

SIXTY-FOURTH SESSION

In re PARKINSON (No. 3)

Judgment 905

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Peter Gath Lindsay Parkinson against the Intergovernmental Council of Copper Exporting Countries (CIPEC) on 21 September 1987 and corrected on 26 September, the Council's reply of 23 October, the complainant's rejoinder of 16 December 1987 and the Council's surrejoinder of 16 February 1988;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Regulations 1.2.1, 3.1.1, 3.2.1, 5.3.2 and 12.1 of the CIPEC Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant's contract with the CIPEC ended in 1987 in circumstances that are described, under A, in Judgment 903 and form the subject of his first complaint. The terms of that contract had been set out in a letter of 30 March 1984 from the Secretary-General and had come into force on 1 April 1984. After describing his duties and status the letter said: "You will be employed three days per week but, if necessary, from time to time, by mutual agreement, you may be employed for additional days with salary pro rata".

On 4 June 1987 the complainant wrote to the Secretary-General pointing out that he had worked five days a week since 1 April 1984, partly at home between April and December 1984 and in April and May 1987, but full time at the office from January 1985 to March 1987. He claimed arrears of pay, including "housing allowances, Social Security provisions, contributions to the Provident Fund, luncheon allowance, etc."; "appropriate adjustments for delay and inflation"; reinstatement of a 4 per cent salary increase he had not been paid since early 1984; cost-of-living adjustment as from 1 January 1987; payment of his yearly subscriptions to the London Metal Exchange for 1986 and 1987; and reimbursement of home leave expenses. The Secretary-General's reply came in a letter of 16 June 1987 which the complainant got on 1 July. The CIPEC had, it said, abided by the contract in paying the part-time rate. The Executive Committee had decided on 16 December 1986 to stop the cost-of-living adjustment and was unlikely to change its mind; his subscription to the London Metal Exchange was a private matter; and he did not qualify for the refund of his home leave expenses. That is the decision he impugns.

B. The complainant contends that Regulation 1.2.1 of the Staff Regulations, which says that "the whole time of staff members shall be at the disposal of the Secretary-General", bars part-time employment. He had to work full time from 1 April 1984 and had the agreement of whoever was Secretary-General at the time. The payments up to May 1987 claimed in his letter of 4 June 1987 are warranted. The salary increase withheld since 1984 is an acquired right and safeguarded by Regulation 12.1, which prescribes "the maintenance of the acquired rights of staff members". He joined the Exchange in 1979 at the request of the CIPEC, which paid his subscriptions for years. The Secretary-General authorised him on 11 February 1987 to take home leave. He invites the Tribunal to allow his claims as "adjusted for delay and inflation" and to award him costs.

C. In its reply the CIPEC submits that the complainant's claims are unsound. For reasons summed up in Judgment 903, under C, his contract of appointment expired, not in May 1987 as he suggests, but on 31 March 1987. Clause 5 of the Secretary-General's letter of 30 March 1984 made it plain he could work more than three days a week only "by mutual agreement". Not only was he not required to work full time but there was no agreement that he should do so and his claim to further payment is groundless. He went to the office simply because he could not put in his time at home. A contract limiting work to three days a week does not authorise payment for five: he was paid at the full rate pertaining to grade E5 for the number of days provided for in his contract. As to his claim to the cost-of-living adjustment, the Executive Committee decided to suspend it in 1987 for executive staff; besides, the complainant would have been entitled to it for only the first three months of the year. His subscriptions to the Exchange are, as he was told, a personal matter, even though when he was head of the Marketing Division it did

refund them.

As to home leave, Regulation 5.3.2 says: "No special home leave shall be granted in the four months preceding the date on which the duties of a member of staff should terminate". Since the complainant's contract ended in March 1987 he was not entitled to go on home leave in that very month.

