

SIXTY-NINTH SESSION

Judgment 1020

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. J.-F. P. S. against the International Criminal Police Organization (Interpol) on 7 October 1989, Interpol's reply of 5 December, the complainant's rejoinder of 2 January 1990 and Interpol's surrejoinder of 20 February 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 3, 23, 36, 37, 38, 52(3) and 53 of the Staff Regulations and Article 103(3) and Appendix VII of the Staff Rules of Interpol;

Having examined the written evidence and decided not to order oral proceedings, 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 joined the staff of Interpol as head of the accounts unit on 1 February 1984. He was dismissed on 6 June 1989 on the transfer of the Organization's headquarters from Saint-Cloud to Lyons.

In keeping with Article 2(3) of Section 2 of Appendix VII to the Staff Rules an individual decision was communicated to the complainant in a minute of 5 October 1988 abolishing his post on 1 June 1989 and saying that an identical post would then be created in Lyons, which he was offered. The minute gave him until 30 November 1988 as a "period for consideration"; if by then he had not accepted the transfer he would have his appointment terminated and be given six months' notice; and the six months would start on 1 December 1988 and expire at the date of abolition of his post. If after accepting transfer to Lyons he changed his mind Article 2(6) would apply: he would not lose the benefit of any "period of notice of termination of appointment" which would still have been left to run "if he had not initially accepted his transfer". Under the heading "Grounds" the text declared that by virtue of Articles 1 and 2(1) of Section 2 of Appendix VII he had an acquired right to keep Saint-Cloud as his duty station and that the length of notice was determined according to Article 5 of Section 1 of Appendix VII and a Staff Instruction of 11 December 1974. Article 5 provides that an official "who took up his post before the date of entry into force of the Staff Regulations and the present Rules" - as had the complainant - shall be entitled to the period of notice "applicable to him under the terms of his employment agreement or of any Staff Instructions issued before that date". The Staff Instruction of 1974 increased the period from three to six months for officials with over five years' seniority.

On 4 November 1988 the complainant submitted to the Secretary General a "request for review" of the decision on the grounds that it did not respect his acquired rights. He reserved his right to appeal against any further decision the Secretary General might take on his case. By a letter of 29 November 1988 the complainant notified to the Secretary General his consent to the transfer but said he reserved his rights in full. On 22 December 1988 he had a disciplinary sanction imposed on him and was suspended from duty. On 8 February 1989 the Secretary General rejected his request for review as irreceivable on the grounds that the decision of 5 October 1988 had caused him no injury. In a letter of 3 March 1989 the complainant informed the Secretary General that he had changed his mind about the transfer. By a decision of 17 March 1989, and in accordance with Article 2(6)(a) of Section 2 of Appendix VII, he was treated as being under notice of termination, the period to expire not on 1 but on 6 June 1989. He was also relieved of working out the period of notice and was to be paid up to the date of termination.

On 14 April he submitted to the Secretary General a request for review of the decision of 17 March, claiming among other things compensation in lieu of notice equivalent to six months' salary. He also sought leave to appeal directly to the Tribunal. The Secretary General gave him such leave in a letter of 12 May 1989. By an individual decision of 16 June 1989 the Secretary General granted him 15,099.63 French francs in discharge of Interpol's liability toward him. On 30 June the complainant submitted to the Secretary General a request for review of the decision of 16 June and again sought leave to go straight to the Tribunal. The Secretary General gave such consent by a decision of 7 July 1989.

B. The complainant maintains that the impugned decision did not respect the period of notice and was therefore in breach of his acquired rights, which Article 52(3) of the Staff Regulations expressly safeguards. Since after consenting to transfer he had to change his mind for objective reasons and assert his acquired right to his duty station at Saint-Cloud, the period of notice should have been six months, not just the period he would have been entitled to had he not at first consented to transfer. The impugned decision was also in breach of Article 103(3) of the Staff Rules in that the period of notice was reckoned in his case, not "from the date on which the decision to terminate" his appointment was notified, but from the day after the date of expiry of the "period for consideration" set in the decision of 5 October 1988. That was contrary to the rule against retroactivity in that the Organization later converted into a period of notice of termination the time that elapsed from the date of expiry of the period for consideration up to the date at which he asserted his acquired right to his duty station.

