Registry's translation, the French text alone being authoritative.

EIGHTIETH SESSION

In re MOSSU

Judgment 1494

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Claude Mossu against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 23 February 1995, OTIF's reply of 28 April and the letter of 16 May 1995 from the complainant's counsel informing the Tribunal that he would enter no rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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, a Swiss citizen who was born in 1936, was President of the Administrative Committee of OTIF from 1987 to 1989. At its 72nd Session, in November 1989, the Committee elected him Director General of the Central Office of International Carriage by Rail (OCTI), the secretariat of the Organisation. The Committee then discussed how long his term of office should be, the matter not being covered by the Convention on the Intergovernmental Organisation for International Carriage by Rail or by the Staff Regulations. It adopted the following declaration unanimously:

"The Director General's term shall be five years. At least six months before expiry the Administrative Committee will decide by a vote of confidence whether to renew it. If the vote is favourable it will be renewed for five years." (Registry's translation).

The complainant took up office as Director General on 1 January 1990. He got no letter of appointment saying how long his term would be.

At a meeting of the General Assembly of the Organisation on 20 December 1990 the member States adopted a protocol to the Convention. At the material time it had not yet come into effect. It added to Article 7.2(d) of the Convention a clause which said that the Director General and Deputy Director General were to be appointed for renewable five-year periods. On 1 January 1993 new Staff Regulations superseded the ones issued in 1980, and the provision of the Convention was incorporated in the first paragraph of Article 33.

The Administrative Committee noted at its 80th Session, on 10 and 11 November 1993, that the Director General's term would end at 31 December 1994 and unanimously decided to put the post up for competition for 1995-99. On 29 December 1993 the complainant wrote to the President of the Committee expressing surprise that it had not held a vote of confidence before putting the post up for competition. He asked for an explanation. By a letter of 28 January 1994 the President replied that, as he saw it, the explanation lay in the five-year limit which the Committee had set at its 72nd Session and which was now in Article 33, paragraph 1, of the Staff Regulations, and that the Committee's declaration at its 72nd Session had conferred on the complainant no right to the holding of a vote of confidence. The complainant told the Committee orally at its 81st Session in June 1994 that he would no longer be seeking renewal. He observed that though he had earlier asked the President for renewal the Committee had not seen fit to put the matter to a vote of confidence. He expressed the view that the rule, introduced at the Committee's 80th Session, about putting the post up for competition did not apply to himself.

From 5 September 1994 he was unfit for reasons of health to carry out his duties. The Committee issued an internal notice on 27 September, at its 82nd Session, stating that his appointment would expire at 31 December 1994 "without any need for further legal action by the Committee". By a letter of 20 October 1994 to the President of the Committee he claimed the right to sick leave after 31 December 1994 under Article 40(b) of the Staff Regulations, i.e. the right, for as long as he remained unfit, to full pay for nine months as from 5 September 1994 and to half

pay for nine months thereafter. By a letter of 28 November 1994, the impugned decision, the President told the complainant that the Committee had turned down his request at its 82nd Session, on 8 and 9 November. In answer to an undated request from the complainant's son and by a letter of 19 December 1994, of which the complainant got a copy by fax the next day, the President gave him leave to appeal straight to the Tribunal.

B. The complainant submits that the sick leave provided for in the Staff Regulations affords insurance against loss of earnings in the event of illness and so entitlement to payment of his salary for as long as he remained unfit for duty. He relies on Judgment 938 (in re Hill No. 2): "a staff member cannot be separated while on sick leave". He says that the social protection a staff member enjoys goes beyond the end of his appointment.

He submits that in disregard of the case law OTIF failed to take a prior and separate decision not to renew his term. It thereby committed a mistake of law. It also failed to state the reasons for non-renewal.

He contends that the Organisation broke its own rules by not holding a vote of confidence in him before putting the post of Director General up for competition for 1995-99. It acted in breach of Article 31 of the Staff Regulations in their 1980 version by failing to send him a letter of appointment when he took up duty.

