

**NINETY-SIXTH SESSION**

**Judgment No. 2300**

The Administrative Tribunal,

Considering the complaint filed by Mrs L. C. T. against the International Criminal Police Organization (Interpol) on 28 February 2003 and corrected on 18 April, the Organization's reply of 4 June, the complainant's rejoinder of 24 July and Interpol's surrejoinder of 25 September 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Colombian and French national born in 1955, joined Interpol in 1978 and works as a Criminal Data Compiler in the Operational Criminal Information Branch (SOIC).

By Staff Instruction 2001.08, notified on 12 November 2001 and applicable with retroactive effect from 17 September 2001, the Secretary General decided, *inter alia*, to introduce special working hours for SOIC staff, which entailed working on some Saturdays, Sundays and public holidays. On 8 October 2001 the complainant, who had heard that new working hours had been planned, had informed her supervisor, the Assistant Director for Criminal Data Processing, that she would be unable to accept any modification of her work contract. She stated that Interpol "should take fair and necessary steps to deal with [her] case". In a memorandum of 13 February 2002, also addressed to her supervisor, the complainant again expressed her refusal of the new working hours. On 14 March a meeting took place between the complainant and the Assistant Director for Human Resources and General Affairs. By an e-mail dated 28 March, she was informed by the latter that her file was "being studied". On 3 April, however, he wrote asking her "to comply with the work schedule established by [her] department in accordance with Staff Instruction 2001.08".

The "complaint" <sup>(1)</sup> concerning her new working hours, submitted by the complainant to the Secretary General on 22 April 2002, was rejected by the latter in a letter dated 22 May. The legal opinion enclosed with the letter stated *inter alia* that the request did not constitute a complaint in the meaning of Article 121(2) of the Staff Rules, since the complainant's situation had been determined by Staff Instruction 2001.08, which she had not challenged within the statutory time limit. On 17 June the complainant filed a request for review <sup>(2)</sup> of that decision. In an opinion dated 28 November, the Joint Appeals Committee found that her letter of 22 April was inadmissible as a "complaint" and recommended that the request be rejected. By an individual decision dated 4 December 2002, the Executive Director endorsed this recommendation on behalf of the Secretary General. That is the impugned decision.

B. The complainant contends that her complaint is receivable, since, according to her, her legal situation was not "fixed" when the Staff Instruction was notified. She points out that, in the course of the internal appeal procedure, the Organization recognised that "a degree of flexibility had been allowed initially for staff encountering justified difficulties" and that she had been allowed such flexibility in order to continue with her German course. Since she had benefited from that transitional measure, and since her situation was being reviewed, she could hardly be blamed for not having lodged a request for review of the Staff Instruction with the Secretary General before the individual decision was taken by the latter settling her situation.

On the merits, the complainant puts forward three pleas. Firstly, she argues that the decision was unlawful since it was based on an opinion of the Joint Appeals Committee bearing the signature of its Chairman alone, and there is no evidence that the other two members of the Committee agreed. Secondly, she alleges that there was an error of law. According to Article 74(1) of the Staff Rules, "the Secretary General may issue Staff Instructions to establish appropriate working hours for certain special posts, particularly in the case of posts manned by shifts to allow continuous service in certain departments". In this case, however, he not only changed the working hours but at the same time increased the number of working days by making some staff members work on some Saturdays, Sundays and public holidays. The Secretary General has no legal authority to impose such constraints on a staff member under contract. Thirdly, the complainant submits that her acquired rights have been breached, insofar as the new working hours constitute "an alteration of a fundamental and essential condition of her employment". While some staff members might find the new conditions of service acceptable, the complainant did not and expected more humane treatment on the part of Interpol in view of her sensitive personal situation and her excellent service record.

The complainant asks the Tribunal to set aside the impugned decision, to send the case back to the Organization for the latter to terminate her contract in view of her refusal to accept the disputed unilateral alteration, subject to payment of all indemnities to which she would be entitled in case of termination, and to award her damages for moral injury and costs.

