

SIXTY-NINTH SESSION

***In re* BURNETT (No. 2)
and VICENTE-SANDOVAL (No. 2)**

Judgment 1024

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss Jane Burnett against the International Criminal Police Organization (Interpol) on 24 October 1989, Interpol's reply of 16 January 1990, the complainant's rejoinder of 10 March and the Organization's surrejoinder of 17 April 1990;

Considering the second complaint filed by Mr. Francisco Vicente-Sandoval against Interpol on 24 October 1989 and Interpol's reply of 17 January 1990, the complainant's rejoinder of 14 March and the Organization's surrejoinder of 20 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 23 and 52(3) of the Staff Regulations and Articles 103(3), 122(1) and 131(2) and Appendix VII of the Staff Rules of Interpol;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. Miss Burnett joined the staff of Interpol on 16 February 1970 and Mr. Vicente-Sandoval on 24 August 1981. Both were employed as revisers. They were both dismissed on 19 June 1989 on the transfer of the Organization's headquarters from Saint-Cloud to Lyons.

On 19 September 1988 they and all the other revisers in the language sections were sent a minute of the Secretary General's about reforms in the Language Department. The minute said that in future each language section would need only one reviser and that competitions would be held to fill posts after the move to Lyons. The revisers who were unsuccessful in the competitions would be offered posts as translators. The complainants acknowledged receipt of the minute on 17 October 1988. Observing that it spoke only of proposals they merely reserved their rights, including the right to appeal against any decision that might be taken to their detriment when the proposals were carried out, and they acknowledged the promises to offer them posts as translators.

In keeping with Article 2(3) of Section 2 of Appendix VII to the Staff Rules an individual decision was communicated to Miss Burnett on 5 October 1988 and one to Mr. Vicente-Sandoval on 12 October. Their posts were to be abolished on 19 June 1989 and they were offered identical posts to be created in Lyons. They were given until 18 December 1988 as the "period for consideration"; if by then they had not accepted the transfer they would have their appointments terminated and be given six months' notice; and the six months would start on 19 December 1988 and end at the date of abolition of their posts. Under the heading "Grounds" the texts told them that by virtue of Articles 1 and 2(1) of Section 2 of Appendix VII they had an acquired right to keep Saint-Cloud as their 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 complainants - "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 4 November 1988 Miss Burnett submitted to the Secretary General a "request for review" of the decision, and Mr. Vicente-Sandoval did so by a letter of 8 November.

They also reserved their right to appeal against any further decision to their detriment which the Secretary General

might take in pursuance of the decisions. By letters of 16 December 1988 they notified their refusal to go to Lyons. Their requests for review were rejected by decisions of 8 February 1989 as irreceivable on the grounds that the decisions they challenged caused them no injury. By individual decisions of 16 June 1989 the Secretary General paid Miss Burnett a total of 23,294.63 French francs and Mr. Vicente-Sandoval a total of 10,624.62 francs in discharge of the Organization's liability towards them, the sums corresponding to their salary for June 1989 and to their accrued annual leave. Observing that those amounts did not include compensation in lieu of notice and believing that such compensation should have been equivalent to three months' salary, the complainants submitted to the Secretary General on 15 July 1989 requests for review of those decisions. They also sought leave to appeal directly to the Tribunal. The Secretary General gave them such leave in decisions of 25 July 1989.

B. The complainants maintain that by compelling them to notify refusal of transfer three months before the normal time limit prescribed in their contracts 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 their 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 they were not allowed two hours a day off work throughout the period of notice for the purpose of looking for other employment; they 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. For that purpose it made use of the Staff Rules and appendices thereto that it had unilaterally drawn up and 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 complainants name were recently treated. Their conclusion is that the Organization applied the Staff Instruction of 11 December 1974 in a way that was greatly to their detriment and contrary to the spirit and purpose of the Instruction. They ask that the Instruction be differently applied to them.

In any event they believe that, since the texts of 5 and 12 October 1988 merely informed them of the Secretary General's intention, they were 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 them six months' pay in compensation.

The complainants further contend that because of the plans for reform announced in the minute of 19 September 1988 they were discriminated against and that they fared worse than almost everyone else. The effect of the minute was to make of revisers an unwarranted exception to the Secretary General's promise to offer everyone an identical post in Lyons. They suffered serious moral injury over and above the pressure put on them to make up their minds about transfer. Such was the threatening and intimidating atmosphere in which they felt compelled to refuse to go to Lyons.

