

SIXTY-NINTH SESSION

***In re* EGGIMANN (No. 2)**

Judgment 1021

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss Anne Eggimann against the International Criminal Police Organization (Interpol) on 24 October 1989, Interpol's reply of 18 January 1990, the complainant's rejoinder of 10 March and the Organization's surrejoinder of 18 April 1990.

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 3, 23, 36, 37, 38 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 joined the staff of Interpol on 1 July 1982 as secretary to a head of division. She was dismissed on 13 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 her on 12 October 1988. Her post was to be abolished on 14 June 1989 and an identical one, which she was offered, was created in Lyons. She was given until 13 December as the "period for consideration"; if by then she had not accepted the transfer she would have her appointment terminated and be given six months' notice; and the six months would start on the day after the date of expiry of the "period for consideration" and would end at the date of abolition of her post. Under the heading "Grounds" the text told her that by virtue of Articles 1 and 2(1) of Section 2 of Appendix VII she had an acquired right to keep Saint-Cloud as her 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 - like the complainant - "who took up his post before the date of entry into force of the Staff Regulations and the present Rules" 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.

By a letter of 13 December 1988 the complainant notified to the Secretary General her refusal to go to Lyons. She also reserved her right to appeal against any further decision to her detriment which the Secretary General might take in pursuance of the decision mentioned above. On 16 December the Secretary General wrote to her to ask whether she wished to appeal against the decision of 12 October 1988, and in a letter of 27 December she answered that she did not. By an individual decision of 16 June 1989 the Secretary General paid the complainant a total of 10,199.26 French francs in discharge of the Organization's liability towards her, the sum consisting of her salary for June 1989 and compensation for her accrued annual leave. Observing that the amount did not include compensation in lieu of notice and believing that such compensation should have been equivalent to three months' salary, she submitted to the Secretary General on 15 July 1989 a request for review of that decision. She also sought leave to appeal directly to the Tribunal. The Secretary General gave her such leave in a decision of 25 July 1989.

B. In her account of the facts the complainant observes that some issues relating to the notice of her termination were covered by her letter of 13 December 1988, which preceded her request for review of 15 July 1989.

She maintains that by compelling her to notify refusal of transfer three months before the normal time limit prescribed in her contract of service Interpol unilaterally altered an acquired right which Article 52(3) of the Staff Regulations and Article 2 of Section 1 of Appendix VII to the Staff Rules safeguard. It was to her detriment to bring forward in that way the starting date of notice of termination. In breach of a promise the Secretary General

had made in a staff circular of 1 March 1988 she was not allowed two hours a day off work throughout the period of notice for the purpose of looking for other employment; she got only 60 hours off work spread over the last three months. The Organization did all it could to tamper with notice of termination so as to get out of paying compensation. It departed from its consistent practice of relieving staff of working out the period of notice and paying them salary in lieu. That is how five officials whom the complainant names were recently treated. Her conclusion is that the Organization applied the Staff Instruction of 1974 in a way that was greatly to her detriment and contrary to the spirit and purpose of the Instruction. She asks that it be differently applied to her.

In any event she believes that, since the text of 12 October 1988 merely informed her of the Secretary General's intention, she was given no formal notification of any decision stating, as Article 103(3) of the Staff Rules required, the starting date of the period of notice. The period of notice therefore failed to start and the Organization owes her six months' pay in compensation.

She is claiming compensation in lieu of notice equivalent to six months' gross salary, interest at the prevailing rate and an award of 10,000 French francs in costs.

C. In its reply Interpol argues that the complaint is irreceivable. Its plea is that it was the decision of 12 October, which is beyond challenge, that settled once and for all the matter of compensation in lieu of notice. It also determined the length and date of expiry of the period of notice of termination of the complainant's appointment, and so those matters, too, are no longer open to challenge. The complainant may not properly contend that her letter of 13 December 1988 amounted to a request for review since she said in a letter of 27 December that it did not.

Interpol further submits that, even if the Tribunal does not accept that plea, the complainant's claim to compensation equivalent to six months' pay is irreceivable anyway inasmuch as her request for review of 15 July 1989 claimed compensation equivalent to only three months' pay.