The complainant submits that the Organization adopted the Staff Rules and the appendices thereto unilaterally: the staff representatives on the joint advisory committee set up to look at the drafts of the Staff Regulations and Staff Rules were given little time to do so.

He claims (1) further compensation in lieu of notice over and above what he was paid for the period, from 6 March to 6 June 1989, of three months instead of six, the sum to be reckoned at the rate of his salary for May 1989; (2) 50,000 French francs in costs.

C. In its reply Interpol argues that the complaint is irreceivable. In its submission the decision of 16 June 1989 merely gave effect to the one of 17 March 1989. Having made a request for review of the latter, the complainant was granted leave to go to the Tribunal by a letter of 12 May 1989 from the Secretary General. Since he failed to do so, the decision of 17 March is beyond challenge.

The Organization has subsidiary pleas on the merits. It contends that the complainant's initial consent to his transfer to Lyons cancelled his acquired right to his duty station at Saint-Cloud. By later changing his mind he unilaterally broke his contract of service, thereby causing injury to the Organization in that it had to look belatedly for someone else. Yet by virtue of Article 2(6) of Section 2 of Appendix VII to the Staff Rules the Organization did him the favour of letting him change his mind. According to 2(6) when someone changes his mind about going to Lyons his status is the same as it would have been had he refused the offer of transfer by the date of expiry of the period for consideration. So he has to work out the period of notice, which is deemed to have started at the same date as that at which it would have started had he not at first consented to transfer.

So the complainant did not work out a shorter period of notice but completed the six-month period of notice that would have begun on the day after the date of expiry of the period for consideration had he then refused to go to Lyons. There was therefore no breach of his acquired right to six months' notice of termination. The special procedure that was followed in his case constitutes a derogation from Article 103(3) of the Staff Rules and was allowed because of the peculiar importance of the transfer of headquarters.

The impugned decision was not in breach of the rule against retroactivity since it gave effect to a provision of the Staff Rules which came into force long before the complainant changed his mind about the transfer.

Lastly, Interpol denies that the Staff Regulations and Staff Rules were adopted unilaterally: the staff representatives were duly consulted through the joint advisory committee.

D. In his rejoinder the complainant seeks to refute each of the pleas in the Organization's reply.

As to receivability, he points out that what he is objecting to is not the date of expiry of the period of notice but the starting date, which he believes should have been 6 March 1989. Since he did not have to work out the period, that date should also have been the date of termination and, in accordance with French law, he was entitled to compensation for the period in which he did not work. He did not get the letter of 12 May 1989 until 19 July 1989, and he submits that it did not have the same meaning after the Secretary General had taken his decisions of 14 and 16 June and especially the one of 7 July.

As to the merits he maintains that since the decision of 5 October 1988 did not take effect until 1 June 1989 he kept up to 1 June 1989 his acquired right to have his duty station at Saint-Cloud. Only under duress did he assert that right, he did so reasonably promptly, and he was not thereby taking an opportunity that Interpol had granted him as a "favour". The minute of 5 October 1988 was just a proposal and amounted only to a decision to transfer him

provided he gave his consent. He doubts whether any period of notice may be "deemed" to have started to run and he submits that it was quite wrong to treat the period from 6 December 1988 to 6 March 1989 as if it were a period of notice when he had not yet asserted his acquired right. Lastly, he believes that Interpol ought to have negotiated a general agreement with its staff which would have given it reasonable time in which to find out what everyone had decided. He asks that over and above the further compensation in lieu of notice he be granted compensation for leave days in an amount he states.

E. In its surrejoinder Interpol presses the case made out in its reply and seeks to refute several points raised in the complainant's rejoinder.