Each of the complainants is claiming compensation in lieu of notice equivalent to six months' gross salary plus interest and an award of 350,000 francs in material and moral damages. Miss Burnett claims 15,000 francs and Mr. Vicente-Sandoval 27,000 francs in costs.

C. In its replies the Organization argues that the complaints are irreceivable. In challenging the individual decisions of 16 June 1989 and claiming compensation in lieu of notice the complainants are in fact objecting to the length and the date of expiry of the period of notice of termination of their appointments. Yet those are issues that were both settled once and for all by the decisions of 5 and 12 October 1988, which the now unchallengeable decisions of 8 February 1989 confirmed.

Interpol further submits that, even if the Tribunal does not accept that plea, the complainants' claims to compensation equivalent to six months' pay are irreceivable anyway inasmuch as their requests 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 complainants' line of reasoning is inconsistent. They contend that the notice ought to have been three months; yet, though they admit that they worked out the six-month period of notice, they ask that the Staff Instruction of 11 December 1974, which sets the period of notice at six months, be applied to them. 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 them than the terms of their contracts of service. It acted properly in applying that Instruction to them and denies any attempt to put them at a disadvantage. The starting dates of the periods of notice of termination were set in the decisions of 5 and 12 October 1988, which did amount to decisions to terminate their appointments should they refuse the offers

of transfer to Lyons. The special procedure followed in these cases 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 complainants work out a six-month period of notice caused them no injury and they are entitled to no compensation in lieu of notice. They never sought the cancellation or reduction of the periods of notice, and the reason why the Secretary General did not relieve them 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 complainants, there was no breach of the principle of equal treatment in that respect. Nor did they suffer injury because of the plans for reform of the Language Department. Those were only proposals and indeed they have not yet been carried out. Besides, even on the least favourable assumption, they were bound to get posts as translators. The sole purpose of the letter of 19 September 1988 was to tell the revisers what was to happen; it issued no instructions; and in any event they got it three months before they had to make up their minds about the offers of transfer. So Interpol cannot be taken to task for having put any pressure on them. Interpol's promise of identical posts in Lyons did not prevent it from abolishing certain posts for the sake of efficiency. In any event the complainants' claim to compensation under that head is irreceivable because the matter of reforms is irrelevant to the impugned decisions and their requests for review of 15 July 1989 did not raise the issue.

As for giving them 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 Miss Burnett 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 but points out that the serious threats to her future career were decisive in inducing her to assert her right to her duty station. She presses her claims.

E. In his rejoinder Mr. Vicente-Sandoval replies to each of the arguments put forward by Interpol in its reply and enlarges on the pleas in his own original brief. He maintains that his complaint is receivable and that for want of express termination of his appointment he had no choice but to challenge the decision of 16 June 1989, which had confirmed his termination once and for all. He again alleges that the circumstances in which he was terminated were unfavourable to him, and to bear that out he cites the application to him of the Staff Instruction of 11 December 1974, the refusal to relieve him of working out the period of notice and the injury he suffered because of the plans for reform, whose real purpose was to sway his decision about transfer. He refers to the reservations in his letter of 17 October 1988.

He asks that, over and above the amount he originally claimed by way of compensation in lieu of notice he be paid compensation for accrued leave entitlement in the amount of 12,159 francs. Should the Tribunal disallow his claim to compensation in lieu of notice equivalent to six months' pay, he seeks an award of an amount equivalent to three months' pay.

F. In its surrejoinder on Miss Burnett's complaint Interpol seeks to refute her arguments on the issue of receivability. It observes that though she was granted leave to appeal to the Tribunal against the decision on the amounts due to her, what she is objecting to is refusal of compensation in lieu of notice, a matter settled, not by the impugned decision, but by the one of 5 October 1988. It presses its earlier pleas on the other issues.

G. In its surrejoinder on Mr. Vicente-Sandoval's complaint the Organization enlarges on its pleas on receivability. It submits that the complainant knew from the individual decision of 12 October 1988 that if he refused transfer by the end of the period for consideration he would have to work out the six months' notice; so he must also have realised that he would not be entitled to compensation in lieu of notice. If he was not satisfied he was free to make a request for review of the decision and did not need to wait until the determination of the amounts due to him confirmed it. The manner of his going was not to his detriment. Interpol maintains its arguments on the other issues he raises.

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. The Staff Regulations and Staff Rules, of which an appendix contained special provisions on the matter of transfer, set out the arrangements for transfer

and for termination of the appointments of those who refused to go to Lyons.

