

SIXTY-NINTH SESSION

***In re* BARAHONA
and ROYO GRACIA (No. 2)**

Judgment 1025

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Oscar Barahona against the International Criminal Police Organization (Interpol) on 19 September 1989, Interpol's reply of 17 November, the complainant's rejoinder of 1 February 1990 and Interpol's surrejoinder of 27 March 1990;

Considering the second complaint filed by Miss Maria Felisa Royo Gracia against Interpol on 2 October 1989, Interpol's reply of 4 December, the complainant's rejoinder of 14 February 1990 and the Organization's surrejoinder of 27 March 1990;

Considering Article II, paragraph 5 of the Statute of the Tribunal and Articles 22 and 52(3) of the Staff Regulations 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 case and the pleadings may be summed up as follows:

A. Interpol employed the complainants as "translator/

revisers" in the Spanish Language Section. Miss Royo Gracia took up duty on 1 August 1983 and Mr. Barahona on 1 March 1984. On the transfer of the Organization's headquarters from Saint-Cloud to Lyons they were both dismissed, on 16 June 1989.

Miss Royo Gracia got an "assessment report" for the period from 1 August 1987 to 31 July 1988 and Mr. Barahona one for the period from 1 March 1988 to 28 February 1989. Their supervisor proposed that they should both have their category changed, from translator/reviser to reviser, in accordance with a Staff Instruction of 27 June 1984 about the Language Department. Nothing came of that proposal, however, and so Miss Royo Gracia filed a "request for review" with the Secretary General on 24 March 1989 and Mr. Barahona on 19 April. On 28 May the Secretary General informed each of them that he was rejecting their claims. The grounds for those decisions were that according to another Staff Instruction issued on 29 January 1988 promotion to reviser was not automatic as it had been under the Staff Instruction of 1984 but depended on there being a vacant post for a reviser; that since the date of entry into force of the Staff Regulations and Staff Rules promotion had been exclusively at the Secretary General's discretion and no-one had any right to it; that a letter of 19 September 1988 had informed them that the number of posts for revisers was being reduced to one for each language section; and that in the Spanish section there were two revisers already.

Mr. Barahona appealed to the Secretary General on 13 June 1989 against that decision and Miss Royo Gracia did so on 14 June. They also applied for leave to go straight to the Tribunal. The Secretary General gave such leave to Mr. Barahona on 23 June and to Miss Royo Gracia on 5 July 1989.

B. The complainants observe that the Staff Instruction of 27 June 1984 was the outcome of a negotiated agreement and submit that the change the Staff Instruction of 29 January 1988 made was a unilateral attempt on the Organization's part to tamper with the career prospects of translators. The provision in the Staff Instruction of 1988 which Interpol relied on to warrant refusing them the change of category was just a pretext since promotion to reviser has always depended on assessment by supervisors and has never been automatic. The complainants plead breach of equality of treatment in that other translator/revisers have had careers following the rules in the Staff Instruction of 1984. They further submit that the impugned decisions are in breach of the duty any international

organisation has to take only such action as its need for qualified staff demands and not to cause its staff pointless or undue injury. They have been unfairly denied the opportunity of competing for the single post of reviser that is still vacant. The Organization's purpose was, to their mind, to keep their salaries at the top of the scale before it moved to Lyons so as to put them off accepting transfer.

They seek redress for moral injury on the grounds that their certificates of service declare them to have been translator/revisers, thereby preventing them from seeking better paid jobs as revisers, and that their personnel records show the stigma of the refusal to promote them. Miss Royo Gracia puts the injury at 50,000 French francs and Mr. Barahona at 20,000 francs. By way of damages for material injury Mr. Barahona claims a further 20,000 francs. Miss Royo Gracia claims an award of damages in an amount equivalent to the difference between the pay she would have been entitled to from 1 August 1988 had the change of category taken place and her actual pay, plus the difference between the sum she would have been entitled to in termination indemnity had the change of category taken place and her actual indemnity, plus interest. She further claims 5,000 francs in costs.

C. The Organization replies that the complainants may draw no support from the Staff Instruction of 1984 for their claims to promotion because the Instruction had ceased to apply both by the date of their claims and by the date at which the assessment reports were made. Because of the change the Staff Instruction brought about they are not in the same position as translators who were promoted by virtue of that text, and so there is no breach of equal treatment. Nor do they have any acquired right to the application of that instruction since it had not yet come into effect at the dates of their recruitment. As the case law makes plain they have no acquired right to mere arrangements for promotion, the Organization being free to make changes therein for the sake of efficiency. In point of fact it had to make reforms to meet the new requirements of the Language Department because there was less revision work to do than before. The new rules have not prevented it from finding new and qualified translators. Promotion is at the Secretary General's discretion, and it was not in Interpol's interest to promote the complainants since before they got answers to their appeals they had already turned down the offers of transfer to Lyons. In any event there were no vacancies for revisers.