It submits that what the complainant meant to challenge in his request of 14 April 1989 was the decision of 17 March 1989 about the date of expiry of the period of notice, and that since it never denied that there should be six months' notice, objecting to the date of expiry came to the same thing as objecting to the starting date. The complainant's appointment did not end until 6 June 1989, even though, in the Organization's own interests, he did not have to work. Though the leave he was granted on 7 July 1989 to appeal directly to the Tribunal repeated the decision of 12 May 1989 to the same effect it was for him to decide for himself where he stood after making more than one application for such leave. In any event the letter of 12 May 1989 must have reached him several days before he got the one of 7 July. His complaint is therefore irreceivable.

The Organization reaffirms that it was the minute he was sent on 5 October 1988 that constituted the decision to terminate his appointment after he had refused transfer. That minute referred to the abolition of his post and the creation of an identical one in Lyons, which it offered him, and explained what the legal effects would be - transfer or termination - of whatever decision he took on that offer. Since he worked out the six months' period of notice he is not entitled to compensation.

CONSIDERATIONS:

1. Interpol, an organisation that has its headquarters in France, decided in 1988 to move from Saint-Cloud to Lyons, and it did so in June 1989. It invited its staff to agree to the transfer on terms that were set out in the Staff Regulations and Staff Rules, in particular in an appendix to the Rules that contained special provisions for the purpose.

The Staff Regulations are stated to "set out the rules and procedures regulating the administration of the Organization's officials" and "define the fundamental conditions of employment and the basic duties and rights" of those officials. Article 23 of the Regulations empowers the Secretary General to transfer an official "from one post to another and from one duty station to another" for several reasons, and one of the reasons is transfer of the official's post to another place. Such transfer, says the article, "shall not lead to any downgrading". Article 36 lays down the general rules on termination of service and is supplemented by 37, which requires notice of termination, and 38, which is about termination indemnity. The Staff Regulations provide for the approval of a set of Staff Rules by the Executive Committee of Interpol to implement the broader provisions of the Regulations.

The Staff Rules consist of 161 articles and 7 appendices. Appendix VII is headed "Transitional measures" and Section 2 contains the special provisions about the transfer of headquarters from Saint-Cloud to Lyons.

Some staff members were informed on recruitment of the future transfer to Lyons; others were not. Article 2 of Section 2 of Appendix VII applies to those, like the complainant, who were recruited earlier, who on taking up duty were not warned of the risk of transfer, and who as headquarters officials had reason to believe that they would pursue their career at Saint-Cloud.

The article says that posts held by such officials at Saint-Cloud are abolished and that at the same time the same posts are created at Lyons and offered to them. If the official accepts the offer he is transferred to Lyons, but if he refuses it he has his appointment terminated in accordance with arrangements that are discussed below.

It is the Secretary General who, in exercise of the authority vested in him by Article 3 of the Staff Regulations, takes decisions applying the arrangements for transfer.

2. Some rules rank above others. According to Article 3 of the Staff Regulations the Staff Rules must respect the Regulations. But Appendix VII to the Rules has the same force in law as the Rules themselves and so may qualify them. The Secretary General exercises his executive authority in accordance with the Rules.

The Regulations say that the Secretary General shall submit the Rules for approval to the Executive Committee, and that procedure has been duly followed.

Although the Regulations do not lay down any other formal requirement such as consultation of the staff, the staff representatives were informed of the draft Regulations and Rules through membership of a joint advisory committee. The complainant cites comments the staff representatives made at the time and it is clear both that the staff were then given their say and that the time they got for looking at the drafts was, though short, long enough. It is mistaken to speak of a travesty of consultation: even supposing that the Organization was under a duty to consult the staff the consultations it did hold discharged that duty.

Consultation does not require negotiation, let alone approval. The staff representatives merely state their opinion, and it is not binding on the Administration. In any event there are no grounds for contending that the Staff Regulations and Staff Rules are flawed for want of approval by the staff representatives.

3. The complainant, who headed an accounts unit, joined the general secretariat of Interpol before the transfer to Lyons was planned, and so the material rule was Article 2 of Section 2 of Appendix VII.

Article 2(3) reads:

"A decision shall be communicated to each official concerned and shall indicate in particular:

- (a) the date on which he must present himself at his new post, assuming that he accepts his transfer to Lyons;
- (b) the period granted to him to consider his decision, this period may not be less than two months;
- (c) the period of notice of termination of appointment to which he is entitled in conformity with Article 5 of Section 1 of the present Appendix, and the date from which this notice shall run, should he not have expressly accepted his transfer in writing at the end of the period granted to him to consider his decision. ..."

4. The complainant got from the Secretary General a text dated 5 October 1988 informing him of the transfer of the Organization's headquarters to Lyons and saying that at 1 June 1989 the post he held at Saint-Cloud would be abolished and an identical one, which he was offered, would be created at the new headquarters. He was allowed until 30 November 1988 to make up his mind ("the period for consideration"). He had, said the text, two options: express, written consent to his transfer to Lyons, and express or implied refusal. If he accepted, the communication of 5 October 1988 constituted the decision to transfer him. If he refused, his appointment would end on expiry of a six-month period of notice that would start on 1 December 1988 and so go right up to the date of the transfer. He would also be paid a termination indemnity.

On getting the text of 5 October 1988 the complainant submitted to the Secretary General a "request for review" of the decision. Before the expiry of the prescribed "period for consideration" he conveyed to the Secretary General his express acceptance of the post that was to be created in Lyons, though he added that at the same time he wished to reserve his rights in full.

The Secretary General took the view, notwithstanding the reservation, that the complainant had "expressly accepted his transfer" and therefore in February 1989 rejected his request for review as irreceivable on the grounds that, since he had accepted the offer, the matter of notice and the amount of the termination indemnity were irrelevant.

5. But the case took another turn on 3 March 1989 when the complainant changed his mind. In a letter of that date he stated the general reasons for his doing so, which were mainly the lack of safeguards and more personal reasons attributable to difficulties he was having with the Organization.

The Secretary General responded promptly on 17 March with the following decisions:

- (a) the complainant was given notice of termination;
- (b) the period of notice of termination would expire on 6 June 1989, not, as had been said earlier, on 1 June;
- (c) in accordance with Article 103(4) read together with Article 96(6) of the Staff Rules, he would not "perform his

functions" in the remaining period of notice, though he would be entitled to pay up to the date of termination.

Not being at issue, the further details of the decision need not be cited.

6. What the complainant wants is that the compensation paid to him, in keeping with the decision of 17 March 1989, against the period of notice from 6 March 1989 to 6 June 1989 should be supplemented at the rate of his salary for May 1989 and that he should be awarded the equivalent of another three months' such salary, or 39,670.59 French francs.

7. His case is that that decision should have granted him pay corresponding to a six-month period of notice starting at the date at which it took effect.

Albeit by different lines of reasoning, Interpol and the complainant concur in maintaining that the period of notice the Organization was required to give was six months, and the sole issue in dispute is not the length but the starting date of that period.

The Organization is relying on Article 2(6) of Section 2 of Appendix VII, which reads:

"If, after accepting his transfer to Lyons in conformity with (5) above, the official concerned changes his mind about the transfer or does not present himself at the post to which he has been transferred, he shall not, however, lose the benefit of:

(a) the period of notice of termination of appointment which might still be left to run,

...

if he had not initially accepted his transfer."

Indeed the Organisation's decision of 5 October cited that provision.

Though the actual wording of 2(6) is not quite clear its meaning is beyond doubt when it is read in the context of the article as a whole: the Organization's intent was to put on a par everyone who refused transfer, whatever the date of refusal might be.

8. As a matter of fact the complainant is not relying on any literal reading of the text. He says that after he had given his qualified consent to his transfer objective reasons forced him to give up his career at Interpol and that that was when he asserted his acquired right to his duty station. Up to that date, his argument runs, Article 2(6) was inapplicable. He did not exercise any option of changing his mind. He acted quite fairly because he took care to assert his acquired right three months before the date of termination, three months being the period of notice which the Staff Instruction of 11 December 1974 requires staff to give on resignation.

He further submits that he never consented to his transfer. Before the "period for consideration" expired he made a request for review of the decision of 5 October 1988 and had it rejected on 8 February 1989 as irreceivable on the grounds that in the matter of notice that communication was not actionable. He points out that the consent he gave in November 1988 was qualified. He objects to the Organization's whole approach: it ought to have negotiated an agreement with its staff on the subject of the transfer. For one thing, many problems might have been overcome had officials been allowed more time to think the matter over. He himself was not given even the prescribed two months for that purpose.

The Tribunal is not competent to comment on the way in which an international organisation is run. Actually the period the staff were allowed for consideration seems reasonable, especially since everyone had known anyway for months of the plan to move to Lyons. That the complainant was not given the full two months was just a material mistake that was later put right and that caused him no injury, since he consented to the transfer within the allotted time. Indeed he does not plead that the mistake had any consequence in law. But his other pleas are more cogent.

9. The text dated 5 October 1988 undoubtedly constitutes an actionable decision, and the fact that it offered options did not prevent its being challenged. Interpol set the starting date of the period of notice of termination in case the offer of transfer were refused - the date being 1 December 1988 in the complainant's case - and thereby took a decision. The decision was not contrary to the Staff Regulations. Article 37 provides that, save in cases which it

exhaustively lists, an official who has his appointment terminated shall be entitled to a period of notice, and the decision gives effect to that rule.

There may be more room for doubt about whether Interpol complied with Article 103(3) of the Staff Rules, which says that the period of notice "shall run from the date on which the decision to terminate the appointment is notified". But in fact the decision shows no flaw. For one thing, since Article 103 and Article 2 of Section 2 of Appendix VII of the Staff Rules are on a par in law the material rule is that the particular qualifies the general. The plea is unsound in fact anyway since the decision of 5 October 1988 did set the date of termination.

The conclusion is that the decision quite clearly determined the starting date of the period of notice and the complainant is mistaken in inferring an implied decision.

10. He has a further argument which runs as follows: since the request for review he made before expiry of the "period for consideration" was rejected as irreceivable on the grounds that the communication of 5 October 1988 was not actionable, Interpol itself acknowledges that it did not amount to any decision.

But Interpol's objection to the receivability of his request rested on the fact that he had consented to his transfer. What the Secretary General said on 8 February 1989 was, not that the communication had not amounted to a decision, but merely that the complainant had agreed to go to Lyons.

As for the reservations with which he qualified his consent Interpol took no stand on the matter. What he said was that he consented to the transfer subject to the reservation of his rights and the phrase was open to more than one interpretation. The Secretary General simply ignored it and took the complainant's words to denote consent. Perhaps he misread them, but he certainly had no intention of departing from the general rules earlier laid down in the Staff Rules or from his own decision as notified to the complainant in October 1988.

11. The complainant cites legislation and case law in the host state.

Interpol is an international organisation and not subject to any national law and, as to the issues on which he submits that French law has a bearing, he does not cite any text of Interpol's that warrants taking account of such law.

12. He alleges breach of the rule against retroactivity: Interpol retroactively and unlawfully treated as a period of notice the time that had elapsed from the date of expiry of the "period for consideration" up to the date at which he announced his refusal to go to Lyons.

The general principle the Tribunal will apply is that, save where there is reversal of an earlier decision - and in this case there was not - an administrative decision may not retroactively impair a right or alter any state of fact.

The complainant's refusal to go to Lyons was not the only fact that determined his status: it was also relevant that he had consented in November 1988 to the transfer and that earlier consent prompted a decision that determined the rights and obligations of both sides. The complainant unilaterally broke the agreement thereby concluded with Interpol and must therefore be deemed never to have consented to his leaving his post at Saint-Cloud by virtue of a decision which was to take effect only in the future. If there was anything retroactive about the period of notice, that was attributable, not to any decision of Interpol's, but to his own shift of position.