Interpol puts forward subsidiary arguments on the merits. It submits that the complainant's line of reasoning is inconsistent. She contends that the notice ought to have been three months; yet, though she admits that she worked out the six-month period of notice, she asks that the Staff Instruction of 11 December 1974, which sets the period of notice at six months, be applied to her. The Organization believes that, for the purpose of applying Article 5 of Section 1 of Appendix VII to the Staff Rules, that Instruction was more favourable to her than the terms of her contract of service. It acted properly in applying that Instruction to her and denies any attempt to put her at a disadvantage. The starting date of the period of notice of termination was set in the decision of 12 October 1988, which did amount to a decision to terminate her appointment should she refuse the offer of transfer to Lyons. The special procedure followed in this case is a derogation from Article 103(3) of the Staff Rules and is allowed because of the peculiar importance of the transfer of the Organization's headquarters.

Making the complainant work out a six-month period of notice caused her no injury and she is entitled to no compensation in lieu of notice. Besides, she never sought the cancellation or reduction of the period of notice, and the reason why the Secretary General did not relieve her of working out the period was that he thought that it would not be in the Organization's interests. Since the officials whom he did relieve were not in the same position as the complainant, there was no breach of the principle of equal treatment. As for giving her time off to look for other employment, the Organization observes that it was bound to apply Article 3(3) of Section 2 of Appendix VII to the Staff Rules, which was subsequent to the circular of 1 March 1988 and took precedence over it anyway.

D. In her rejoinder the complainant expresses surprise that the Organization should object to receivability inasmuch as the Secretary General himself gave her leave to appeal to the Tribunal. She believes that she need add nothing to her original pleas, which show how confused and unfavourable was the situation that the Organization created and that led to her termination.

E. In its surrejoinder Interpol seeks to refute the complainant's arguments about the receivability of her complaint. It observes that, though she did have leave to appeal directly to the Tribunal against the decision on the amounts due to her in discharge of the Organization's liability, what she is now objecting to - the refusal of compensation in lieu of notice - was not determined by the decision she is impugning but by the one of 12 October 1988. It presses the other arguments in its reply.

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 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 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 in 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.

All that need be said here is that it is the Secretary General who, in exercise of the authority vested in him by Article 3 of the Staff Regulations, takes the individual decisions applying the arrangements for transfer.

2. Miss Eggimann joined the general secretariat of Interpol in 1982 and in 1988-89 was serving as secretary to a head of division. At the date of her recruitment the transfer to Lyons was not yet 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. ...".

The complainant got from the Secretary General a text dated 12 October 1988 informing her of the transfer of the Organization's headquarters to Lyons and saying that her post at Saint-Cloud would be abolished on 14 June. At the same date an identical post, which she was offered, would be created at the new headquarters. She was allowed until 13 December 1988 to make up her mind (the "period for consideration"). She had, said the text, two options: express, written consent to the transfer to Lyons, and express or implied refusal. If she refused, her appointment would end on expiry of a six-month period of notice that would start on the day after the date of expiry of the "period for consideration" and end at the date of abolition of her post at Saint-Cloud.

She refused the offer on 13 December 1988.

On the expiry of the six-month period of notice given in the text of 12 October 1988 she had her appointment terminated by a decision of 13 June 1989.

After filing an internal appeal she sought and was granted leave to appeal directly to the Tribunal.

3. What the complainant is claiming is the payment of compensation against the period of notice she was given, equivalent to six months' gross salary plus interest. The impugned decision did not grant her such compensation.

4. Her contention is that the Organization was wrong to give six months' notice: the period should have been only three months.

In support of her claim she observes that had the period of notice of termination been only three months she would have had a longer "period for consideration" and would not have needed to make up her mind so hastily in the last quarter of 1988. The Organization contrived to bring forward by three months the deadline for her replies to the offer.

The complainant cites the terms of her contract of service of 30 June 1982. The contract has a clause stipulating that if the appointment is terminated three months' notice shall be given. She is relying on an acquired right which she says was safeguarded both by Article 52(3) of the Staff Regulations, which protects rights acquired before the Regulations came into force, and by Article 2(1) of Section 1 of Appendix VII to the Staff Rules, which says that "the provisions of the employment agreement ... shall remain applicable to the extent that: (a) they create an acquired right in favour of the official concerned".

