Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. (No. 2)

v.

ILO

120th Session **Judgment No. 3546**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. D. S. against the International Labour Organization (ILO) on 18 March 2013 and corrected on 30 May 2013;

Considering the e-mail of 1 August 2013 in which the complainant requested a stay of proceedings until 20 September 2013;

Considering the ILO's reply of 23 October 2013, the complainant's rejoinder of 23 January 2014 and the ILO's surrejoinder of 2 May 2014;

Considering Article II, paragraph 1, 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 principle of extending the active service of a staff member beyond the age of 65 and the terms thereof.

At the material time, the complainant, an official of the International Labour Office – the ILO's secretariat – in the General Services category, was a member of the Staff Union Committee, a participants' representative in the ILO Staff Pension Committee and a representative of the latter Committee on the Board of the United Nations Joint Staff Pension Fund (UNJSPF). He was also a member 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.

Although she had reached the statutory retirement age – which in her case was 60 – in June 2006, Ms D., the Director of the Office of the former Director-General, had been retained in service, by decision of the Director-General, through a series of extensions of her appointment until 4 November 2011. At that point she began to draw a pension. However, as she had been asked by the Director-General to remain in her post until he himself left the Organization, she was then granted a fixed-term appointment for the period from 7 November 2011 to 6 November 2012.

On 29 February 2012 the complainant filed a grievance with the Human Resources Development Department (HRD) in which he challenged the retention of Ms D. in her post beyond the age of 65 and the specific terms thereof. The Director of the HRD dismissed his grievance as irreceivable in a letter of 26 April.

In the meantime, by a letter of 15 March, Ms D. had asked to resume participation in the UNJSPF and to have the payment of her pension suspended with retroactive effect from 1 February 2012. The terms of her appointment were amended accordingly on 27 March 2012.

The complainant filed a grievance with the Joint Advisory Appeals Board (JAAB) on 25 May 2012, in which he asked it to recommend that the Director-General cancel the decision dismissing his grievance as irreceivable and draw all the consequences therefrom, cancel the appointment of Ms D. for the period after 30 June 2011, order that the UNJSPF be reimbursed with the sum which it had not received in respect of Ms D.'s last contract and redress the injury suffered. The ILO requested the dismissal of the grievance on the grounds that the complainant had no cause of action and, subsidiarily, that it was without merit.

The JAAB issued its report on 25 October 2012. It found that while the complainant had no cause of action in his personal capacity, his grievance had in fact been filed in the collective interest of the Office's staff and participants in the UNJSPF, and that to dismiss the

grievance on the grounds that he had no cause of action would amount to a denial of justice. Since it considered that retaining Ms D. in her post after 30 June 2011, the last day of the month in which she had reached the age of 65, was not in conformity with Articles 11.3 and 14.6 of the Staff Regulations, it unanimously recommended that the Director-General should review and clarify the practice of extending appointments beyond the statutory retirement age. Noting that Ms D.'s last contract excluded her participation in the UNJSPF and hence enabled her to receive a salary and a pension concurrently, the JAAB held that the Director-General had committed an abuse of authority and had infringed the principles of ethics and good governance of the Office and the UNJSPF. It recommended that steps should be taken to ensure that Ms D. resumed participation in the UNJSPF throughout the period from 7 November 2011 to 31 January 2012 and that she should reimburse the UNJSPF for the benefits which she had received during that period.

By a letter of 19 December 2012, which constitutes the impugned decision, the Director-General rejected the JAAB's second recommendation on the basis that the UNJSPF alone was competent to decide on the issue of dual income (salary and pension) and that he had neither the authority nor the power to require a former official to reimburse a sum of money to an external entity. As for the policy on retaining officials in service beyond the statutory retirement age, he said that he intended to adopt appropriate measures in the near future.

On 18 March 2013 the complainant filed a complaint with the Tribunal asking it to set aside the impugned decision, to order redress for the injury suffered, to order the ILO to reimburse the UNJSPF with the sums which the latter had not received in respect of Ms D.'s appointment during the disputed period and, lastly, to award him costs in the amount of 2,000 Swiss francs.

The ILO asks the Tribunal to rule that it is not competent to hear the complaint insofar as it concerns the issue of drawing a salary and a pension concurrently, and to dismiss the complaint as irreceivable – because the complainant has no cause of action – insofar as it concerns the extension of Ms D.'s appointment. Subsidiarily it asks the Tribunal

to dismiss the complaint as unfounded and moot and to dismiss the claim for costs.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 19 December 2012 by which the Director-General dismissed, for the most part, his grievance challenging the principle of extending the active service of Ms D., the Director of the Office of the former Director-General, beyond the age of 65 and the terms thereof.

2. More specifically, the complainant in substance requests the setting aside of the decisions whereby Ms D. was retained in service after 30 June 2011 and that the ILO be ordered to pay the United Nations Joint Staff Pension Fund (UNJSPF) the sums which the latter did not receive during part of the period concerned, because Ms D.'s last employment contract made no provision for her continued participation in the Fund.

As these two requests raise separate legal issues, the Tribunal will deal with them consecutively.

3. With regard to the challenged decisions to retain Ms D. in service after 30 June 2011, the Tribunal will first dismiss the ILO's submission that this issue is moot.

In this connection, the ILO first contends that, in his decision of 19 December 2012, the Director-General endorsed the JAAB's recommendation that he should review and clarify the Office's practices with regard to the employment of staff members beyond the statutory retirement age. However, the mere fact that the Director-General thus undertook to adopt general measures on that matter in the future obviously does not render moot the complainant's request that the decision to retain Ms D. in service during the disputed period should be cancelled.

The Organisation also argues that the extension of Ms D.'s appointment had ended by the time the complainant filed his complaint

with the Tribunal, but this circumstance likewise does not render his request moot, since the decisions that resulted in this extension were nevertheless implemented and thus produced legal effects (see Judgments 3206, under 12, or 3449, under 4, *in fine*). The ILO's reference in this context to Judgment 3198, which concerned the different situation of a decision which was withdrawn by its author, is of no relevance to the instant case.

4. The ILO further submits that the complainant's claims regarding the decisions to retain Ms D. in service are irreceivable for want of a cause of action.

5. 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 in the General Services category, he could hardly have aspired to hold Ms D.'s post, which was at the grade of a deputy director-general. Indeed, in Judgment 2754, delivered on the complainant's first complaint, the Tribunal had already held that his claims – which in that case concerned an appointment to a grade P.5 post – were irreceivable on these grounds. However, in his submissions to the Tribunal and throughout the internal appeals procedure, the complainant clearly indicated that in this case he is essentially acting as a staff representative. The ILO's submission in this respect is therefore irrelevant.

6. It is unnecessary to determine whether the complainant's status as a staff representative in itself gives him a cause of action to challenge the administrative decisions at issue in this case. Indeed, the Tribunal notes that, at the material time, he was a member of the Joint Negotiating Committee, and in his complaint he alleges a breach of the Office's duty, under Article 11.3 of the Staff Regulations, to inform that Committee of any decision to retain an official at a grade equal to or higher than P.5 in active service beyond the normal retirement age. Insofar as he thus alleges a failure to respect the prerogatives of a body of which he himself was a member, the complainant has 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).

7. As to the merits, it is plain that the decisions extending Ms D.'s appointment beyond 30 June 2011 are unlawful.

In the version in force at the time of those decisions, Article 11.3 of the Staff Regulations, which stipulated that an official must retire on the last day of the month in which he or she reached the age of 60 or 62, depending on when he or she was appointed, stated that "[i]n special cases the Director-General may retain an official in service until the end of the last day of the month in which the official reaches the age of 65". It is clear from these provisions that no appointment may be extended beyond that final limit, as the Tribunal has in fact already observed in Judgments 580, under 11, and 3071, under 12. It follows that by deciding to retain Ms D. in service after the end of the month in which she reached the age of 65, the Director-General breached the aforementioned Article 11.3.

While Article 14.6 of the Staff Regulations does permit exceptions to the Regulations if the official concerned consents, it expressly states that this is possible "only if such exception does not prejudice the interests of any other official or group of officials". This condition was not met in this case. Indeed, the Organization is mistaken in contending that the extension of Ms D.'s appointment beyond the age of 65 did not prejudice the interests of third parties, since other staff members obviously could have been entrusted with her duties during the disputed period.

8. In addition, the Tribunal is bound to observe that the Organization committed another unlawful act in dealing with the situation of Ms D., by repeatedly ignoring the above-mentioned duty, established by Article 11.3 of the Staff Regulations, to inform the Joint Negotiating Committee of any extension of the service of an official in a grade equal to or higher than P.5. It is ascertained that the Committee was not officially informed of any of the decisions that

were taken to retain Ms D. in service after she had reached the age limit normally applicable to her, i.e. 60 years, in June 2006.

In this regard, the ILO's argument that its failure to comply with this duty reflected a long-standing practice to which the Staff Union had never previously raised any formal objection is of no avail. Indeed, as the Tribunal has consistently held, a practice cannot become legally binding if, as is the case here, 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).

Lastly, although the Organization points out that the Officers of the Governing Body were duly informed that Ms D. had been retained in service, this fact plainly does not remedy the failure to comply with its duty also to inform the Joint Negotiating Committee.

