

## SIXTY-SIXTH SESSION

### *In re* RATTEREE

#### Judgment 977

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. William Ratteree against the International Labour Organisation (ILO) on 2 September 1988, the ILO's reply of 30 November 1988, the complainant's rejoinder of 6 March 1989 and the ILO's surrejoinder of 21 April 1989;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal and Articles 1.9, 2.1, 4.2 and 13 of the Staff Regulations of the International Labour Office;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a United States citizen born in 1951, held short-term appointments with the ILO from 1980 and a series of fixed-term appointments from July 1981 at grade P.3 in the Equality of Rights Branch (EGALITE), in the Promotion of Equality Department. His duties related to the ILO's campaign against apartheid in southern Africa. An application he made in 1984 for the upgrading of his post to P.4 was unsuccessful.

In April 1987 the ILO advertised an internal competition to fill a vacant P.4 post in EGALITE which covered the duties the complainant was performing. He and six others applied. In its report the Selection Board recommended him as "the only candidate to meet the stated requirements in full", its second choice being Mrs. D.-B., a Ghanaian, and its third Mr. O.. Mrs. D.-B. and Mr. O., who were already at P.4, pointed out that Article 4.2 of the Staff Regulations gave applications for transfer priority over claims to promotion. The Deputy Director-General asked the Board to reconsider, but it confirmed its recommendation. In a minute of 10 August 1987 to the Director-General the Deputy Director-General queried the recommendation, cited other criteria he thought important, and proposed appointing Mrs. D.-B.. The Director-General approved the proposal on 20 August.

Having learnt of that decision some time in September 1987, the complainant made a "request" for review on 7 October under Article 13.1 of the Staff Regulations. He explained orally to the Personnel Department that he was worried about his future because his duties formed part of the post granted to Mrs. D.-B.. In a letter of 26 October a personnel officer answered that he seemed not to be objecting to Mrs. D.-B.'s appointment as such and reassured him about his future in the Organisation.

In a minute of 26 November the Director of the Promotion of Equality Department told him that he was to be put, though only for six months, on a post which included duties relating to the Arab territories occupied by Israel and which another official, Mr. M., had held up to the date of his transfer to New York. The reason why the assignment was temporary was that the position was thought to be delicate and the complainant's nationality to be unsuitable. In a minute of 3 December 1987 to the Director and to the chief of the Branch he agreed to the assignment provided that he did not have to go on mission to the territories.

On learning later of his assignment the Director-General disapproved and on 15 January 1988 told the chief of EGALITE to take him off work relating to the territories. By a minute of 11 February 1988 the Director of the Director-General's Office informed the Deputy Director-General that the Director-General had decided to grant a one-year appointment to Mrs. C., a French citizen holding a short-term appointment at grade P.3, to transfer her to EGALITE on 1 April on a new post that would cover work related to the territories, including the mission there, and to give her grade P.4. The matter was referred to the Selection Board. Having met on 16 March, the Board recommended appointing Mrs. C., but only at P.3 "in the first instance"; it also hoped that a suitable position would soon be found for the complainant. Mrs. C. was thus appointed to the post in EGALITE on 1 April and, despite the recommendation, at P.4. The complainant continued work on projects relating to southern Africa.

On 8 April he filed a "complaint" under Article 13.2 of the Staff Regulations challenging the appointment of Mrs. D.-B. - the "first decision" - and that of Mrs. C. - the "second decision". In a letter of 6 June 1988, the decision

impugned, the Director of the Personnel Department told him that the Director-General had rejected his complaint: his challenge to the first decision was time-barred because he had not respected the time limit of six months in Article 13.2, and it was, besides, unfounded; his objections to the second decision, which had not altered his own position, were also unsound.

On 1 August 1988 he was transferred to another department.

B. The complainant submits that he has been treated unfairly, wrongly and in breach of the Staff Regulations and the terms of his appointment.

As to the "first decision" - the appointment of Mrs. Date- Bah to the P.4 post he applied for - he contends that his 13.2 complaint of 8 April 1988 was not time-barred: the six months did not start until he got a minute dated 12 October 1987 informing him officially that he had not been appointed. Besides, not until later did he find out about the criteria improperly followed in picking Mrs. D.-B..