D. In his rejoinder the complainant seeks to correct what he sees as mistakes of fact in the reply and enlarges on his submissions. He always had to work five days a week to get through. From January 1985 until March 1987 he went to the office; from 1 April to 21 May 1987 he worked, at the Secretary-General's bidding, at home as far as possible and indeed the Council does not even deny that. He reached agreement with the Secretary-General in February 1985, July 1986 and January 1987 that he should work full time. The CIPEC may not use his services five days a week and then refuse to pay for them. The Executive Committee may not just cancel the cost-of-living adjustment prescribed in Regulation 3.2.1, which is an acquired right protected by 12.1. His subscriptions to the Exchange were of use to the CIPEC because he was in charge of marketing. The Secretary-General consented to his taking home leave in March 1987 and did not tell him his contract was ending. He restates and presses his claims.

E. In its surrejoinder the Council goes over the facts of the case, cites its pleas in reply to the complainant's first complaint and develops its submissions at length. It maintains that he well knew he was entitled only to what the contract authorised and that he was paid accordingly. There was no agreement that he should work five days a week. There is nothing in the Regulations to forbid part-time employment. The complainant was at the top of the highest grade and under Regulation 3.1.1 was not entitled to any further increment. In a minute of 7 February 1985 the Secretary-General declined liability for his subscriptions to the Exchange. Even if the Secretary-General did agree to his home leave he is not entitled to benefits the rules preclude.

CONSIDERATIONS:

1. The complainant's post as general adviser was abolished by the Executive Committee of the organisation at its 166th meeting on 16 December 1986. As his contract of employment expired on 31 March 1987 his employment was allowed to continue until that date. This is his third complaint arising out of the termination of his employment.

2. His claims are the following.

(1) He claims arrears of pay for two days a week from April 1984 to May 1987 - the difference between a full-time salary and the part-time salary he was paid - plus all appropriate allowances (housing allowances, social security, and so on) and adjustments for delay and inflation.

(2) In 1981 he was given a four per cent increase in salary. He says it was removed with effect from the beginning of 1984 and he claims its reinstatement.

(3) He claims a cost-of-living adjustment he says is due from 1 January 1987 under Staff Regulation 3.2.1.

(4) He claims reimbursement of his subscriptions to the London Metal Exchange for 1986 and 1987.

(5) He claims expenses for the home leave he took in March 1987.

The claims were rejected by a letter dated 16 June 1987 from the Secretary-General which is the decision impugned.

Arrears of salary

3. In January 1984 the post of head of the Marketing Division which the complainant had held was taken over by someone else. A new contract dated 30 March 1984 for the post of a general adviser reporting to the Secretary-General was offered to the complainant, and he accepted. Clause 5 of the contract read:

"The post you will occupy is assimilated to grade E5 in the Staff Regulations and you will be placed at step 7 of that grade with effect from the date on which the present contract enters into force. You will be employed three days per week but, if necessary, from time to time, by mutual agreement, you may be employed for additional days with salary pro rata."

4. By a letter of 8 November 1984 the complainant claimed pay for extra hours he said he had worked in 1984. The Secretary-General replied on 6 February 1985:

"Since 1 April 1984 you have been covered by a part-time contract, point 5 of which stipulates that the overtime which you may be called upon to perform should be by mutual agreement and should be paid pro rata. After verification, I can find no written agreement on this subject between you and Mr. Llosa [the previous Secretary-General]. Nevertheless, inasmuch as the days indicated by you correspond more or less to the period when meetings were held and, as an exceptional gesture to respect the continuity of the Secretary-General's decisions, I agree to pay you your 26 days' overtime."

5. In view of that letter it was incumbent on the complainant to ensure that the same did not happen again. He might have been expected to seek written confirmation of any agreement on his working extra hours and to make a timely claim for agreed additional hours worked. In fact he made no claim to extra hours worked from 1985 until he left in 1987. He then contended that he had been employed full time, which the CIPEC denies.

His failure to challenge the calculation of his salary at any time after the settlement of his claim of November 1984 to payment for overtime is explicable only on the assumption that there was no agreement to change his part-time contract into a full-time one.

The claim accordingly fails.

Salary increment

6. Regulation 3.1.1 provides:

"The salary scale comprises a basic salary (step 1) for each grade and various steps for length of service. The number and value of these are fixed by the Executive Committee. The current value of annual salary increments is 4% for all employees. The normal period of service before moving up from one step to another is of one year."

When the complainant was appointed to a new post in 1984 he was granted step 7 in grade E5, the highest in the salary scale. Once that step is reached there can be no further increment. The complainant was paid what the organisation agreed to pay him and was not entitled to any increment over and above the highest in the scale.

