout the entire period when he occupied the position of Advisor. He adds that he accepted that assignment under duress.

When he was nearing the end of his assignment as Advisor, the situation deteriorated. He was concerned by the negative comments made in the performance appraisal he received in September 2003. Until that point, no one had informed him that there were deemed to be problems with his performance as SAFO. At the time when he was reassigned to the position of Advisor in May 2002, it was said in clear terms that his performance as SAFO was not in issue. He had reported directly to the Deputy Regional Director who retired in late 2002, but contrary to usual practice, no request was made to that official for his input in the performance report. Furthermore, he submits that all along he was made to suffer because he had denounced “bullying activities” perpetrated by another official in his department. His working environment deteriorated and a mobbing campaign took hold against him: a small group of staff influenced his supervisor to treat him in an “increasingly negative and hostile manner”.

He seeks the quashing of the Director-General’s decision to stop the Joint Panel proceedings, which, he adds, was rendered in “the knowledge that the Joint Panel was to be replaced shortly by a new body with different rules”; a written apology for his “wrongful removal from the post of SAFO”; moral damages, for “unjust action and harassment against him during the 14 month period of assignment as Advisor”, in an amount equal to 50 per cent of his salary during that period; moral damages for denial of due process by the ILO; and a performance evaluation for the period from 1 May 2001 to 30 April 2003 that includes comments from his former direct supervisor, the Deputy Regional Director. He also claims “costs incurred by the ILO Staff Union”.

C. In its reply the Organization submits that the Joint Panel, as an advisory body, was not competent to decide on the receivability of the complainant’s grievance. It considers that it was justified in construing the Panel’s letter of 22 April 2004 as being a recommendation on the complainant’s grievance. It was clear to the Organization that the issue of receivability would ultimately have been invoked against the complainant, and in order to protect “the legality of the procedure”, the Director-General’s final decision was issued on 7 May 2004. By issuing that decision the Organization acted in the complainant’s best interests as it gave him the possibility of filing a complaint with the Tribunal.

The ILO maintains that the internal grievance filed by the complainant in September 2003 was time-barred. It takes the view that his grievance was directed chiefly against his transfer to the post of Advisor, and that he introduced the element of “ongoing harassment” in order to make his case appear receivable. According to the defendant, the

allegations of harassment, too, were not put forward in a timely manner. Furthermore, the complainant did not raise those issues in the grievance he submitted to the Regional Director in May 2003. It contends that his complaint to the Tribunal is irreceivable since it relates to decisions against which no timely appeal was made, or is premature, having been filed before he has exhausted internal remedies available to him.

Regarding his claims for redress, the Organization argues that the complainant's request for a performance evaluation is not receivable because the relevant internal procedure relating to that appraisal is still ongoing, and no final decision has yet been made. The complainant is, moreover, wrong in his assertion that he was "removed" from his post of SAFO. He was transferred from that post, and there are thus no grounds for issuing the apology he is seeking. As for the damages which the complainant claims for denial of due process when the Organization withdrew from the Joint Panel proceedings, the Organization maintains that it acted in the best interests of the complainant by protecting the legality of the internal procedure. It considers that the complainant has failed to show that he suffered any injury. It also contends that the complainant cannot make a claim for costs "incurred by third parties".

In response to the complainant's allegations of harassment, the defendant says that the transfer to the Advisor post was carried out with the complainant's full consent and cooperation, and he has provided no proof to support his allegation that he accepted it under duress. It denies that he was the victim of harassment or mobbing. It states that his allegations are unsubstantiated and asks the Tribunal to dismiss his claim to damages in this regard.

D. In his rejoinder the complainant develops his pleas. He accepts that his claim to a performance appraisal cannot be deemed receivable and he maintains his other claims. He holds to his belief that he was denied due process.

E. In its surrejoinder the Organization maintains its objection to the receivability of the complaint. It considers that the numerous attachments submitted by the complainant with his rejoinder do not constitute objective evidence. Rather, they contain, for the most part, his subjective interpretation of certain facts and situations.

