

FORTY-FIRST ORDINARY SESSION

***In re* ASP**

Judgment No. 357

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Labour Organisation (ILO) on 10 October 1977 by Mr. Christer Bertil Asp, found on 6 December 1977 in the office of the Registry in an envelope bearing neither identification nor postmark, and the ILO's reply of 10 February 1978;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Article 7.5(b) of the Staff Regulations of the International Labour Office as worded before 1 January 1977 and as worded since then;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the International Labour Office on 22 July 1974 at grade G.6 on a short-term appointment. He was later given a fixed-term appointment. He was promoted to grade P.2 in 1976 and left the staff on 31 August 1977, when a third extension of his appointment expired.

B. In accordance with Article 7.5(b) of the Staff Regulations as amended on 1 January 1977 he was told that when he left, on 31 August 1977, he would receive in compensation for his accrued 37 ½ days' annual leave a sum calculated on the basis of his pensionable remuneration after deduction of his own contribution. He challenged that application of the amended text of Article 7.5(b) in a "complaint" of 11 August 1977, which was dismissed on the Director-General's behalf by Mr. McDonald, Deputy Director-General in charge of general management, by a letter of 8 September 1977. That is the decision impugned.

C. The complainant takes the view that the text of Article 7.5(b) before 1 January 1977 ought to have been applied to his case and he construes that text as entitling him to full reimbursement of his leave days, including post adjustment. In his complaint he asks that compensation for his accrued leave days be calculated on the basis of net salary plus post adjustment. He also claims 250 Swiss francs in costs.

D. The ILO asks the Tribunal: (a) to declare that it was right to apply the amended text of Article 7.5(b) of the Staff Regulations in force at the time when the complainant's accrued annual leave was paid off; (b) subsidiarily, to find that even if the applicable provision was the old version of the article the outcome would be the same, in accordance with the construction regularly put on that provision throughout its period of application, which has never been challenged, namely that compensation should be calculated on the basis of net salary excluding all allowances and benefits such as post adjustment - an interpretation "required by the whole logic underlying the system of compensation introduced by the Staff Regulations". The ILO therefore asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

As to the Provision which applies:

1. Article 7.5(b) of the Staff Regulations governs compensation for accumulated leave, namely the compensation payable to a staff member on leaving the service of the ILO for annual leave due but not taken. Until 31 December 1976 it read as follows:

"An official who, on leaving the service otherwise than by transfer to the United Nations or a specialised agency, has not exhausted the annual leave to which he is entitled shall be granted a sum proportionate to the number of

days of annual leave he has accumulated, up to a maximum of 60 working days..."

On a recommendation of the International Civil Service Commission the provision was amended to read as follows with effect from 1 January 1977:

"An official who, on leaving the service otherwise than by transfer to the United Nations or a specialised agency, has not exhausted the annual leave to which he is entitled shall be granted a sum based on pensionable remuneration less staff assessment and proportionate to the number of days of annual leave he has accumulated, up to a maximum of 60 working days..."

2. The complainant contends that he has an acquired right to application of the former text of Article 7.5(b). Although his appointment terminated on 31 August 1977 - after that text had been repealed - he relies upon that text to claim compensation for 37 ½ days' accumulated annual leave. He has a mistaken notion of acquired rights.

A staff member may derive an acquired right either from a clause of his contract of appointment or from a provision of the Staff Regulations or the Staff Rules which was important enough to affect the mind of the ordinary applicant when he was considering joining the staff of the Organisation. The complainant may not rely on either of those alternatives. Not only does he omit to cite any clause of his contract but there is nothing to suggest that an applicant for a position on the staff would have joined the Organisation in reliance on the former rule on payment of compensation for accumulated annual leave. The argument which rests on the existence of an acquired right is therefore unfounded.

3. But is the application of the former text of Article 7.5(b) warranted by the rule precluding retroactivity, which removes from the ambit of new law facts and events which were completed by the time that law came into force? In so far as the accumulated annual leave in the present case became due before 1 January 1977, is there not a completed set of facts which is not subject to any rules in force after that date and therefore continues to be subject to the former law?

There is no need to settle that point since the complaint must be dismissed whichever provision is applied.

As to the application of the former text of Article 7.5(b):

4. The ILO contends that, according to a consistent and uncontroversial construction of the former text of Article 7.5(b), compensation for accumulated leave days was based on net salary excluding allowances and benefits such as post adjustment. The complainant does not object to that interpretation, and in any event it is the right one. A staff member who leaves the ILO is supposed to return to his home country and to use there the sum which he has received as compensation for accumulated annual leave. In calculating that sum, therefore, there are no grounds for taking account of benefits and allowances such as post adjustments, which have been determined in the light of the cost of living at the duty station. On 31 August 1977, when the complainant left the ILO, he was paid as compensation for accumulated leave days an amount based on his net salary, in other words, in accordance with the construction consistently put on the former text of Article 7.5(b). He is therefore mistaken in alleging a breach of that provision.

As to the application of the new text of Article 7.5(b):

5. The complainant does not deny that he obtained the compensation to which he was entitled according to the text of Article 7.5(b) which came into force on 1 January 1977. Whether the new or the former text of the provision is applied, his claim must therefore be dismissed.

6. In any event it is immaterial that it does not appear clearly from the written evidence and in particular is not indicated by the complainant himself on what date his annual leave accrued and that, according to a mere supposition on the part of the ILO, most of the unused leave days "presumably accrued before 1 January 1977". It is also immaterial whether, according to the rule against retroactivity account should be taken of the remuneration which the complainant received at the time when he was entitled to the unused leave or of that which he was receiving when his appointment terminated.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet