

SIXTY-NINTH SESSION

In re O'SULLIVAN (No. 2)

Judgment 1023

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Stephen Denis Richard O'Sullivan against the International Criminal Police Organization (Interpol) on 14 October 1989, Interpol's reply of 8 November, the complainant's rejoinder of 3 December 1989 and Interpol's surrejoinder of 19 February 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 23 and 52(3) 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 served on the staff of Interpol, first as a translator and then as a reviser, from 4 February 1980 to 16 June 1989, when he was dismissed on the transfer of the Organization's headquarters from Saint-Cloud to Lyons.

On 19 September 1988 the Secretary General sent him and the other revisers of the language sections a minute setting out plans for reforms of the Language Department. The minute said that in future there was to be only one post for a reviser in each of the sections and after the move to Lyons competitions would be held to fill those posts; revisers who were unsuccessful in the competitions would be offered translator's posts. The complainant acknowledged receipt of the minute on 17 October 1988; he said that since it was only a proposal he was merely reserving his rights for the time being, including the right to appeal against any decision that might be to his detriment if the proposal went through; and he acknowledged the promise of a translator's post.

In keeping with Article 2(3) of Section 2 of Appendix VII to the Staff Rules an individual decision was communicated to the complainant on 12 October 1988 to abolish his post on 19 June 1989, create an identical one in Lyons and offer it to him. He was given until 18 December 1988 as the "period for consideration"; if he refused the transfer he would have his appointment terminated and be given six months' notice of termination; and the six months would start on the day after the date of expiry of the "period for consideration" and would expire at the date of abolition of his post. If, after accepting his 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" - like 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 6 November 1988 the complainant filed a "request for review" of the decision of 12 October 1988. He alleged, among other things, breach of his right to a period of notice starting at the date at which he might change his mind about acceptance of transfer, and he reserved his right to appeal against any further decision to his detriment. By a letter of 8 December 1988 the complainant notified to the Secretary General his consent to the transfer but said he reserved his rights. On 8 February 1989 the Secretary General rejected his request for review as irreceivable on the grounds that the decision of 12 October had caused him no injury. In a letter of 2 June 1989 the complainant informed the Secretary General that he had changed his mind about the transfer and was asserting his acquired right

to his duty station. By a decision of 5 June 1989 the terms of the decision of 12 October 1988 were applied to him. On 8 July 1989 he sent the Secretary General a request for review of the decision of 5 June and sought consent to his appealing directly to the Tribunal. The Secretary General gave such consent in a decision of 18 July 1989.

B. The complainant maintains that the impugned decision was in breach of his acquired rights. He explains that he changed his mind about transfer because of the very real threat he saw to his career in the plans to reform the Language Department. One outcome of the abolition of his post was his downgrading, and that was in breach of the promise in the letter of 12 October 1988 to create an identical post for him in Lyons and of Article 52(3) of the Staff Regulations which safeguards the rights officials acquired before the Staff Regulations came into force. There was also 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". 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) compensation in lieu of notice of termination equivalent to 5 1/2 months' gross salary, plus interest reckoned from the date of termination and (2) an award of 20,000 French francs in costs.

C. In its reply Interpol submits 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 to take over from him. 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 first consented to the transfer.

That is why the complainant did not work out a shorter period of notice but completed the six-month period that ought to have begun on the day after the date of expiry of the period for consideration. 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 that had come into force long before the complainant changed his mind about the transfer. It is doubtful that the plans for reform of the Language Department swayed his decision. Though he was told of those plans in September 1988 he did not notify his refusal until 17 days before the date at which he was to take up duty in Lyons. Besides, the plans have not yet been carried out. The need for efficiency may require the abolition of posts. It is likely enough that the complainant's late change of mind was largely due to his finding another job.

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. He contends that his qualified consent to transfer did not cancel his acquired right to his duty station at Saint-Cloud and that indeed he continued to exercise that right up to the date of his termination. He did not do so by any "favour" of the Organization's. He was never asked to explain which rights he wanted to reserve. He neither broke his contract of service nor harmed Interpol's interests. He never got any formal decision to terminate his appointment: the minute of 12 October 1988 was just a proposal and was supposed to make for confusion anyway. He discusses the matter of the starting date of the period of notice. He cites the reservations in his letter of 17 October 1988 and contends that it was the plans for reform, among other things, that put him off going to Lyons. He argues that the Organization should have been more expeditious in drawing up Staff Regulations and Staff Rules and that in the end they were simply imposed willy-nilly.