## CONSIDERATIONS

1. On 17 September 2003 the complainant, an ILO official who was then stationed in Bangkok, submitted a grievance to the Regional Director alleging "a series of acts over the period from February 2002 until [the] present" which he characterised as "unfair treatment in Human Resource matters". He claimed in that grievance that the Regional Director himself was "primarily responsible" for that treatment. The Regional Director responded to the grievance on 30 September, denying or challenging the matters alleged and stating that he was willing to meet the complainant "to discuss a possible resolution of th[e] matter". No meeting then took place as the complainant had left Bangkok the previous day to return to ILO headquarters in Geneva.

2. Having returned to Geneva, the complainant filed a grievance with the Joint Panel on 11 November 2003. The Joint Panel notified him on 19 November that it appeared that a substantial part of his grievance involved a claim of harassment which had to be referred to the Ombudsperson before it could be dealt with by the Panel. The complainant was advised either to submit a revised grievance or to submit the entire matter to the Ombudsperson. He elected to take the latter course and his grievance was received by the Ombudsperson on 24 November. On 2 December, the Ombudsperson informed the complainant that "[f]or practical and financial reasons" no investigation could be conducted but offered to facilitate discussions with the Regional Director. As it happened, no discussions took place within the 30 days specified in the Staff Regulations because of what is described in the Ombudsperson's subsequent report as "scheduling difficulties". The report also indicates that the Regional Director was willing to have the time limits extended to enable a discussion to take place in early February but the complainant did not agree to that course. Following that report, the grievance was submitted within time to the Joint Panel.

3. The ILO did not respond to the substantive issues raised by the complainant in his grievance before the Joint Panel. It simply contended that the grievance was time-barred and, thus, irreceivable. In this respect, it was contended that, subject to one matter which the Organization correctly claimed could not be brought before the Joint Panel, the grievance had not been submitted within 60 days of the individual acts upon which the complainant relied.

4. On 22 April 2004 the Joint Panel informed the Organization that, in its view, the grievance concerned an “ongoing matter” and was, thus, receivable. In this regard, it noted that pursuant to Article 13.2.1 of the Staff Regulations, a staff member may initiate a grievance with respect to an “ongoing matter” within 60 working days from “the last date on which the matter affected him or her”. The Joint Panel also informed the Organization that a hearing would take place on 13 and 14 May 2004.

5. The Organization informed the complainant on 7 May 2004 that it had received “the recommendations communicated by the Joint Panel [...] in respect of the receivability of [his] grievance” and that the Director-General had made a final decision that it was not receivable. That decision is the subject of the complaint.

6. As already noted, the grievance submitted to the Regional Director in September 2003 complained of “a series of acts from February 2002 until [the] present”. Similarly, in his grievance to the Joint Panel, the complainant claimed that he was continuing to experience the effects of unfair treatment. Ordinarily, a claim of ongoing unfair treatment will specify particular acts which are said to constitute or to evidence that treatment. Some of those acts may be final administrative decisions in respect of which the person affected may, if he or she so elects, file a grievance or initiate other action with a view to having that decision modified or reversed. So it was in the present case.

7. The grievance initiated by the complainant centres around the decision of the Regional Director to transfer him sometime in May 2002 from his position as Senior Administrative and Financial Officer to that of Advisor on Structure and Management Issues. That was a final administrative decision which the complainant elected not to challenge. So too, the Regional Director’s decision in late May 2003 that the complainant be transferred back to Geneva at the end of June was, apparently, a final administrative decision. In that instance, the complainant elected to initiate a grievance which resulted in discussions leading to a modified return date of 29 September. However, the complainant raised more than these isolated events in his grievance of 17 September 2003.

8. In that grievance, the complainant referred to conduct on the part of the Regional Director commencing before but leading up to his acceptance of the transfer to the position of Advisor. He says that he chose to accept the transfer rather than return to Geneva before the expiry of his appointment in Bangkok because the latter course of action would have resulted in disruption for his family. In his grievance, he also contended that he was isolated in his position as Advisor and that the management report he wrote was unfairly disparaged by the Regional Director. He also claimed that, although he had been told that his work performance was not the reason for his transfer to the position of Advisor, he was presented with a draft performance appraisal report by the Regional Director which falsely and unfairly criticised his work. He further claimed that he was adversely affected in the allocation of work and office space on his return to Geneva as a result of the earlier decision of the Regional Director to transfer him to the position of Advisor.