The plea fails. There is an acquired right only where an amendment to the material rules that is to the official's detriment disrupts the structure of the contract or impairs the fundamental terms of employment that induced him to take up duty with the Organization. That condition is plainly not met in this case.

There is a rule that directly applies: Article 5 of Section 1 of Appendix VII. It provides that for an official who "took up his post before the date of entry into force of the Staff Regulations and the present Rules" the period of notice of termination shall be "that applicable to him under the terms of his employment agreement or of any Staff Instructions issued before that date". The Secretary General is bound to apply the Staff Rules and so had to comply with their requirements in this case. The issue is not respect for acquired rights but respect for the rules by the Secretary General.

The complainant's contract of service has to be read together with the Staff Instruction of 11 December 1974 which raised the period of notice from three to six months for anyone with over five years' seniority who had to leave because of abolition of his post or for some other reason. The complainant came within that rule and so was entitled to six months' notice. Indeed, even in the peculiar circumstances of the transfer to Lyons, that period was to her advantage: even if she had consented to the transfer she would have been free at any time to change her mind without detriment to her interests.

5. The complainant submits that even supposing that it was lawful to set the period of notice at six months Interpol acted in breach of promises it had made her.

On 1 March 1988, before the Staff Regulations and Staff Rules had come into force, the Secretary General sent the staff a circular about the move to Lyons. The circular said that during the period of notice of termination anyone who had refused the transfer might be given two hours a day off work to look for other employment.

Though that text is unfortunately not very clear, presumably it does not mean that the Secretary General intended to reduce the working day by two hours throughout the period of notice. The wording suggests that it was a matter of discretion, and indeed that is the approach that was properly reflected in Article 3(3) of Section 2 of Appendix VII: "the normal duration of the working day ... shall be reduced by two hours per day on up to thirty work-days during the last six weeks of the period of notice ...". Article 3(3) is not at odds with the circular and was correctly applied to the complainant. In any event she offers no written evidence of refusal of any application from her for time off work. Her plea fails.

6. She further alleges that no decision was taken to terminate her appointment and that that was in breach of Article 103(3) of the Staff Rules, which says that notice runs "from the date on which the decision to terminate the appointment is notified".

The plea is rejected. The starting date of the period of notice was set by the individual decision of 12 October 1988, which said that the period of notice "shall start on the day after the date of expiry of the period for consideration", i.e. the day after 13 December 1988. The plea is unsound in fact.

The individual decision also set the date of termination. No further written communication was necessary or required by the Rules.

7. Lastly, the complainant pleads breach of the principle of equal treatment. She says that in so treating the staff who refused transfer that they had to work in the period of notice Interpol broke with earlier custom. She names five former officials who were dismissed before 1988 and who were paid compensation instead of having to work in the period of notice.

The main purpose of notice of termination is to protect someone who has his appointment terminated from sudden action that might put him in an awkward plight. Either he may go on working throughout the period or else he may be paid compensation in lieu. In any event there is nothing compulsory about compensation.

It is for the Organization as employer to determine where its interests lie. In this instance carrying out the move to Lyons successfully meant having as few staff as possible absent over the transitional period. That is how it managed to go on working properly, or at least without undue disruption, right up to the date set for the move.

That approach did not prevent Interpol from paying compensation for several months to someone who is a complainant in another case, and it was quite lawful for the Organization to do so. The decision to make staff work out the period of notice is evidence, not of harassment of those who refused transfer, but of the Secretary General's desire to keep the Organization working efficiently.

As for the other officials, whom the complainant merely names, their cases do not in themselves suggest that the treatment of the complainant was unlawful. As the Tribunal has said, the general principle of equal treatment does not mean that everybody is to be subject to the same rules. It means rather that where officials are in like case the treatment of them must be the same, but where they are not, the treatment may be different.

8. Since the complaint is devoid of merit there is no need to rule on Interpol's plea that the complaint is timebarred and therefore irreceivable.

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