

SIXTY-NINTH SESSION

***In re* HEITZ**

Judgment 1033

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. André Joseph Léon Heitz on 24 October 1989 against the International Union for the Protection of New Varieties of Plants (UPOV), the Union's reply of 7 February 1990 as supplemented on 7 March and the complainant's rejoinder of 16 March 1990;

Considering Article II, paragraphs 4 and 5, of the Statute of the Tribunal, Article 24 of the International Convention of 1961 establishing the Union, as revised, Articles 1, 4 and 8 of the Agreement concluded between the Union and the World Intellectual Property Organization in 1982, former Regulation 3.1 bis and present Regulations 11.2 and 12.1 of the Staff Regulations and Rule 11.1.1 and .2.1 of the Staff Rules of the International Bureau of the World Intellectual Property Organization (WIPO);

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 International Union for the Protection of New Varieties of Plants is an international organisation which administers a branch of the law of intellectual property, the rights of breeders of new varieties of plants. It was established under an International Convention which was signed in Paris on 2 December 1961 and came into force on 11 July 1968. It was revised on 10 November 1972 and on 23 October 1978.

There are links between the Union and the World Intellectual Property Organization. In particular WIPO manages the staff of the Union; its Director General is ex officio the Secretary-General of UPOV; and any decision he takes on staff policy as Director General of WIPO applies directly to the staff of UPOV.

Article 24(1) of the Convention as revised in 1978 states: "The Union shall have legal personality"; and 24(3): "The Union shall conclude a headquarters agreement with the Swiss Confederation". An Agreement was concluded between WIPO and UPOV on 26 November 1982, and Article 8(1) reads:

"Subject to the other Articles of this Agreement and to paragraphs (2) and (3) of this Article, the provisions of the Staff Regulations and Staff Rules of WIPO and the provisions of the Financial Regulations and Rules of WIPO, including future modifications thereof, shall, mutatis mutandis, apply also in respect of the staff of the Office of UPOV ...".

Former Regulation 3.1 bis of the WIPO Staff Regulations read:

"(a) Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member is, as a result of a variation in the exchange rate between the Swiss and United States currencies, less than for the preceding month, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation.

(b) For the purposes of paragraph (a) above, 'take-home pay' shall mean the salary in accordance with Regulation 3.1, after deduction of the staff member's contribution to the Pension Fund, increased by any post adjustment applicable under Regulation 3.5 and any dependency allowance applicable under Regulation 3.12".

And Regulation 12.1 reads:

"(a) The Director General may propose amendments to these

Regulations. Such amendments shall enter into force after approval by the Coordination Committee. However, any amendment for the purpose of adapting certain provisions of the Staff Regulations to changes in the provisions concerning the staff of the United Nations or the Specialized Agencies of the United Nations ('common system'), and in particular to any adjustment of salaries and allowances within the common system as applied in Geneva, may be provisionally decreed and applied by the Director General, provided the required amounts can be covered by the budget.

(b) Amendments shall be without prejudice to any condition of service specified in the letter of appointment or contract of a staff member, neither shall any amendment affect the application to a staff member of the provisions of the Staff Regulations in force up to the effective date of the amendment; amendments may not have retroactive effect unless the terms of appointment of staff members would thereby be improved".

An information circular, No. 78 of 31 October 1988, announced to the staff of WIPO and of UPOV that at its 25th Session the Coordination Committee of WIPO had decided to repeal Regulation 3.1 bis as from 1 October 1988 and apply the following transitional provision to staff serving at 1 October 1988:

"Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member in service as of October 1, 1988, is, as a result of a variation in the exchange rate between the Swiss and United States currencies, less than for the month of October 1988, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation."

That provision was to be superseded on the adoption of permanent rules on variations in exchange rates in the United Nations common system.

The complainant has been on the staff of UPOV since 1975 and is at grade P.5. His take-home pay for October 1988 - the figure the transitional provision takes - came to 8,884.55 Swiss francs; in November 1988 the figure rose to 9,003.60 and in December 1988 it fell to 8,978.40.

By a letter of 21 January 1989 the complainant asked the Secretary-General of UPOV to review the decision notified in his pay slip for December 1988 on the grounds that his take home pay as reckoned in accordance with 3.1 bis as in force at the time of his appointment was 25.20 francs lower than the figure for November. In a memorandum of 9 February 1989 the Head of the Personnel Section answered on the Secretary-General's behalf that 3.1 bis no longer formed part of his conditions of service and that his take-home pay had been calculated in accordance with the transitional measures of which he had been given the text. By a letter of 9 May 1989 he submitted to the Chairman of the Appeal Board of WIPO an appeal under Rule 11.1.1 of the WIPO Staff Rules.

In its report of 21 July 1989 the Appeal Board held that it was competent but that, since the Director General of WIPO and Secretary-General of UPOV had had no choice but to give effect to the Coordination Committee's decision, it could not advise him to do as the complainant had asked, namely set aside the decision notified in information circular 78 and apply 3.1 bis as in force up to 30 September 1988. By a memorandum of 26 July 1989 the Legal Counsel of WIPO informed the complainant that the Secretary-General confirmed the decision.

