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

FORTY-FOURTH ORDINARY SESSION

In re JOHNSON

Judgment No. 414

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Labour Organisation (ILO) by Mr. Edgar Johnson on 29 January 1979 and brought into conformity with the Rules of Court on 8 March, the ILO's reply of 27 July, the complainant's rejoinder of 30 December and the ILO's surrejoinder of 8 February 1980;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.6(d), 11.5, 11.6 and 11.16 of the Staff Regulations of the International Labour Office;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the International Labour Office on 15 November 1964 and was appointed as librarian in the International Institute for Labour Studies at grade P.2/P.3. At the end of one year he had his appointment confirmed and was given a contract without limit of time. He was later transferred to the library of the International Labour Office. At his own request he was given leave without pay from 1 September 1972 to 1 August 1974. At the beginning of 1976 he was transferred to the Computer Systems Branch, where he was in charge of the collection and compilation of data relating to the work of analysts. In November 1976 the Governing Body of the International Labour Office approved the abolition of 51 posts as an economy measure. It was accordingly decided to abolish one Professional category post and four General Service category posts in the library. In accordance with Article 11.5 of the Staff Regulation the Administrative Committee carried out a review of personnel files so as to take account of competence, efficiency and official conduct, length of service and the factor of geographical distribution in deciding which Professional category official was to be dismissed. The complainant addressed the Administrative Committee on 11 May 1977. From its comparison the Committee concluded that the criticisms in his annual performance reports were much more serious than those in the reports of other officials. The Director-General therefore informed him on 13 May 1977 that his appointment would end on 14 August 1977. On 20 May he appealed to the Joint Committee against that decision in accordance with Article 11.5(e) of the Staff Regulations. On 3 June he was given the excerpts from the Administrative Committee's report on his case. On 1 July, however, he agreed to sign an agreement proposed to him by the defendant organisation. Under the agreement his appointment as a permanent official came to an end on 16 August and he was given a fixed-term renewable contract for 15 months starting on 17 August 1977. The agreement also provided that in the event of termination of his employment he would be entitled to the indemnity provided for under Article 11.6 of the Staff Regulations; that the ILO would make every effort to help him to find another position outside the Office; that, if he obtained other employment before the expiry of the contract on 1 November 1977, he would receive the maximum indemnity provided for under Article 11.16, unless he obtained permanent employment; and that the Office would help him, if need be, by giving him leave without pay, to solve his problems of residence in the country of his duty station. A final clause provided that he would withdraw his appeal to the Joint Committee. The following year he continued to be seconded to the Computer Systems Branch, his contract being financed out of the library programme. On 15 September 1978, however, he was informed that his contract would not be renewed beyond 16 November 1978. On 26 October he wrote to the Director-General denouncing the agreement of 1 July 1977 and applying for resumption of the Joint Committee proceedings. On 1 November 1978 the Chief of Personnel refused that application on the Director-General's behalf.

B. In his complaint, which impugns the decision of 1 November 1978, the complainant pleads that the agreement of July 1977 was invalid and, subsidiarily, that the defendant organisation failed to perform it. He contends that the agreement is null and void on the grounds that no derogation may be made by any individual agreement from the conditions of employment applicable under the Staff Regulations to all staff members if such derogation is detrimental to the official's interests. Secondly, he pleads that the only reason why he consented to the agreement

was that he had been threatened with termination of his employment if he did not agree to the conversion of his permanent appointment into a fixed-term one. Such pressure is inadmissible, in his view, and tantamount to duress which voids the agreement. Furthermore, he was misled into consenting because he was given to believe that the agreement would be automatically renewed and was merely an administrative arrangement intended to preserve his employment despite the abolition of his post. It was not until later that he found he had been mistaken. Lastly, the ILO did not make every effort, as it had undertaken in the agreement to do, to find him employment. He further pleads that it was unlawful for a clause in the agreement to require him to withdraw his appeal to the Joint Committee since a staff member may not by agreement waive his right to appeal.

C. The complainant accordingly asks the Tribunal to order the ILO to pay him compensation amounting to 450,000 United States dollars, representing his salary up to the date of his retirement at the age of 60, or else to order his reinstatement in the position which he held in August 1977.

D. In its reply the ILO contends that the complainant's objection to the validity of the agreement is time-barred and therefore irreceivable. When he signed the agreement he was aware of what he now alleges vitiated his consent, in particular the pressure and duress under which he says he signed, and of the unlawfulness which he now pleads of any derogation from the Staff Regulations. He ought therefore to have filed his appeal within the time limit which ran from the date of signature. As to the merits, the ILO observes that the Staff Regulations expressly provide for the abolition of posts. It is hardly open to the complainant to find fault with the agreement for derogating from the provisions of the Staff Regulations when its purpose was to give him much more favourable treatment. He knew full well that his appeal to the Joint Committee had little chance of success and that but for the agreement he would have been dismissed on 16 August 1977. As for the alleged flaws in his consent, lengthy negotiations took place before he signed and so he was fully aware of what he was doing. It is surprising that he did not detect the flaws until 15 months after he had signed. The Organisation infers that the real reason for his appeal is the decision not to renew his appointment after 16 November 1978. Indeed he states himself that he would not have challenged the agreement had it been performed in good faith. In the internal appeal he lodged on 26 October 1978, however, he merely asked to have the agreement annulled and the status quo restored: he did not impugn the decision not to renew his appointment. The Organisation therefore maintains that in so far as he is impugning that decision he has failed to exhaust the internal mean; of redress and his complaint is irreceivable. On that point, and as to the merits, it observes that his fixed-term appointment followed the pattern of such appointments in all respects and laid it under no special duty of renewal. The reason why it concluded the agreement with the complainant was that at the time no one knew whether the United States of America was going to leave the ILO or not. Instead of dismissing the complainant forthwith, the ILO thought it better to mark time by giving him a fixed-term appointment. When the United States finally decided to withdraw from membership, the Organisation had to abolish another hundred posts, and it was obviously impossible to renew the complainant's appointment or find him other employment in the Office. Moreover, he obtained a one-year appointment with the World Health Organization to work in the WHO Regional Office in Alexandria.