The Organization denies the complainants' allegations of injury. In particular their certificates of service cause no moral injury: since the certificates declare that the complainants were performing the duties both of translators and of revisers, they may apply for posts of either kind.

D. In their rejoinders the complainants contend that the Staff Instruction of 1984 has never been expressly repealed and Interpol has failed to show that they have no acquired right to have it applied. What they were told on recruitment about the very reforms that led to the issue of the Staff Instruction induced them to accept the offers of appointment. Indeed they wonder whether Interpol did not issue the Staff Instruction of 1988 from a fear that the one of 1984 might be deemed to confer an acquired right on staff who took up duty before the Staff Regulations and Staff Rules came into force. They submit that the status of translators who did get promotion was no different from their own since they all had the same obligations and were subject to the same provisions of the rules. There are no "new requirements" in the Language Department: translations always have to be revised and since there was no question of cuts in translation there cannot have been any question of cuts in revision. Besides, there is no formal text establishing or limiting the number of posts for revisers. The ulterior motive of the refusal of promotion was Interpol's wish to deter them from going to Lyons; but for that, it would not have taken so long to answer their appeals. The new recruits are less well qualified than the complainants, having been taken on as mere translators.

In conclusion Mr. Barahona gives detailed estimates of the material injury he has suffered and Miss Royo Gracia points out, as to the moral injury, that in her line of work there is no confusing the title "translator/reviser" with "reviser".

E. In its surrejoinders the Organization seeks to refute each of the pleas in the complainants' rejoinders. In its submission it is untenable in law that someone who is about to be recruited should derive any acquired right from a Staff Instruction that has not yet come into effect. The Instruction of 1988 did replace the one of 1984 and, contrary to what the complainants allege, the earlier one would not have applied to them had they consented to transfer. The Instruction of 1988 and the plans for reform were warranted by sound management that took account of actual needs. The ideal solution would be for each language section to have a head, one reviser and three translators since in any given period a reviser revises more pages than a translator translates.

CONSIDERATIONS:

1. Miss Royo Gracia, while employed at Interpol as a "translator/reviser" in the Spanish Language Section, got an "assessment report" that covered the period from 1 August 1987 to 31 July 1988. Her immediate superior concluded that, by the criteria set out in a Staff Instruction of 27 June 1984, she met the technical and administrative requirements for promotion to the grade of reviser. Though the second- and third-level reporting officers had no quarrel with the favourable assessment they took a different line and said that since there was no vacancy in the Section she could not be promoted. At the end of the report came her objections, which she signed on 10 January 1989.

Having got no decision from the competent authority, the complainant put her case to the Secretary General on 24 March 1989. By a decision of 28 May he refused to promote her. Within the prescribed time limit she made a "request for review" but had it rejected on 5 July 1989. The Secretary General nevertheless gave her leave to appeal directly to the Tribunal, and she is asking it to set aside the decisions and grant her damages.

Mr. Barahona is in like case. He too was employed as a translator/reviser in the Section and got a very favourable assessment of his work in the period from 1 March 1988 to 28 February 1989. His immediate superior came to the same view of him as of Miss Royo Gracia. Apart from the dates, the internal proceedings were also similar, and by a decision of 23 June 1989 the Secretary General granted his request for leave to put the case directly to the Tribunal. He too seeks the quashing of the decision not to promote him and an award of damages.

The two complaints, which are receivable, raise the same issues and are joined to form the subject of a single ruling.

2. The general rule is that promotion is at the Secretary General's discretion. Although it holds good even if there is no written text to that effect it is in fact embodied in Article 22 of the Staff Regulations which empowers the Secretary General "at his discretion" to promote officials "within the general classification of posts". Though "discrétionnairement" in the French version of the text is not the right term, the plain intent is that a decision on promotion should be at the Secretary General's discretion. It is therefore subject only to limited review and the Tribunal will ordinarily set it aside only if it was taken without authority or in breach of a rule of form or of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there were abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

Sometimes, however, instead of deciding case by case, the executive head of an organisation will issue general rules on promotion and announce them to the staff beforehand. Although, if he does so, he will still be exercising his discretion he has to abide by the rules he has set for himself. If the Tribunal has to determine whether some such rule is lawful it will do so within the limited scope of review set out above. But the executive head must conform to the rules he has issued because they are binding in law, and any breach of them will be a fatal flaw in his decision.