As to the merits of the first decision he contends that rejecting him was in breach of Article 4.2(a) of the Staff Regulations, which says that the "paramount consideration" in filling vacancies is the need for "staff of the highest standards of competence, efficiency and integrity". As is plain from the Deputy Director-General's minute of 10 August 1987, other criteria were applied, such as the need to bring Mrs. D.-B. back from a regional office and the desirability of appointing a woman. The ILO overlooked the criterion of language skills, which the Selection Board is supposed to apply and did, to his advantage. The criteria were either different from the ones cited in 4.2 or else inconsistently or arbitrarily applied. Much later he learned of political discrimination against him "prejudicial to the independence of the international civil service": he was accused of having lobbied ILO delegates, an accusation he was, moreover, given no chance to answer.

Mrs. C.'s appointment was in breach of 4.2 because there was no post vacant. The only vacancy in EGALITE was the one the complainant had agreed to be temporarily assigned to in December 1987 and which covered work on the occupied Arab territories. The decision was in breach of Article 1.9(a) ("The Director-General shall assign an official to his duties and his duty station subject to the terms of his appointment ..."): it disregarded the terms of his appointment by conferring some of his duties on Mrs. C.. Neither the Administrative Committee nor the Selection Board was consulted beforehand, the Director-General's decision being simply passed on to the Board and its recommendation about the grade discarded. It was unfair not to offer the complainant the assignment at P.4. He did not refuse to go to the territories; he merely asked that, in the ILO's interests and his own, he should not have to, and everyone agreed. He was thrust aside to make way for Mrs. C.. There was no urgency in filling the post, and, if need be, she could have been given a short-term appointment to carry out the required mission to the territories: what was apparently urgent was finding her an assignment. She replaced him at important meetings on apartheid in 1988 which he had expected to attend.

He asks the Tribunal to quash the decision of 12 October 1987 not to appoint him to the advertised P.4 post and order action on the Board's recommendation, or order his reinstatement in the post Mrs. C. was appointed to as from 1 April 1988, or else award him compensation.

C. In its reply the ILO gives its own version of the facts.

In its submission the complainant's challenge to Mrs. D.-B.'s appointment is irreceivable under Article VII(1) of the Tribunal's Statute because he failed to exhaust the internal means of redress. He did not file his 13.2 complaint until 8 April 1988 though he had been fully informed not later than 22 September 1987 - over six months earlier - of "the treatment complained of". Though he does not say how he came to hear of the decision of 20 August 1987 to appoint Mrs. D.-B., he knew of it by mid-September, when he sought meetings with the Personnel Department and the Deputy Director-General to talk about it. The Deputy Director-General's records show that he saw the complainant on 22 September, so that by then he had confirmation of the decision. He lodged his 13.1 request on 7 October 1987 and may not properly allege that the way he got to hear of the decision sufficed for the purpose of 13.1 but not for that of 13.2. Besides, 13.2 does not say that the time limit starts only on formal notification. Even if the time limit had started on the date of the formal announcement of the result of the competition, which was 8 October 1987, his 13.2 complaint would have been one day late. The repetition to him of unproven allegations about the reasons for the decision cannot extend the time limit.

As to the merits, the Organisation observes that the Director-General is not bound to follow the Selection Board's

recommendation. The Board's function is to identify suitable candidates, but the Director-General may, indeed must, consider other criteria such as the ILO's interests as a whole, the structure of the staff and the objectives of staff policy. The considerations of policy in the Deputy Director-General's minute amply justified Mrs. D.-B.'s appointment. That her language skills were inferior mattered little since all papers on apartheid are in English, the language she knows best. The Organisation rejects any suggestion that the decision was influenced by political considerations of the kind which the complainant alleges on the strength of second-hand information from staff union representatives.