9. The complainant now accepts that the question of his performance appraisal report, as such, could not be the subject of his grievance before the Joint Panel. However, he contends that the content of the report – in circumstances where his work had not previously been criticised and, he says, was judged to be satisfactory by his immediate supervisor for much of the period involved – constitutes evidence which may properly be taken into account in determining whether there was a pattern of unfair behaviour towards him on the part of the Regional Director. In this he is correct. So, too, he is entitled to have the circumstances leading to his acceptance of his transfer and its aftermath taken into account in determining that issue, notwithstanding that, standing alone, the decision to transfer him to another post cannot, of itself, now be the subject of a grievance because of the passage of time.

10. In reaching his decision which is the subject of this complaint, the Director-General wrongly considered isolated events which, either because of their nature or the passage of time, cannot individually be the subject of a grievance before the Joint Panel. He ignored the complainant’s explicit claim that his grievance was with respect to unfair treatment over a period commencing in February 2002, prior to his acceptance of a transfer to the post of Advisor, and continuing until the end of his posting in Bangkok and having effects thereafter. The Joint Panel was correct to hold that the grievance initiated by the complainant related to an ongoing matter and was, therefore receivable. The impugned decision must be quashed.

11. Before turning to the question of the relief to be afforded to the complainant, it is necessary to refer to one other matter. The Director-General characterised the Joint Panel’s finding that the grievance was receivable as a “recommendation”. To so describe it is a misuse of language. It is useful to note what the Joint Panel itself said of

the course taken in this matter:

“The Joint Panel is further of the view that issues of receivability of cases be left to the Joint Panel or any similar bodies in the future to decide. An internal justice system in which one party to the conflict may decide the receivability of a case is neither credible nor effective.”

12. A body charged with internal review of administrative decisions, like any tribunal, necessarily has the power to determine the receivability of matters brought before it. And if it finds the matter to be receivable, it has a duty to proceed to exercise its powers with respect to that matter. Without that power and concomitant duty, its proceedings would be beset by unacceptable delays, as has happened in this case. Moreover, the parties would be forced to bring other proceedings to settle essentially sterile questions whilst the real issues remained unresolved. Furthermore, the existence of that power and duty occasions no detriment to an organisation, such as the ILO, since any recommendation subsequently made can be rejected on the basis that the matter was not receivable.

13. Given that the decision of the Director-General of 7 May 2004 must be set aside, the question arises as to the relief that should be granted.

The complainant asks this Tribunal, amongst other things, to order the Organization to issue him with a written apology for his “wrongful removal from the post of SAFO” and to award moral damages for the unfair treatment he received while in the post of Advisor. That relief can only be granted on the basis that he was subjected to unfair treatment as claimed. His claim has never been the subject of investigation and, on that issue, the matter must be remitted to the Joint Panel or, if the complainant so agrees, to its successor. If necessary, the Organization must reconstitute the Joint Panel.

The complainant also seeks an order with respect to the preparation of his performance appraisal report for the period from 1 May 2001 to 30 April 2003. That is a matter neither for the Joint Panel nor this Tribunal. Accordingly, no such order can be made. However, there should be an award of moral damages in the sum of 10,000 Swiss francs for the prejudice occasioned by the wrongful interruption of the proceedings before the Joint Panel. And although much of the work involved in relation to this complaint has been undertaken by the ILO Staff Union, there should be an award of costs in the sum of 5,000 francs.

## DECISION

For the above reasons,

1. The Director-General’s decision of 7 May 2004 is quashed.
2. The Director-General shall refer the complainant’s grievance back to the Joint Panel or, if the complainant agrees, to its successor for its consideration in accordance with its rules. If necessary, the Organization shall reconstitute the Joint Panel.
3. The Organization shall pay the complainant 10,000 Swiss francs as moral damages for the prejudice occasioned by the wrongful interruption of proceedings before the Joint Panel.
4. It shall pay him costs in the sum of 5,000 francs for the proceedings before the Tribunal.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.