Miss Burnett joined the general secretariat of Interpol in February 1970 and Mr. Vicente-Sandoval in August 1981. They both refused transfer to Lyons. They had their appointments terminated on 19 June 1989, at which date they held posts as revisers in the Language Department.

Since their complaints raise the same issues they may be joined to form the subject of a single ruling.

2. Article 2 of Section 2 of Appendix VII to the Staff Rules lays down the rules on transfer for those, like the complainants, who were recruited before the transfer to Lyons was planned. 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. ..."

Miss Burnett got from the Secretary General a text dated 5 October 1988 and Mr. Vicente-Sandoval one dated 12 October informing them of the transfer of the Organization's headquarters to Lyons and saying that at 19 June 1989 their posts at Saint-Cloud would be abolished and identical posts, which they were offered, would be created at the new headquarters. They were allowed until 18 December 1988 to make up their minds (the "period for consideration"). They had, said the texts, two options: express, written consent to the transfer to Lyons, and express or implied refusal. If they refused, their appointments 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 their posts at Saint-Cloud.

On 16 December 1988 the complainants both refused the offers of posts in Lyons.

By decisions dated 16 June 1989 they had their appointments terminated on expiry of the period of notice given in the letters of 5 and 12 October 1988, viz. on 19 June.

They thereupon made "requests for review" of the decisions of 16 June, also seeking leave to appeal directly to the Tribunal as Article 131(2) of the Staff Rules allowed. The Secretary General granted them such leave on 25 July 1989.

3. The Organization raises the same objection to the receivability of both complaints. It submits that inasmuch as they impugn the decisions of 16 June 1989 and claim the payment of compensation against the period of notice the complaints are irreceivable because the decisions of 5 and 12 October 1988 settled those issues by implication and are beyond challenge. It was in compliance with those decisions that the complainants went on working throughout the period of notice of termination, the six months from 19 December 1988 to 19 June 1989.

They challenged the decisions of 5 and 12 October 1988 by the requests for review they submitted to the Secretary General on 4 November 1988 and, after stating their case, they observed that those requests would not prevent them from challenging any later decisions that might be to their detriment.

The Secretary General rejected their requests several months later, on 8 February 1989, after consulting a Joint Appeals Committee. There was one important issue he settled since he actually stated that they were at the time working out the periods of notice of termination the decisions of 5 and 12 October 1988 had notified to them.

Interpol's argument is that the decisions of 16 June 1989, the ones they do impugn, were the logical outcome of those facts. Those decisions did not specify and did not need to specify either the date of expiry of the "period for consideration" or the length of the period of notice of termination or the date of expiry of that period of notice since those issues had been settled much earlier. In fact the sole point of the decisions of 16 June 1989 was to determine the amounts due to the complainants by virtue of the decisions taken earlier about their future with the Organization.

Though there is some substance to the Organization's plea it must fail because it is at variance with Article 122(1) of the Staff Rules. That provision, which is about the "Limitation period for appeals", reads: "In the case of a complex decision or a series of successive decisions, the limitation period for appeal shall run from the date of notification of the last decision". Being of general purport, that rule allows of no exception when the time limits for challenging several successive decisions have not been respected.

Moreover, determining the rights and duties of staff on the transfer of headquarters to Lyons is a complex exercise. Although Interpol's purpose in drawing up a special appendix about transfer was to set out the rules in as much detail as possible, the staff did not always realise that that was its intention and the Tribunal holds that both in law and in equity the Organization's objections to the receivability of the complaints must be rejected.

4. Interpol has two further objections to the receivability of some of the complainants' claims to financial redress, but the Tribunal will come back to them later.

5. One plea of the complainants' is sound: that there was breach of the Secretary General's promise to offer identical posts to those who consented to the transfer.

Article 23 of the Staff Regulations says that when an official is transferred "to meet service requirements, in the interests of the smooth operation of the Organization" the transfer "shall not lead to any downgrading". That rule is reflected also in Article 2(2) of Section 2 of Appendix VII to the Staff Rules, which is directly applicable to these cases and is headed "Officials of the Organization who have an acquired right with regard to the location of their duty station". Article 2(2) says that the transfer of headquarters "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". That is plain enough: it is the same post that must be created after the transfer. The decision of 5 October 1988 about Miss Burnett and the one of 12 October about Mr. Vicente-Sandoval applied Article 2(2) and further explained that their transfer should entail no change in their posts but the duty station.