On that score the effect of the decision of 8 February 1989 is immaterial for the reasons already stated in 10 above.

There was no breach of the rule against retroactivity and the plea therefore fails.

13. The complainant alleges breach of his acquired rights, which, he observes, the Staff Regulations and Staff Rules expressly safeguard.

The case law already acknowledges the importance of acquired rights to international civil servants and there is no need to go over it in detail here: a reference to Judgment 832 (in re Ayoub et al.), and particularly to what is said under 13, will suffice.

The Staff Regulations of Interpol recognise the doctrine: according to Article 53 they "may be amended or supplemented" only "without prejudice to the rights the Organization's officials have acquired" thereunder. That is

an affirmation of the rule that the official may plead an acquired right not only when it is contractual but even when the staff regulations have been amended.

Section 2 of Appendix VII is much more explicit since it covers the very contingency that is relevant to this case: Article 2, which applies to the complainant, is headed "Officials of the Organization who have an acquired right with regard to the location of their duty station".

The text is not to be taken literally. It cannot mean that the Organization needs its staff's consent to decide on a matter like the transfer of its headquarters. A decision of that kind is inherently immune to review. Besides, that is not the thrust of the complainant's plea. The doctrine is relevant rather in considering the consequences transfer may have for the official's career.

The complainant's case is that when he resolved once and for all not to go to Lyons he still held his acquired rights because the consent he had given in November 1988 had been subject to the reservation of all his rights. Working at Saint-Cloud in the ensuing months was an assertion of his acquired right to his duty station. The construction which Interpol put on the rules so as to make the period of notice start on 6 December 1988 was in breach of his rights.

The position of staff to whom Article 2 applies is determined by a provision of the Staff Regulations. Since the Tribunal may not review the policy decision to move to Lyons the only effect it can give to the doctrine of acquired rights as recognised by Interpol is to determine whether the arrangements for carrying out the move were properly objective. Since the transfer did disrupt the lives of its staff the Organization had a duty to ensure that there was no undue or pointless detriment to their interests.

The consequences of the change which the transfer brought in the conditions of their employment are to be gauged against cardinal principles such as equality of treatment, good faith and the rule against retroactivity, the last of which has already been discussed in 12 above.

Interpol would have acted in breach of an official's acquired rights had it required him to choose between compulsory transfer and straightforward resignation, together with the consequences of resignation. Fortunately it did nothing of the kind, and its approach, complicated though it may have been, did respect the complainant's basic rights.

Interpol abided by the rules of good faith and indeed the other principles mentioned above by treating staff who changed their minds about transfer as if they had respected the time limits in Article 2. For the sake of efficiency the time limits had to be short. But by allowing a change of mind without detriment to rights the Organization enabled anyone who had not had time to think the consequences over thoroughly within the two months to ponder further before making up his mind once and for all. That was no breach of acquired rights but proper respect for them. But for Appendix VII, the common law would have applied and the treatment of the complainant would have been too strict since Interpol would have been free to treat him as having resigned. The approach it did adopt respected the principle of equality and duly applied the doctrine of acquired rights.

The complainant says that the choice was probably harder for him to make because of his own special circumstances. The Tribunal need not dwell on the point but merely observes that nothing in the evidence reveals any position of the Secretary General's that would warrant finding breach of the general principles that apply even in the absence of written rules.

14. For the first time the complainant claims in his rejoinder payment of compensation for accrued leave entitlement. The claim is irreceivable. The ambit of a complainant's claims is confined to those he puts forward in his original complaint and may not be extended in a later brief.

15. Apart from this last claim, which is irreceivable, the complaint fails on the merits, and so there is no need to take up the broader objections to receivability which Interpol raises.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by SD. Approved by CC. Last update: 10 March 2008.