9. It may be concluded from the foregoing that the Director-General's decision of 19 December 2012 must be set aside insofar as he rejected the complainant's request to cancel the decisions to retain Ms D. in service for the periods 1 July 2011 to 4 November 2011 and 7 November 2011 to 6 November 2012. The latter decisions must also be set aside.

10. The complainant also challenges the specific terms of appointment enjoyed by Ms D. during part of the time she was retained in service, in that her last contract made no provision for her participation in the UNJSPF. The complainant takes issue with the fact that she was thus able simultaneously to draw her pension and a salary, while being exempted from any contribution based on the latter, and he asks the Tribunal to order the ILO to reimburse the Fund with the sums which it did not receive during the disputed period which, bearing in mind Ms D.'s request of 15 March 2012 to resume participation in the Fund, is that falling between 7 November 2011 and 31 January 2012.

11. The ILO submits that the Tribunal is not competent to entertain such a claim because it relates to a dispute concerning the UNJSPF and hence, according to Article 48 of the Fund's Regulations, falls under the jurisdiction of the United Nations Appeals Tribunal. However, Article 48 refers to decisions taken by the Fund, and no act on the part of the latter is at issue in the instant case, which concerns the terms on which Ms D. was employed for the period in question under a decision of the Director-General. This challenge to the Tribunal's jurisdiction will therefore be dismissed (see, for example, Judgment 3024, under 9).

12. The Tribunal considers that the complainant has no cause of action entitling him to ask the Tribunal to order the ILO to reimburse the UNJSPF with the sums which it did not receive in respect of the extension of Ms D.'s appointment.

13. It must first be noted that, contrary to his submissions, his status as an official participating in an individual capacity in the UNJSPF does not give him a cause of action in this respect, since the fact that contributions to the Fund were not made in respect of another official's appointment has no impact on his own situation. The complainant cannot therefore legitimately claim such reimbursement by the Organization. Nor indeed would he be entitled to request that the official herself be ordered to repay sums which she might have received in error (see Judgments 2281, under 4(a) and(b), and 3206, under 20). The complainant's reference to Judgment 1330, concerning a decision which, on the contrary, affected the pension rights of the complainants themselves, is of no relevance here.

14. Neither can the complainant derive a cause of action, in this connection, from his status as a staff representative. Although he invokes the general interest in safeguarding the financial interests of the UNJSPF, or in ensuring that the Office's governance rules are strictly observed, such an interest, however legitimate it might be, cannot in itself be regarded as one which the Tribunal is competent to protect.

In addition, the contention that the benefits enjoyed by Ms D. during the disputed period might have jeopardized respect for other officials' pension rights by compromising the financial equilibrium of the UNJSPF must plainly fail, having regard to the amounts in question and the size of the Fund's budget.

Since the Office's special treatment of Ms D. does not have any direct and immediate impact on the terms of employment or the rights of other officials, the complainant has no standing to bring the above-mentioned claim in his capacity as a member of the Staff Union Committee (see, for cases raising similar issues, Judgments 3342, under 9 to 12, and 3343, under 2 to 5).

15. For the same reasons, the complainant has no standing to bring that claim in his capacity as a participants' representative in the ILO Staff Pension Committee, on which he likewise relies.

16. The complainant seeks redress for the injury which he allegedly suffered on account of the impugned decision. Since, as noted above, his claims seeking to have various decisions set aside are partly irreceivable, this claim could in any case be accepted only to the extent that it concerns the injury which might have been caused by the extension of Ms D.'s active service *per se*. However, the complainant does not explain anywhere in his submissions what that injury consists of and, as stated under 5, above, his personal interests are unaffected by this extension.

17. The complainant also appears to rely on the injury resulting, regardless of the contents of the impugned decision, from certain comments contained in the letter of the Director of HRD of 26 April 2012 in response to his initial grievance. It is, however, plain from this letter that the comments in question were designed to draw his attention to the unlawful nature of his access, revealed by the grievance, to confidential information in Ms D.'s personal file. In this case, contrary to the findings of the JAAB, this warning, which was legally well-founded, cannot be regarded as a breach of the complainant's right of appeal or of the exercise of freedom of association. While it is certainly

regrettable that these comments were couched in rather blunt terms, there is no reason to order the Organization to pay financial compensation on this count.

18. The complainant’s claims for financial compensation will therefore be dismissed.

19. In the circumstances of the case, there are also no grounds for granting the complainant’s claim for costs.

DECISION

For the above reasons,

1. The Director-General’s decision of 19 December 2012 is set aside insofar as he did not grant the complainant’s request for the cancellation of the decisions to retain Ms D. in service during the periods 1 July 2011 to 4 November 2011 and 7 November 2011 to 6 November 2012. Those decisions are also set aside.
2. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