E. In its surrejoinder the Organization invites the Tribunal to reject the pleas in the complainant's rejoinder and enlarges on its own arguments. It submits that it was the communication he was sent on 12 October 1988 that constituted the decision to terminate his appointment. That text 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. Though he was free not to run the risk of going to Lyons he may not hold the Organization liable on that account. As for the drafting of the Staff Regulations and Staff Rules, there were consultations with professors of law on the subject as early as 1983.

CONSIDERATIONS:

1. This complaint is largely similar to Miss Royo

Gracia's first complaint and Mr. Barahona's second one, on which the Tribunal rules in Judgment 1019.

Like Miss Royo Gracia and Mr. Barahona, the complainant was on the staff of Interpol in June 1989 when it moved headquarters from Saint-Cloud to Lyons. Like them, too, he changed his mind after having agreed to his transfer to the new duty station. By a letter of 2 June 1989 he refused the offer of a post in Lyons and a few days later, on 5 June, the Secretary General took note of his change of mind and dismissed him.

The main issues are the dates at which the notice of termination began and expired. His claims are the same as those of the other two complainants, save that the amount of the compensation claimed in lieu of notice differs from one complaint to the other. Though some of the evidence in this case relates to other forms of compensation, the complainant does not discuss them, and it is the nature of his claims that determines the ambit of the dispute.

The prior internal proceedings and most of the pleas are common to the three complaints. As to the issues it rules on in Judgment 1019, the Tribunal need only refer to its reasoning in that judgment.

2. But Interpol's application for joinder is disallowed: The complainant has a plea which Miss Royo Gracia and Mr. Barahona do not put forward and which calls for separate treatment. That is not because the other two complainants are guilty of any oversight but because of a difference in grade. Whereas the other two were employed as translator/revisers in 1988-89 at grade C.5, the complainant was a reviser at the higher grade of C.4. That accounts for the difference in the pleadings.

3. By a letter of 19 September 1988 the Secretary General informed the complainant of his intention of reforming the Language Department after the move to Lyons: each language section was to have only one reviser; to reduce the number of revisers competitions were to be held under the auspices of an independent jury; and revisers who proved unsuccessful would be offered posts as translators.

The complainant acknowledged receipt of that letter on 17 October 1988. He observed that since it spoke only of intentions he could not yet appeal, but he reserved his right to appeal against any decision that might be to his detriment. In conclusion he acknowledged the promise to offer him a post as translator if his own post were abolished.

No evidence before 2 June 1989 makes further reference to the matter. In a letter he wrote at that date to the Secretary General the complainant refused transfer to Lyons. He cited, without explanation, personal and family reasons for his refusal and contended that both the change of duty station and uncertainty over the plans for reform announced on 19 September 1988 were detrimental to him. He pointed out that he had had no answer to his letter of 17 October and that his career prospects would suffer if he lost his post as reviser.

He adduces the same argument in his complaint. His case is that in doing away with his post Interpol acted in breach of Article 52(3) of the Staff Regulations, which safeguards the rights acquired by staff before the text came into force. It also thereby broke the promise of identical posts at Lyons which the Secretary General made in his letter of 12 October 1988 to staff announcing the transfer and assuring them that it would have no other consequences.

The argument raises issues both of fact and of law.

4. It is Article 2 of Section 2 of Appendix VII to the Staff Rules that affords the basis in law of the impugned

decision of 5 June 1989. In Judgment 1019 the Tribunal holds that the procedure which that article prescribes and which the decision of 12 October 1988 complied with was correct. It accordingly rules that when a staff member withdraws his consent to transfer in the course of the period of notice that period starts on the day after the date of expiry of the "period for consideration".

Though that is beyond dispute, the issue is whether the procedure prescribed in the rules has been properly applied in each case.