As for the second decision, he was assigned to temporary duties pending transfer; in January 1988 the Director-General had the nature of his duties changed; and he stayed on in EGALITE carrying out the different duties until transfer. The appointment on 1 April 1988 of Mrs. C. to perform the duties pertaining to his position made no difference to him. If he objected to the change in his duties in January 1988 that was the decision he should have challenged. He has no grounds for attacking the second decision. Besides it neither constituted unlawful treatment of him nor caused him injury. There was no breach of Article 1.9 because the Director-General had authority to determine what his duties should be. The decision to appoint Mrs. C. at P.4 does not give him any retroactive right to have been granted the same grade. His contention that he was pushed aside is unsupported and does not square with the sequence of events. It was not Mrs. C., but Mrs. D.-B., who replaced him at the meetings on apartheid. His career has not suffered: he has been given a two-year extension of contract, to the end of 1990, and continues to be eligible for an appointment without limit of time.

D. In his rejoinder the complainant points to facts which he believes the reply obscures. He explains why the treatment of him was unfair and wrong and the procedure by which decisions came to be taken improper. He fell foul of the Administration because senior officers thought him too zealous in the pursuit of certain principles. The pattern of discrimination against him had ulterior political motives. He describes the injury and anxiety it has caused him. He explains how he came to be transferred, in August 1988, to a post he did not want. He accuses the Administration of acting high-handedly and in breach of procedure, using the Board's recommendation to back up a decision already taken and discarding it when it did not serve that purpose.

He contends that he could not challenge the decision to appoint Mrs. D.-B. until it had been communicated to him formally in writing, viz. by the minute of 12 October 1987, which he got on his return from leave on 20 October. When he filed his 13.1 request he did not know whether the decision was final. He did not see the announcement of the result of the competition because he was on leave at the time.

He further argues the merits of the first decision, discussing the function of the Selection Board, the validity of the criteria applied in appointing Mrs. D.-B., the objectives of staff policy and the political bias against him. He enlarges on his substantive objections to the appointment of Mrs. C. and explains in what ways that appointment was improper, formed part of the pattern of discrimination against him and caused him injury.

He presses his claims, namely reinstatement in "one of the posts from which he was unjustly removed" or, failing that, an award of damages. He claims 4,000 Swiss francs in costs.

E. In its surrejoinder the ILO develops its objections to the receivability of the challenge to Mrs. D.-B.'s appointment. It points out that if the complainant's reasoning were right the results of a competition could be challenged until six months had elapsed after every one of the unsuccessful candidates had got individual formal notice. That would be awkward and is no doubt why the Staff Regulations do not require such notice.

As to the merits the ILO observes that the complainant is seeking to widen the scope of his complaint beyond the two decisions and that much of his rejoinder, which addresses other issues, is immaterial. The Organisation nevertheless seeks to "set the record straight" on those other matters, observing that his sense of wrong beclouds his judgment and makes him persist in reading ulterior, and mistaken, motives into straightforward decisions. The ILO describes again how those decisions came about. In assigning people to politically sensitive jobs the Director-General enjoys wide discretion, as indeed he must, and exercises particular vigilance. The ILO submits again that there is no evidence to suggest that either of the two decisions at issue is tainted with a fatal flaw. In particular, his allegations of political bias are purely speculative. The Organisation again explains that the decision not to appoint him for good to work on the occupied territories - which he did not challenge at the time anyway - has not marred his career: his name is on the list of officials qualifying for the grant in 1989 of an appointment without limit of time.

## CONSIDERATIONS:

1. The complainant objects to two decisions, one of 20 August 1987 and the other of 11 February 1988, later confirmed on the recommendation of the Selection Board. He lodged an internal appeal on 8 April 1988 against both decisions, and by a letter of 6 June 1988, the decision now impugned, the Director of the Personnel Department of the International Labour Office informed him that the Director- General rejected his appeal.

The decision of 20 August 1987

2. In 1984 the complainant was unsuccessful in an attempt to get the upgrading of the P.3 post he then held in the Equality of Rights Branch (EGALITE) of the Office.