This claim fails as well.

Cost-of-living adjustment

7. A cost-of-living adjustment is payable under Regulation 3.2.1, which reads:

"At the beginning of each year, the Secretary-General will fix the amount of the cost of living allowance, which will take into account the rise in the cost of living in Paris during the preceding year. He will also, during the year, make provisional adjustments whenever the official index has risen by more than 5% since the preceding adjustment. Each adjustment will take effect two months after the date at which the 5% rise in the official index took place."

8. The decision impugned says that a final decision on the subject has not been taken. The organisation does not advert to this in its reply and merely refers to the Executive Committee's decision at its meeting in December 1986, which was to alert staff to the fact that benefits provided for in their contracts and in the Staff Regulations would not be granted.

9. Under Article VII(1) of the Tribunal's Statute a complaint will not be receivable unless it challenges a final decision or, under VII(3), an implied one. Since the organisation did not take an express final decision within 60 days of the date on which the complainant notified his claim by letter of 4 June 1987, his claim is receivable under VII(3) in the same manner as one challenging an express final decision.

10. Whatever reasons the staff who continued in employment may have had to waive their entitlements, there is no reason why the complainant should forgo any right he enjoys under the material rules. He is therefore entitled to payment of the cost-of-living adjustment provided for in Regulation 3.2.1 from 1 January to 31 March 1987.

Subscriptions to the London Metal Exchange

11. The complainant was informed by a minute of 30 January 1985 from the Secretary-General that though the organisation had been subscribing to the London Metal Exchange in the name of Mr. Olivares and the complainant when he was in charge of the Marketing Division the Secretary-General had decided, since Mr. Olivares had taken over the duties of head of the Marketing Division and the complainant had become a part-time adviser, to subscribe thenceforth to the London Metal Exchange only for Mr. Olivares and the head of the Promotion Division.

12. The complainant having protested, the Secretary-

General wrote to him on 7 February 1985 reiterating his decision:

"If you so wish, you are free to continue being a member of the LME in your individual capacity and to defray the relevant expenses. The Secretariat bears no responsibility in that regard ... Please consider this note as representing a final decision and draw the appropriate consequences therefrom."

13. Having received that letter about the subscription for 1985, the complainant can have been left in no doubt that if he continued membership of the Exchange he would have to pay his own subscription. He therefore has no entitlement to be reimbursed his subscriptions for 1986 and 1987.

Home leave travel expenses

14. The complainant wrote the Secretary-General a memorandum dated 9 February 1987 asking for 10 days' home leave in March 1987, his contract being then due to expire on 31 March. Regulation 5.3.2 provides:

"No special home leave shall be granted in the four months preceding the date on which the duties of a member of staff should terminate."

In his reply the Secretary-General said:

"My difficulty in dealing with your leave application has been due to the Staff Regulation which does not allow the granting of leave to an officer four months before the end of the officer's contract. However as I intend engaging you in another form and hoping that formalities can be concluded before you leave, I grant you the leave."

When the Secretary-General approved the home leave it was obviously in the hope that a different working relationship could be negotiated with the complainant. If it had been there would have been no break in the continuity of his employment. In the circumstances he should not suffer on account of a decision which the Secretary-General apparently made bona fide and which he relied on in incurring travel expenses. Any question of the Secretary-General's having acted ultra vires is a matter between the organisation and its executive head. The complainant should be paid the sum allowed under Regulation 5.3, travel expenses at the rate of air transport in tourist class or equivalent. The sum having been put on bank deposit, he should also be paid the interest thereon.

DECISION:

For the above reasons,

1. The organisation shall pay the complainant the cost-of-living adjustment calculated in accordance with Staff Regulation 3.2.1 from 1 January to 31 March 1987, plus interest at 6 per cent a year from 4 June 1987.
2. It shall pay him the expenses he incurred in travel on special home leave in March 1987 calculated in accordance with Regulation 5.3, not exceeding the rate of air transport in tourist class or equivalent, plus the interest due.
3. It shall pay him 4,000 French francs in costs.
4. His other claims are 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 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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