B. The complainant submits that the Tribunal is competent to hear his complaint by virtue of Regulation 11.2 of the WIPO Staff Regulations, which directly apply to UPOV staff. Though UPOV has not addressed to the Director-General of the International Labour Office a declaration recognising the Tribunal's jurisdiction, the Swiss authorities assimilate UPOV staff to WIPO staff and WIPO's recognition applies *mutatis mutandis* to the staff of UPOV.

He further contends that his complaint is receivable and he argues his case on the merits.

He invites the Tribunal: (1) to declare that it is competent; (2) to quash the Secretary-General's decision to pay him in December 1988 take-home pay lower than the figure for November 1988; (3) to restore to him the benefit of 3.1 bis as in force at 30 September 1988; and (4) to award him 5,000 Swiss francs in costs.

C. In its reply the Union points out that the Secretary General of UPOV was not only against amending the Staff Regulations but pointed out to the Coordination Committee that amending them might have the effect of lowering take-home pay and might therefore be seen as impairing the staff's acquired rights. Notwithstanding that warning

the Committee went ahead.

The Union points out that it has never denied that the Appeal Board of WIPO and the Tribunal are competent to hear the case. The terms of the declaration of 28 January 1971 by the Director General of WIPO recognised the Tribunal's competence to hear complaints alleging the non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations and Staff Rules of the International Bureau of WIPO. Under Article 8 of the Agreement between WIPO and UPOV the staff of the latter are subject to the Staff Regulations and Staff Rules of the former and are assimilated to WIPO staff. Rule 11.2.1 of the WIPO Staff Rules, which provides for appeal to the Tribunal, therefore applied to the staff of UPOV.

D. In his rejoinder the complainant submits that, should the Tribunal reject the Union's acknowledgment of its competence, it may be competent under Article II(4) of its Statute. The dispute has arisen out of a contract, namely the Agreement between WIPO and UPOV. WIPO has not complied with Article 1 of that Agreement, which requires it to "satisfy the requirements of UPOV as regards (ii) personnel administration, as far as the staff of the Office of UPOV is concerned". So his complaint lies not against UPOV but against WIPO.

CONSIDERATIONS:

1. The complainant is an official of the International Union for the Protection of New Varieties of Plants (UPOV). The Union was set up under an international Convention of 2 December 1961, which was revised on 10 November 1972 and 23 October 1978, and it has its headquarters in Geneva. The issue in this case is how to determine the complainant's take-home pay after deletion of Regulation 3.1 bis from the Staff Regulations that apply to him. The staff used to have protection under that provision against fluctuations in the rate of exchange between the Swiss franc and the United States dollar, the currency in which salaries are determined.

2. It is beyond dispute that the defendant organisation has made no declaration recognising the Tribunal's jurisdiction under Article II(5) of its Statute. The complainant submits that the Tribunal is competent by virtue of an Agreement UPOV concluded on 26 November 1982 with the World Intellectual Property Organization (WIPO). WIPO, which is also in Geneva, was established by the Stockholm Convention of 14 July 1967 and his case is that WIPO's own recognition of the Tribunal's competence extends to UPOV, his employer. He observes that, according to Article 1(1) of the Agreement, "WIPO shall satisfy the requirements of UPOV as regards ... (ii) personnel administration, as far as the staff of the Office of UPOV is concerned"; that under Article 8(1) of the Agreement the Staff Regulations and Staff Rules of WIPO shall *mutatis mutandis* apply also to staff of the Office of UPOV; and that Article 11.2 of the Staff Regulations allows appeal to the Tribunal.

3. Under Article 4(1) of the Agreement the Secretary-

General of UPOV is also the Director General of WIPO. In answer to a question from the President of the Tribunal he says that he endorses the complainant's submissions on the Tribunal's competence. He takes the view that by virtue of Article 8 of the Agreement the staff of UPOV are assimilated to WIPO staff and that the remedies prescribed in the WIPO Staff Regulations are available to UPOV staff as well. He adds that WIPO's contribution to the costs of the Tribunal's secretariat is reckoned on the strength of a number of staff that includes UPOV officials.

4. Such arguments afford no grounds for the Tribunal's declaring that it is competent to hear this case.

5. According to Article II(5) of its Statute it is competent to hear a complaint only if the international organisation that employs the complainant has addressed to the Director General of the International Labour Office a declaration of recognition in accordance with its Constitution or internal administrative rules and if the Governing Body of the International Labour Office has approved the declaration.

6. Under Article 24 of the Paris Convention of 1961, as amended, UPOV has legal personality of its own and the administrative arrangements provided for in its Agreement with WIPO do not impair its distinct identity. The reasons why the complainant may not appeal are that even though the WIPO Staff Regulations and Staff Rules apply to him as an employee of UPOV he is not an official of WIPO, and the organisation that does employ him has not recognised the Tribunal's jurisdiction under Article II(5).

7. The conclusion is that the Tribunal is not competent to hear the complaint.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy 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
Mella Carroll
P. Pescatore
A.B. Gardner