C. In its reply the defendant challenges the receivability of the complaint. Since Staff Instruction 2001.08 is an administrative decision open to appeal within 30 days of notification, the written request she submitted on 13 February 2002 was time-barred. In reply to the argument that the complainant's legal situation was not fixed, Interpol contends that the arrangements made to enable her to attend her German course do not fall within the degree of flexibility for which Staff Instruction 2001.08 provides in the event of justified difficulties (such as the case of mothers with several children who have problems finding child care). Furthermore, the complainant has not proved that the matter was under discussion; the e-mail sent by the Assistant Director for Human Resources and General Affairs indicated that she should await a reply but not that an arrangement was being considered.

Subsidiarily, the Organization replies to the three pleas put forward in the complaint. To start with, it points out that according to Article 152(3) of the Staff Rules, consultative opinions rendered by the Organization's various Joint Committees must be signed by their Chairmen. It submits, furthermore, that the Secretary General complied strictly with Article 74(1) of the Rules. A change of working hours does not require the consent of the official concerned. Special working hours are introduced by means of Staff Instructions which the Secretary General alone is empowered to issue, and "the case of posts manned by shifts to allow continuous service" is expressly provided for in the aforementioned article. Moreover, it is in its view "clearly mistaken" to argue that the Secretary General increased the number of working days, since time off in lieu is allowed for all hours worked on Saturdays, Sundays and public holidays. Also, an additional financial compensation is paid, ranging from 25 to 100 per cent of the hourly rate. Lastly, Interpol denies that there was any alteration of the complainant's fundamental and essential conditions of service. Normally, a compiler is on weekend duty twice a month, once on a Saturday and once on a Sunday. The officials concerned may arrange to be replaced, an option of which the complainant took advantage. The change to her working hours is therefore very slight and her acquired rights have not been breached. The Organization states that it did take account of the complainant's personal circumstances in the past, but was not aware that her situation remained delicate. In any case, the humanitarian considerations mentioned above would never justify terminating her contract "at the Organization's expense", which would bring the complainant unjustified financial benefit.

D. In her rejoinder the complainant maintains that her complaint is receivable. She explains that the reason why the Assistant Director for Human Resources and General Affairs gave her several interviews was because she had mentioned specific personal difficulties she encountered in adapting to the new working hours. The Organization can hardly pretend that when it reviewed her case the matter had not been explored further. The complainant believed in good faith that her legal situation was being reviewed. Consequently, her complaint cannot be considered time-barred, since, as the Tribunal has held in the past, time limits are not supposed to be a trap or a means of catching out a staff member who acts in good faith.

On the merits, she argues firstly that it is common practice for the three members of the Joint Appeals Committee to sign its opinion because Article 152(3) of the Staff Rules does not guarantee the transparency that officials are entitled to expect. Secondly, she considers it a fact that the number of working days has increased, since at regular intervals six days per week instead of five are worked. She adds that "the fact that a decision has a statutory basis

does not warrant subjecting just anybody to any requirement whatsoever". She regrets the fact that the Organization has not taken account of her legitimate interests. Thirdly, she argues that the fact that she tried to find someone to replace her whenever she could and that her state of mental health has drastically deteriorated amply demonstrates that the contested change was "fundamental and essential" in nature. She produces a medical certificate issued by a psychiatrist stating that certain facts "tended to indicate a close link between the new working conditions [...] and her state of depression". In her opinion, it is not in the defendant's interest to prolong her sick leave, knowing that there is no reason to expect any improvement in the short term, unless she is offered acceptable working conditions or her contract is terminated.

E. In its surrejoinder Interpol points out that the fact that the complainant submitted a "complaint" rather than a request for review shows that she felt she had exceeded the time limits. Her use of such a device in order to reactivate her case casts doubts on her alleged good faith. The Organization adds that the e-mail from the Assistant Director for Human Resources and General Affairs was merely a confirmation of the decision announced in Staff Instruction 2001.08.