E. In his rejoinder the complainant presses all his claims for relief. He maintains that the ILO's decisions, and particularly the agreement, were wiles designed to dismiss him without following the proper procedure. He believes that his case came under Article 11.5(a) of the Staff Regulations, which states that an established official whose appointment is terminated shall during the two years thereafter be offered appointment to any post which becomes vacant and for which he possesses the necessary qualifications. He was never offered any such appointment. When he realised that he was not receiving any such offer and that the Office was doing nothing to help him to find employment in other organisations, he concluded not merely that it was failing to perform the agreement but also that he had been misled about its motives in signing. Lastly, he points out that his present appointment with the WHO is not renewable.

F. In its surrejoinder the ILO observes that the complainant's performance reports are immaterial to the decision to abolish a post in the library. It was only after the post had been abolished and a decision had to be made as to who should go that the reports became material. In such a case the performance of several staff members is compared, whereas in the event of termination for unsatisfactory performance such performance is an absolute and exclusive criterion. The complainant fails to draw the proper legal distinction between the validity of the agreement and its performance. He has made a general accusation about the performance of the agreement but has failed to state which of its provisions have been violated by any finial decisions taken by the ILO. To refute the objection that his complaint is time-barred, he has charged the ILO with failing to perform the agreement, but to alter in that way his interpretation of his own complaint is to make it irreceivable for want of substance. The ILO has not failed in any legal or moral duty towards the complainant, it acted solely in the hope of serving his interests ani in any event he

was fully aware of the advantages and risks of the agreement. In particular, it did not fail in its obligation to offer him a post within two years of the termination of his permanent appointment - if indeed it was under any such obligation - since no post suited to his qualifications fell vacant during those two years.

CONSIDERATIONS:

The validity of the agreement of 1 and 18 July 1977

1. By a letter dated 13 May 1977 the Deputy Director-General in charge of administrative and personnel questions informed the complainant that the post which he held under a permanent appointment had been abolished and that since no other post could be found for him his contract would end on 14 August 1977.

The complainant appealed against that decision to the Joint Committee. While the appeal was pending an agent of the ILO and the complainant signed an agreement on 1 and 18 July 1977 which provided, among other things, that his permanent, appointment should terminate on 16 August 1977; that a new and renewable contract should come into force on 16 August for a period of 15 months; that he should be granted compensation in various contingencies; that his acquired rights should be preserved; and that he should withdraw his appeal.

The complainant alleges that the agreement was invalid on the grounds that it was contrary to the terms of employment in the Staff Regulations, concluded under duress and even tainted with an essential error.

2. There is no need to determine whether the pleas are receivable since they are clearly unfounded.

The complainant is mistaken in contending that it was a breach of the Staff Regulations to replace an appointment without limit of time with a fixed-term appointment. Although such a change is not expressly provided for in any text, it is by no means precluded. There is nothing to prevent an official who has left the Organisation for some reason or other from being reappointed and it is therefore equally admissible to replace one kind of appointment with another.

The complainant is also mistaken in alleging that he acted under duress. He had a choice between alternative courses of action: either to go ahead with the Joint Committee appeal, or else to enter into a fixed-term contract. It is true that either alternative entailed the risk of losing his employment altogether in the ILO - in the one case, if he lost his appeal, and in the other, if he did not have his fixed-term appointment renewed. On the evidence, however, the complainant was able to make his choice freely and was not subject to any pressure from the ILO. The most that can be said is that there would have been duress had the ILO declared a fictitious abolition of the complainant's appointment without limit of time in order to make him consent to a fixed-term appointment. But it did not do so. The abolition of his permanent post formed part of a real reorganisation and was no mere pretext.

Lastly, the error which the complainant alleges is not true. It was not open to him to infer from the agreement or from the circumstances in which it was signed that the renewal of his fixed-term appointment would be automatic. Indeed there would have been no point in including the clauses on compensation had the ILO intended to keep him on the staff indefinitely.

Non-performance of the agreement of 1 and 18 July 1977

3. In his rejoinder the complainant seems to be taking a different legal stand. He states that he "Never appealed against the decision not to renew the fixed-term appointment provided for in the agreement, but against the non-performance of that agreement". The rejoinder continues: "He could therefore not appeal against the ILO's actual decision since it merely afforded evidence of the non-performance of the agreement. He has therefore appealed against non-performance". This reasoning is difficult to follow, but probably it has to be read in the context, and what the ILO is being accused of is that it did not offer the complainant a new post.

4. There is no need to determine whether the plea is receivable since it is plainly irrelevant.

For some years the ILO has been experiencing financial difficulty and has had to make savings, for example by curtailing the number of posts. It must therefore have found it difficult to offer a post to the complainant. Yet the Administrative Committee did try to find him another assignment, and some ILO officials made efforts to get him an appointment with some other organisation. Their lack of success does not mean that the ILO failed in its obligations. Indeed it was only to be expected in the circumstances. In any event there is no evidence to suggest

that it appointed staff members less well qualified than he to duties which might have suited him.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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