Appendix VII to the Staff Rules acknowledges that the staff have an acquired right to their duty station. As the Tribunal observes in Judgment 1019, strict respect for that right would make the Organization unworkable. But the right is not meaningless and does have some essential substance to it. Thus Article 23 of the Staff Regulations forbids any downgrading when a staff member is transferred in the interests of the Organization. That principle is reflected in Article 2(2) of Section 2 of Appendix VII, which says that the "transfer of the Organization's Headquarters to Lyons shall imply first of all the suppression of the posts occupied in Saint-Cloud by the officials concerned and, secondly, the simultaneous creation of the same posts in Lyons". The term "the same posts" is clear and not open to dispute. The decision of 12 October 1988 on the complainant's case is even more specific in that it states that his transfer will mean no change in his post other than the duty station.

So the texts confer a right on staff by guaranteeing that the transfer will mean no downgrading nor indeed any change at all in conditions of service.

The material issue is whether Interpol has respected the texts.

For one thing, it did not downgrade the complainant's post and on that score at least it abided by the texts. But in his letter of 19 September 1988 the Secretary General anticipated the transfer to Lyons and warned the complainant that his status there would be uncertain. In his reply of 17 October 1988 the complainant naturally enough pointed out that he could not properly challenge what was just a declared intention. At about the same time, in its letter to him of 12 October, the Organization reaffirmed his right to remain in its employ. That was how things stood, and there was no clarification, up to the date of transfer.

The Organization maintains that it may in its own interests reform its administrative structure, for example by doing away with certain posts. Though there can be no dispute about that, the application of the principle does raise special difficulties in this case. Interpol was unable, without incurring the charge of inconsistency, both to acknowledge the complainant's right to keep his job and to do away with that right. Though the wisdom of the Organization's going to Lyons is not questioned the transfer did seriously disrupt the lives of its staff and so it quite properly sought to safeguard equal treatment and certainty in carrying out the move. In the complainant's case, however, it failed to afford such safeguards.

5. Interpol's argument concentrates on issues of fact. It contends that it was a mere pretext for the complainant to say that his position would be shaky if he went to Lyons, that in fact he was loth to run the risk of competing with other highly experienced officials, and that it showed "courtesy" in warning the revisers what their conditions of service would be after the move.

The Organization adds that the complainant's main reason for refusing to go to Lyons was that he had found a good job in Paris and that indeed that was why he was so late in changing his mind. It did not learn until just before the date of the move that he had changed his mind and its interests suffered because it lost his services unexpectedly at a critical time.

That line of reasoning fails: when an official's rights have not been respected he is free to seek a ruling on the matter from the Tribunal.

To be sure, Interpol's letter of 12 October 1988 did not tell the complainant that his post had been abolished but merely informed him of the possibility of abolition. In so informing the revisers it believes that it gave them fair warning of what their prospects would be at Lyons, and indeed had the complainant consented to the transfer he would have got an equivalent post there.

6. But there has to be good faith in applying the rules. Not only did the Organization's letter of 19 September 1988 inform the complainant of likely changes in his status but throughout the period of transition it never explained what was to happen. In the circumstances he had good reason to infer that if he consented to the transfer he would

have to face the uncertainty of a competition and the risk of downgrading. The safeguards embodied in the material rules were not fully respected.

The impugned decision gave effect to Article 2 of Section 2 of Appendix VII and to the decision of 12 October 1988 about notice of termination. But the conditions laid down therein were not fully met, and Interpol therefore acted in breach of the complainant's rights as prescribed in Article 23 of the Staff Regulations.

7. The complainant seeks compensation in lieu of notice of termination. Since the parties do not address the issue the Tribunal cannot rule on his claim to financial redress: it can only rule that Article 2 was misapplied. It therefore refers the complainant to Interpol for determination of the amount of the compensation which he is entitled to, and which shall bear interest at the rate of 10 per cent a year from the date of termination.

The Organization shall also pay him 10,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.
2. The complainant is referred to Interpol for determination of the compensation he is entitled to, the amount to bear interest at the rate of 10 per cent a year from the date of termination.
3. The Organization shall pay him 10,000 French francs in costs.

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