The Organization maintains its subsidiary arguments on the merits. It points out, however, that the Tribunal's assessment of the consequences of the changes introduced in working conditions at Interpol must rest on objective considerations, applicable to all officials concerned, and not subjective, that is, taking each individual case into account. Even if the Tribunal does not adopt this approach, the complainant would still have needed to show in good time that she faced real difficulties. In addition, the Organization expresses doubts regarding the alleged link between the complainant's state of health and the change in her working hours, and draws attention to the psychiatrist's "cautious use of the conditional tense". Lastly, it fails to see how it can transfer the complainant to another post while she is on sick leave.

## CONSIDERATIONS

1. The complainant joined Interpol in 1978 and works as a Criminal Data Compiler at grade C8 in the SOIC. She had in the past been allowed special working hours, on the last occasion by an individual decision of the Secretary General dated 3 January 1995.

As a result of the major reorganisation undertaken at Interpol following the attacks in the United States on 11 September 2001, it was decided that the Organization should be operational 24 hours a day, seven days a week. In Staff Instruction 2001.08, notified on 12 November 2001, concerning the organisation of the Operational Police Support Directorate and the rearrangement of working hours and standby duty in the Executive Directorate, the Secretary General decided, *inter alia*, to introduce special working hours for SOIC officials, which implied working on some Saturdays, Sundays and public holidays.

On 13 February 2002 the complainant sent a memorandum to her supervisor, the Assistant Director for Criminal Data Processing, in which she stated:

"Following the reorganisation of my department [...], I am sorry to inform you that, since I am not prepared to accept such changes in my contract of employment, I no longer see the need to comply with the department's planned work schedule (working hours and standby duty).

Having regard to my length of service (23 years), I would ask you to ensure that fair and necessary steps are taken in this respect.

Such measures could take the form of a transfer to an equivalent post, with normal working hours, of course, or Interpol's consent to exempt me from the above-mentioned constraints."

This memorandum confirmed the concerns the complainant had already expressed in an e-mail to her supervisor dated 8 October 2001.

The Assistant Director for Human Resources and General Affairs sent the complainant an e-mail in reply on 28 March 2002, in which he said:

"Your file is being studied. It is better to spend a little more time upstream so as to avoid wasting time later."

On 3 April he asked the complainant "to comply with the work schedule established by [her] department in accordance with Staff Instruction 2001.08". He added:

"A degree of flexibility has initially been allowed for staff who face justified difficulties owing to the introduction of the new working hours so as to give them time to adapt.

It would appear from your memorandum that any future absences on your part may be deliberate. I would sincerely draw your attention to the consequences your refusal to comply with the changes in working hours under Staff Instruction 2001.08 may entail."

The complainant filed a "complaint" with the Secretary General on 22 April 2002. Arguing that the new working hours should not apply to her, she suggested that if the Organization would not transfer her to a post with normal working hours, it would have to terminate her contract. In support of her "complaint", she pointed out that she had not received any individual decision modifying that of 3 January 1995, which had allowed her personalised working hours, and maintained that the Staff Instruction infringed her acquired rights.

On 22 May 2002 the Secretary General rejected her "complaint", on grounds of service requirements.

On 17 June the complainant sent him a request for review of his decision. She reiterated her arguments, stating that the new working hours constituted an infringement of her acquired rights.

In its opinion dated 28 November, the Joint Appeals Committee, to which the matter had been referred, considered that the request was irreceivable, since the Staff Instruction had not been challenged within the statutory time limits. Subsidiarily, it took the view that the challenged decision did not breach the complainant's acquired rights. It therefore unanimously recommended rejecting the request.

By an individual decision of 4 December 2002, the Executive Director, acting on behalf of the Secretary General, rejected the request for review. That is the impugned decision.

2. The complainant asks for the impugned decision to be set aside. She also asks for the case to be sent back to the Organization in order that the latter may terminate her contract, in view of her refusal to accept the contested unilateral alteration, and to pay her all indemnities to which she is entitled in case of termination. She also claims compensation for moral injury and costs.

Interpol calls for the complaint to be dismissed, principally on the grounds that it is irreceivable, and subsidiarily on the grounds that it is unfounded.

The arguments put forward by the parties are set forth and considered below as necessary.

3. The complainant contends that the decision is unlawful because it is based on an opinion by the Joint Appeals Committee signed by its Chairman alone, whereas it is common practice in Interpol, as in other international organisations, for this type of document to be signed by all members of the Committee.