The complainant seeks the quashing of the decision to refuse him sick leave under Article 40(b) after 31 December 1994 and payment of salary thereafter for as long as he remained unfit for duty for reasons of health and up to the limits set in 40(b), plus interest at the rate of 5 per cent a year as from 1 January 1995. He asks the Tribunal to declare that OTIF made mistakes of law over the non-renewal of his appointment and claims awards of 200,000 Swiss francs plus interest at 5 per cent a year as from 1 January 1995, and of costs in an amount of 5,000 francs plus interest at the same rate and as from the same date.

C. In its reply OTIF maintains that the complainant's term expired at 31 December 1994. At the Administrative Committee's 72nd Session the two candidates still in the running, one of whom was the complainant, were told of its declaration limiting the Director General's term to a renewable period of five years. By deciding not to include such a provision in the 1993 Regulations the Committee refrained from confirming its original stance that it had to hold a vote of confidence.

An official who is put on sick leave gets full pay, then half pay, on the assumption that he is unfit for reasons of health to carry out his duties. As from 1 January 1995 the complainant was no longer Director General; so he was entitled to no pay anyway after 31 December 1994.

His objections to the non-renewal of his term are irreceivable because he has failed to exhaust the internal means of redress. He neither lodged an appeal with the Administrative Committee nor sought leave from the President to put that part of the dispute straight to the Tribunal. In any event the claims are out of time.

In subsidiary argument the Organisation pleads that a fixed-term appointment confers no right to renewal unless the terms of appointment state otherwise. The Staff Regulations as in force at the date of the complainant's election confer no such right; nor does the declaration the Committee adopted at its 72nd Session. So the Committee had wide discretion in the matter and was entitled to put the post up for competition.

CONSIDERATIONS:

Receivability

1. According to Article VII, paragraph 1, of the Tribunal's Statute a complaint will be receivable only if the impugned decision is a final one and the complainant has exhausted all the means of internal redress available under the staff regulations. The staff regulations may, however, quite properly relieve the complainant of the obligation to go through the internal appeal procedure and let him come straight to the Tribunal. Article 58(1) of the Staff Regulations of OTIF, as in force since 1 January 1993, affords the right to appeal to the Administrative Committee. Article 59(1) grants staff the right to appeal to the Tribunal against a final decision taken at the close of the internal appeal provided for in 58(1). And Article 59(2) reads:

"Notwithstanding the provisions of (1), a staff member may, with leave from the President of the Committee, forgo appeal under Article 58(1) and appeal directly to the Administrative Tribunal of the ILO." (Registry's translation).

2. The present complainant has two quite separate claims. One is to payment of the equivalent of his salary in

accordance with Article 40(b) of the Staff Regulations beyond the normal date of expiry of his appointment and for the duration of his illness. The other is to payment of 200,000 Swiss francs in damages for the non-renewal of his appointment and the Organisation's failure to comply with the rules on renewal. His application to the President of the Administrative Committee for leave to waive his right of internal appeal, and indeed the President's consent, covered only his first claim - to salary under 40(b) - which the Committee had refused. The waiver is to be construed as both sides could and should reasonably have construed it in the context. The complainant's application and the leave from the President are limited in two respects. First, they relate to a quite specific claim to an amount readily worked out by the criteria in 40(b). Secondly, the cause of action arises under the Staff Regulations and the complainant rests his claim on his illness at the time of expiry of his appointment and on what he sees as the social purpose of the provision, not on the failure to renew his appointment. His other claim - to damages for being replaced as Director General - is not the same, either in the amount he claims, which is 200,000 Swiss francs, or in the cause of action, which is the moral injury and breach of duty he imputes to the Organisation. Nor is the second claim one that the parties could and should have seen from the outset as a corollary of the first or one that the Organisation should have expected. The complainant is mistaken in arguing that the two claims are inseparable on the grounds that both arose from non-renewal and the Tribunal must review all the effects of non-renewal. He put forward no such argument when he applied for waiver. Besides, a staff member may always limit his claims so as to satisfy the rule that he must have exhausted the internal means of redress: see, for example, Judgment 1149 (in re Baillod) under 4. So the claim to damages, distinct as it is from the claim under 40(b), is irreceivable. That being so, there is no need to say whether it is irreceivable also for failure to meet the time limit in Article VII(2) of the Tribunal's Statute or is devoid of merit.