In April 1987 the ILO put up for internal competition a new post which was graded P.4 and which comprised duties the complainant had till then been carrying out. He applied for the post. The Selection Board recommended appointing him, its second choice being Mrs. D.-B., who already held a P.4 post. On 20 August 1987 the decision was taken to appoint Mrs. D.-B. instead to the vacancy. The complainant learned of that decision in September 1987 at meetings with Mr. S., the Chief of the Personnel Development Branch, and, on the 22nd, with Mr. T., the Deputy Director-General. On 7 October he made a request for review under Article 13.1 of the Staff Regulations. A letter of 26 October from the Personnel Policy Branch refused his request but added: "... your contribution to the Office has been appreciated, as demonstrated by your past performance appraisals. There is no reason therefore to believe that the Director-General's decision could prejudice your future career with the Office". In the meantime the Chief of the Personnel Development Branch had informed him by official notice dated 12 October that he had not been appointed to the vacancy.

3. Article 13.1(a) provides that an official who complains that he has been treated inconsistently with the Regulations or with the terms of his contract of employment "may request that the issue in question be reviewed with a view to its settlement". He may do so, moreover, "without prejudice to the right to submit a complaint in accordance with Article 13.2 within the time limit specified in that Article".

Article 13.2 provides that any complaint about treatment inconsistent with the Regulations or with the terms of the contract of employment "shall, except as may be otherwise provided in these Regulations, be addressed to the Director- General" through prescribed channels "within six months of the treatment complained of".

4. Having made his 13.1 request for review on 7 October 1987, the complainant submitted a "complaint" under 13.2 on 8 April 1988.

The lodging of the 13.1 request and the substance of it show that the complainant had become aware of "the treatment complained of" over six months before he lodged his "complaint", and it was therefore out of time under 13.2.

5. The complainant argues that time should run only from the date of receipt of official written notice.

But that is not what the Staff Regulations say: if he was aware of the treatment complained of more than six months before acting under 13.2 his internal "complaint" is out of time.

6. He further submits that he could not have known whether what he had been told was true.

Yet his sources of information were at a high level, and he must have known the information to be authoritative. Indeed it prompted him to make his request for review under 13.1.

7. The Director-General was therefore correct in rejecting the internal complaint about the decision of 20 August 1987 as out of time. Even though the complainant filed in time the present complaint impugning the final decision in the letter of 6 June 1988, that does not remove the time bar to his challenge to the decision of 20 August 1987. Since he failed to act within the time limit in 13.2 he failed to exhaust the available internal remedies and under Article VII(1) of the Tribunal's Statute his complaint is irreceivable insofar as it relates to that decision.

The decision of 11 February 1988

8. The other component of the impugned decision is the appointment of Mrs. C. to the P.4 post in EGALITE to

carry out, among others, the functions relating to the Arab territories occupied by Israel which had earlier been carried out by another official, Mr. M., until he had been transferred to the ILO's office in New York. That decision appears in a minute which the Director of the Director-General's Office sent on 11 February 1988 to the Deputy Director-General and to the Director of the Personnel Department.

The complainant's specific objections are the following.

(a) Since he had already been assigned to the post there was no vacancy to be filled and the appointment of Mrs. C. was therefore in breach of Article 4.2 of the Staff Regulations ("Filling of vacancies").

(b) It was in breach of his contract and of Article 1.9 ("Assignment of duties") in that his employment in the post had been duly authorised and formed part of the terms of his appointment.

(c) The decision was taken in breach of Article 4.2 because there had been no prior consultation of the Selection Board.

(d) The treatment of him was arbitrary and unfair:

(i) because the ILO stated no reasons for its instruction in January 1988 that he "should no longer have any responsibilities in relation to the new job description that he had accepted";

(ii) because he suddenly found himself with no budgetary post;

(iii) because he was given no clear instructions about the job he should be performing;

(iv) because he was not offered the temporary appointment at P.4, the grade at which Mrs. C. was later appointed;

(v) because the decision to remove him was made on political grounds relating to the performance of his duties, the quality of which was never called in question; and

(vi) because after Mrs. C. had been appointed he was neither sent to an ILO conference on apartheid held in May 1988 in Zimbabwe nor put on the list of the secretariat of the Committee on Apartheid at the International Labour Conference in June 1988.