The Organization rightly points out that, in accordance with Article 152(3) of the Staff Rules, the Chairman of the relevant Joint Committee shall sign the consultative opinion. This provision cannot be challenged on the grounds that different practices prevail in other organisations. There is no evidence, moreover, to support the complainant's suspicion that the report signed by the Chairman might not truly reflect the views of the Committee.

This plea is clearly unfounded and must fail.

4. The Organization argues that the complaint is time-barred because the Staff Instruction introducing the new working hours was not challenged by the complainant within 30 days, through a request for review submitted to the Secretary General in accordance with Article 43(1)(a) of the Staff Rules.

The complainant, on the other hand, considers that the Staff Instruction is only a general decision which still needs to be implemented by means of an individual decision, and that it did not constitute a final decision in her case, considering that she had been told that her situation was being reviewed, as shown by the e-mail of 28 March 2002.

(a) A general decision which establishes the obligations and/or rights of a group of officials, without requiring an implementing decision, may be directly challenged; one example of this would be a decision concerning an electronic clocking-in system (see Judgment 2279 delivered this same day).

However, such a decision is not challengeable if its terms are not sufficiently clear in themselves to allow a challenge (see Judgment 2258, under 3).

In the present case, the disputed Staff Instruction has been issued. Although it does not contain precise working hours, that point is not in dispute. It may be assumed, therefore, that the working hours were known to the complainant when she was first notified of the Staff Instruction. Although it is quite likely that certain details regarding teams and the weekend and holiday duties then assigned to officials still had to be determined on an individual basis in order to implement the Staff Instruction, those may be considered secondary points in relation to the aims of the Staff Instruction. To exclude an appeal against the original decision on those grounds, whilst allowing staff to challenge that same original decision by appealing against work schedules reflecting the new working hours would be contrary to the appeal system and to the need for decisions to have authority.

Thus the disputed Staff Instruction *per se* was open to challenge.

(b) It must therefore be ascertained whether the instruction could be considered as not constituting a final decision with regard to the complainant, owing to the uncertainty surrounding her request of 13 February 2002.

In Judgment 2066, under 5, the Tribunal stated that when an organisation hints that it will reconsider a decision affecting a staff member, it cannot reasonably expect the latter to challenge that decision. Nor may the staff member lodge an appeal against it unless the Administration expressly states that the appeal procedure will take its course despite attempts to settle the case.

Clearly that precedent applies only where the process of reconsidering the decision begins prior to the expiry of the time limit allowed for an appeal against the decision; it does not, in itself, afford grounds for restarting a time limit which has already expired.

(c) According to Article 43(1)(a) of the Staff Rules, any official may, within a period of 30 days from notification of the impugned decision, submit to the Secretary General a written request for review of the administrative decision prejudicial to his interests.

In this case the decision contained in the Staff Instruction was notified to the complainant by e-mail on 12 November 2001. It therefore became final if not challenged by 12 December 2001. The complainant's request of 13 February 2002, submitted after the expiry of the 30-day time limit, could not therefore be considered as a request for review of the Staff Instruction submitted within the statutory time limits.

The same applies to the subsequent steps undertaken by the complainant, particularly her "complaint" of 22 April 2002.

It emerges from the above that, insofar as it challenged the Staff Instruction, the internal appeal was irreceivable because it was time-barred. The complaint submitted to the Tribunal is therefore equally irreceivable because internal remedies have not been exhausted.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

*(Signed)*

James K. Hugessen

Jean-François Egli

Seydou Ba

Catherine Comtet

1. According to Article 121(2) of the Staff Rules, "the term 'complaint' means a written request, the grounds for which have not previously been the subject of any decision by the Secretary General, and on which the Secretary General must take an individual decision in application of the terms of the employment agreement of the person concerned or of the provisions of the Staff Regulations, of the [Staff] Rules or of Staff Instructions".

2. According to Article 121(1) of the Staff Rules, "the term 'request for review' means an action by which a person who has been notified of a decision taken by the Secretary General impugns the content of the decision and initiates an appeal procedure with a view to having it modified."