Before the Staff Regulations came into force - although in fact that does not matter because it is general principles that apply in this case - the Secretary General issued Staff Instructions which, among other things, set conditions for promotion to reviser.

The first of those Instructions, dated 27 June 1984, said that officials in the complainants' grade would be promoted provided that they had completed at least five years' service, including two in that grade, their work was satisfactory and they had the qualifications that the next grade required.

Another Instruction, dated 29 January 1988, amended the one of 1984 by providing that promotion to the grade of reviser would thenceforth not be automatic but depend on the number of posts vacant.

The complainants contend that though they met the conditions in the Instruction of 1984 the one of 1988 put paid to their prospects of promotion.

The Secretary General may as a rule amend a text that sets in general terms the conditions for promotion that are to hold good in future and, as was said above, the Tribunal has only a limited power of review over texts of that kind.

3. Arguing that the 1988 Instruction does not apply, Miss Royo Gracia alleges a formal flaw. The substance of the one of 1984, she says, had been negotiated with the staff, and she produces items of evidence to support that view; what had been agreed to was displaced by a decision taken unilaterally and without prior consultation of the staff.

The plea is disallowed. The two Instructions bear only one signature, that of the Secretary General, who, even before the Staff Regulations were issued, was empowered to make rules on his own sole authority. To be sure, before he acts he may choose to consult the staff; but he has no duty to do so if no text prescribes it. However far-reaching were the consultations between the Secretary General and staff, and even though they led him to change his mind on some points, they did not amount to negotiation. What that means in law is that in the end an agreed text is signed by both sides. The consultations the Secretary General held with the staff before taking his first decision did not lead to any agreement that was binding between the parties. So he did not act unlawfully in taking the second decision on his own and there is no formal flaw.

4. The complainants allege breach of acquired rights.

The Tribunal has already declared that rules on promotion do confer an acquired right insofar as they offer staff an expectation of advancement. But the particular arrangements for the grant of promotion confer no such right because on recruitment staff cannot foretell how they will fare in their career. For the Instruction of 1988 to say that there must be a vacancy before someone is promoted to it is a perfectly reasonable condition of advancement. Though those principles do in practice make for inequality between staff in their advancement that cannot be helped: any other approach would paralyse the Organization and check progress.

In any event an organisation may change the rules on promotion for the sake of efficiency and so as to cope with changing circumstances.

There is another point that the complainants plead and that arose after the Instruction of 29 January 1988. In other cases before it the Tribunal has to construe a letter the Secretary General sent the revisers on 19 September 1988 about reform of the language sections. His purpose was to inform them of a proposal for a drastic cut in their number. If the proposal went through the complainants' prospects would be not nearly so bright.

In the exercise of its limited power of review the Tribunal rejects that plea. First, as the Organization observes - and indeed there is no evidence to the contrary - the language sections have to be adapted to changing circumstances. Secondly, though promotion will probably come more slowly the prospect of it will not vanish altogether: there will still be a need for revisers. Perhaps in future Interpol will have to ensure fair treatment but that is not a problem yet. After all staff who because of new rules have not such good prospects of promotion are not in the same plight as those whom because of the same rules may lose their employment altogether.

5. Another plea comes under abuse of authority and so the Tribunal may entertain it, again in exercise of its limited power of review. The complainants submit that the purpose of the Instruction of 1988 was not to enhance efficiency but to get round a provision that had been put in the Staff Regulations and was to come into force a few months later. Although Article 52(3) of the Staff Regulations says that "all previous provisions in force shall become null and void, and the present Regulations shall be applicable to officials of the Organization who entered the service of the Organization" before the date at which they enter into force, it adds that "the rights acquired by such officials by virtue of legal provisions in force prior to that date shall remain valid". The Tribunal finds no evidence of any subjective reasons the Secretary General might have had for harbouring any malicious intent, and the complainants put forward no argument in support. The plea fails.

6. Lastly, Interpol observes that it had no interest in promoting officials who were to leave in June 1989 anyway. All that need be said on that score is that the point is a sound one. The purpose of promotion is not only to reward the employee for past and present services but also, and perhaps even more, to induce him to stay on in the Organization's own interests.

It appears from the foregoing that the complaints must fail.

DECISION:

For the above reasons,

The complaints 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 26 June 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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