In support of their contention that the rule was not complied with they cite letters the Secretary General sent them on 19 September 1988. He told them in those letters that after the move to Lyons he intended to reform the Language Department, in which they were working as revisers; each language section, he said, was to have only one reviser; to reduce the number of revisers, competitions were to be held in Lyons under the auspices of an independent jury; and revisers who proved unsuccessful would be offered posts as translators.

The complainants acknowledged receipt of those letters on 17 October 1988. They observed that since the Secretary General spoke only of intentions they could not yet appeal, but they reserved their right to appeal against any further decision that might be to their detriment. In conclusion they acknowledged the promise to offer them posts as translators if their own posts were abolished.

The complainants argue that they and the other revisers were unlawfully discriminated against because of the Secretary General's stand and that there was breach of his promise to offer everyone an identical post in Lyons.

The texts cited above 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 Organization did not downgrade the complainants' posts but merely warned that if they went to Lyons their status there would be uncertain. At about the same time, in the decisions of 5 and 12 October 1988, the Organization reaffirmed their right to remain in its employ even though on 19 September 1988 it had informed them of plans for reform that were to their detriment.

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 quarrel about that, the application of the principle does raise special difficulties in these cases. Though the Tribunal will not question the wisdom of the Organization's going to Lyons 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 complainants' case, however, it failed to afford such safeguards.

6. The Organization submits that the purpose of its letters of 19 September 1988 was to keep the complainants properly informed; that those letters had no effect in law; and that, besides, the complainants were given the

information nearly three months before they had to make up their minds about the offers of transfer.

Interpol further observes in its replies to the complaints that the promises it made in the individual decisions meant that not only the posts but also the risks inherent therein were to be transferred. It adds that at the date of those replies the reform of the Language Department had not yet gone through and that two of the complainants' seven colleagues consented to the transfer and are still employed as revisers.

7. The Tribunal does not accept that argument.

The fact that the letters of 19 September 1988 have not yet been put into effect is immaterial: the validity of the complaints turns solely on the facts as they stood at the time of the transfer.

There has to be good faith in applying the rules. Not only did the Organization's letters of 19 September 1988 inform the complainants of likely changes in their status but throughout the period of transition it never explained what was to happen. The complainants argue that because of the attitude of senior officers the atmosphere at Interpol was threatening and intimidating. Though the Tribunal will not go so far as that, it is satisfied that they had good reason to infer in the circumstances that if they consented to the transfer they would face the uncertainty of a competition and the risk of downgrading. The safeguards embodied in the material rules were not fully respected.

The impugned decisions gave effect to Article 2 of Section 2 of Appendix VII and to the decisions of 5 and 12 October 1988 about notice of termination. But the conditions laid down were not fully met, and Interpol therefore acted in breach of the complainants' rights as prescribed in Article 23 of the Staff Regulations.

Having come to that conclusion the Tribunal need not rule on the complainants' other pleas. Besides, it is clear from Judgments 1021 and 1022 (in re Eggimann No. 2 and in re Michel) that none of them would succeed anyway.

8. The complainants seek the following financial redress:

- (a) compensation in lieu of notice equivalent to six months' gross salary plus interest reckoned from the date of dismissal;
- (b) the sum of 350,000 French francs each in moral and material damages on account of the circumstances of their termination and, more particularly, the breach of the promises that they would get equivalent posts in Lyons;
- (c) Miss Burnett claims 15,000 francs in costs and Mr. Vicente-Sandoval 27,000 francs.

The Organization contends that the claims as put to the Tribunal are wider than the claims made in the internal appeals insofar as the complainants seek compensation in lieu of notice ((a) above) and awards of 350,000 francs each in damages ((b)).

The objections to the receivability of those claims are upheld: the complainants may not put to the Tribunal claims which did not form part of their internal appeals, and their claims to financial redress must be confined to compensation in lieu of notice.

In his rejoinder Mr. Vicente-Sandoval seeks an award of compensation for accrued leave entitlement. That claim, too, is irreceivable because it is not in his original complaint.

Since the parties do not address the issue the Tribunal cannot rule on their claims to financial redress: it can only rule that Article 2 was misapplied. It therefore refers the complainants to Interpol for determination of the amounts of the compensation which they are entitled to, and which shall bear interest at the rate of 10 per cent a year from the date of termination.

Each of the complainants is awarded 10,000 francs in costs.

DECISION:

For the above reasons,

1. The impugned decisions are set aside.

2. The complainants are referred to Interpol for determination of the compensation they are entitled to, the amounts to bear interest at the rate of 10 per cent a year from the date of their termination.

3. The Organization shall pay each of them 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