The merits

3. Article 40 of the Staff Regulations ("Sick leave") reads:

"A staff member who is unfit for duty because of illness or accident or unable to report for work because of public health measures shall be granted sick leave on the following terms:

(a) Sick leave shall be approved on the Director General's behalf.

(b) Any staff member not appointed under Article 33(3) shall be entitled to sick leave on full pay for up to nine months and on half pay for up to nine in any unbroken period of eighteen months, the total period of such leave in any unbroken period of four years not to exceed eighteen months. ..." (Registry's translation).

4. On 20 October 1994 the complainant wrote to the Administrative Committee relying on a medical certificate from his own doctor which said he had been ill since 5 September 1994 and claiming payment under Article 40(b) after 31 December 1994. He made out that after that date he was entitled, not to his pay as such, but to a "social" benefit of an equivalent amount. By a decision of 28 November 1994, the one now impugned, the Committee refused his claim on the grounds that his appointment was to end at 31 December 1994 and that the benefit of 40(b) might be due only to someone still in the Organisation's employ. The Organisation presses the plea in its reply.

5. Citing Judgments 607 (in re Verron) and 938 (in re Hill No. 2), the complainant claims entitlement to sick leave beyond 31 December 1994, the date of expiry of his appointment as Director General. That would mean a corresponding extension of appointment and payment of salary for the duration of his illness in accordance with 40(b).

6. The judgments he relies on must not be read out of context. The Tribunal was not ruling therein that someone who falls ill towards the end of his appointment should, whatever the circumstances, be entitled to sick leave, to the consequent extension beyond the date of expiry and to pay for the same term. Indeed it ruled out the idea of such extension in Judgment 157 (in re Antonaci). It did order one in Judgment 607, but that was because the rules of the defendant organisation so allowed and the circumstances of the case so warranted, in particular a connection that the organisation had kept with the complainant after expiry of the last extension of his contract. In the case that the Tribunal ruled on in Judgment 938 the defendant organisation had dismissed the complainant, a typist, at a time when she said she was ill and had applied for sick leave. The organisation refused to grant her the leave on the grounds that she was not ill. Though the Tribunal held in 12 that "a staff member cannot be separated while on sick leave", the ruling must be seen in context: it cannot apply to termination in any circumstances whatever. Thus Judgment 1149 (in re Baillod) held that a staff member might not apply for sick leave with pay beyond the date of departure on retirement.

7. The upshot is that whether sick leave is to be extended beyond the date of expiry of an appointment is a question to be seen first and foremost in the light of the social protection afforded by an organisation's rules, which are to be construed according to the law of the international civil service.

8. The precedents cited by the complainant are irrelevant. His case is different from Verron because there is no provision in the Staff Regulations allowing the grant of sick leave beyond the date of expiry of appointment; and from Hill because there was no wrongful dismissal of someone who was ill. The complainant's appointment as Director General was for five years and he had already decided in June 1994, before he fell ill, not to seek renewal. Articles 39 to 43 of the Staff Regulations afford the staff ample social protection. Article 39 requires them to take out sickness insurance to which the Organisation contributes. According to Article 43 they are covered by the Swiss Federal Insurance Fund against old age, invalidity and death (Article 43), over and above the old-age, invalidity and survivors' benefits they get under compulsory Swiss insurance. In such circumstances, where the staff member's appointment expires and he decides, when still well, not to carry on, and where he has adequate social protection against illness and invalidity, there are no social grounds - as there were in Verron - for granting him sick leave after the expiry of his appointment.

9. Lastly, when the complainant put his case to the Administrative Committee he applied, not for sick leave beyond 31 December 1994, but only for the payment of social benefits in an amount equivalent to the pay of a staff member on sick leave. As the Committee pointed out, the Staff Regulations make no provision for benefits of that kind.

10. In the light of the foregoing the complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Mella Carroll
Egli
A.B. Gardner

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