9. The Tribunal will take up those arguments in the same order.

(a) A vacancy occurred as soon as the Director-General cancelled the decision of January 1988 to appoint the complainant temporarily to perform Mr. M.'s former duties and it occurred several months before the actual appointment of Mrs. C.. The complainant is mistaken in saying that there was no vacancy.

(b) Under Article 1.9 of the Staff Regulations it is for the Director-General to assign the complainant to his duties. The Director-General was acting *intra vires* in cancelling the within-branch transfer and his decision was valid. There was never any question of appointing the complainant permanently to the post and his temporary appointment to it duly ceased in January 1988.

(c) The minute of 11 February 1988 which contains the Director-General's decision to appoint Mrs. C. asks that all administrative and other steps be taken to give effect to it as soon as possible. One of those steps was to submit the proposed appointment to the Selection Board in accordance with Article 4.2. The Board approved the appointment, though it queried the proposed grade, which was the one the previous holder of the post had had. The Director-General's decision was plainly contingent on the taking of "all necessary steps" and was therefore not in breach of 4.2.

(d) The Tribunal is satisfied that the treatment the complainant received was neither arbitrary nor unfair.

(i) He says in his original brief that the ILO gave no explanation when it ended his temporary appointment and in his rejoinder that his sudden withdrawal from the duties, notified to him orally, was founded on vague allegations about his unsuitability for the job. The Organisation does not comment.

In the circumstances the Tribunal concludes that when he received the oral notice of termination he was told that

the reason, though "vaguely stated", was his unsuitability. While more than a vague statement might have been expected, so might an inquiry from someone who felt aggrieved. Yet the complainant made no inquiry or protest about the change in January 1988. He would have had reason for complaint had he asked for a more detailed explanation and been refused it; since he did not even ask for one, there is nothing arbitrary or unfair about the way in which the matter was dealt with.

(ii) It is true that when the appointment of Mrs. C. took effect on 1 April 1988 funds had to be found elsewhere to finance the complainant's appointment since he could no longer be paid from the resources allocated for the post. But that did not affect the complainant in any way and was a problem only for the Branch: according to Article 2.1 of the Staff Regulations ("Composition of the staff") it is "established officials" who must be put on budget posts or specially funded posts, and "fixed-term officials" like the complainant are not established officials.

(iii) The absence of a clear job description after the termination of his temporary posting did not prevent him from continuing to deal with projects related to apartheid, which indeed kept him occupied fully and without interruption until his transfer. The objection fails because he was clearly on provisional assignment pending transfer to another branch and he was fully taken up with work he was familiar with anyway.

(iv) The reason why the complainant was offered the temporary appointment in November 1987 was that there could be such direct transfer within the Branch without seeking the approval of the Selection Board. He accepted the post at grade P.3 and his contract was renewed at that grade. Although Mrs. C. was appointed at P.4, the grade held by the previous incumbent, there was nothing arbitrary or unfair about offering the complainant the post temporarily and provisionally at P.3.

(v) The Director-General ended the temporary appointment because he did not consider the complainant suitable for the post. He took the view that the job called for someone who would carry out all the duties, including missions to the occupied Arab territories, permanently and not just temporarily. Nationality was an important criterion because the holder of the post must be able to travel to the territories without interference or difficulty, as indeed the complainant himself recognised in asking to be relieved from going on mission to the territories. There was, moreover, an incident that prompted discussion with the complainant in November 1987 and January 1988. The Director-General took the view that it showed a certain lack of judgment and insufficient appreciation of the need for full consultation on sensitive matters, both of which were qualities considered essential for the post. The decision to remove the complainant from his temporary posting was at the Director-General's discretion and the exercise of his discretion was proper.

(vi) The complainant blames the appointment of Mrs. C. for his not being put on the secretariat of ILO meetings on apartheid in May and June 1988. The Organisation refutes that: it was Mrs. D.-B. who replaced the complainant in the performance of those duties which formed part of the position she had been appointed to as a result of the competition.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux  
Mella Carroll  
E. Razafindralambo  
A.B. Gardner

