

SEVENTY-FOURTH SESSION

Judgment 1216

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. J.-F. S. against the International Criminal Police Organization (Interpol) on 19 February 1992 and corrected on 26 March, Interpol's reply of 10 June, the complainant's rejoinder of 26 August and the Organization's surrejoinder of 21 October 1992;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Article 36(3)(d) and 43(1)(a) of the Staff Regulations and Articles 6(2), 14, 100(4), (5) and (7), 101, 121(1) and (2), 122(1), 123(1), 131(2) and Section 2 of Appendix VII of the Staff Rules of Interpol;

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 Frenchman, served Interpol as head of the accounts unit from 1 February 1984 to 6 June 1989, when his appointment was terminated on the transfer of the Organization's headquarters to Lyons.

He is seeking compensation for the material and moral injury Interpol's allegedly repeated breach of the following provisions caused him:

(a) Article 6(2) of the Staff Rules, by levelling groundless charges against him;

(b) Article 14 of the Staff Rules, by keeping an unlawful "parallel" personal file on him;

(c) Article 36(3)(d) of the Staff Regulations and Articles 100(4),(5), and (7) and 101(2) of the Staff Rules, by sending him only two notices of vacancy issued in the two years after the date of his dismissal. On 19 September 1991 he submitted a "complaint" to the Secretary General under Article 121(2) of the Staff Rules claiming damages in the amount of 18 months' gross base salary reckoned at the rate of his last monthly salary. By an individual decision of 15 October the Secretary General rejected his "complaint".

On 12 November he sent the Secretary General a letter asking him to review his decision in accordance with Article 43(1)(a) of the Staff Regulations and Articles 121(1), 122(1) and 123(1) of the Staff Rules. In a letter of 19 November 1991, the decision under challenge, the Secretary General told him that the decision of 15 October was final and gave him leave under Article 131(2) of the Staff Rules to go straight to the Tribunal.

B. The complainant describes the disputes with his former supervisors which led Interpol to abolish his post even before moving its headquarters from Saint-Cloud to Lyons. One reason why he turned down its offer of transfer to Lyons was that he could no longer put up with being harassed by his supervisors, who never thought twice about trumping up accusations against him, in breach of Article 6(2) of the Staff Rules. The disciplinary and appeals committees that heard his case cleared him of almost all the charges, the sole purpose of which had been to get him to leave.

Interpol's offer of a post in Lyons identical to the one he held at Saint-Cloud did not square with Section 2 of Appendix VII of the Staff Rules. Even though his former supervisor had told the Joint Appeals Committee when it met on 27 June 1989 to consider the grading of the complainant's post that there was no plan to recruit a new head of the accounts unit, the Organization restored the position and filled it 18 months later.

Interpol did not so much as offer him the post, although had he known it was vacant he would doubtless have applied. Only once, by a letter dated 26 September 1990, did Interpol send him notices of vacancy. That was in breach of Article 36(3)(d) of the Staff Regulations and Articles 100(4), (5) and (7) and 101(2) of the Staff Rules, which require that an official whose post has been abolished be sent any notices issued by the Organization in the first two years after the date of dismissal. His dismissal caused him grave material injury.

On looking through his personal file the complainant came across an unsigned minute dated 21 July 1988 which referred to "the best way to get rid of" him. He takes Interpol to task for keeping unlawful "parallel" files: his own, he discovered, contained a document dating back to 1985 about a warning that the Administration gave him in May of that year but withdrew three months later. Interpol maliciously produced it in its surrejoinder on the case Judgment 1085 ruled on. Keeping such a file about him was in breach of Article 14 of the Staff Rules.

He claims half-pay for 36 months in damages for the material and moral injury from July 1988 on and 20,000 French francs in costs.

C. Interpol replies that the complaint is irreceivable under the *res judicata* rule insofar as it rests on the same facts as did his five earlier complaints, all of which the Tribunal dismissed. He is still trying to get redress for material and moral injury he alleges the Organization caused him from July 1988 on. In the complaints the Tribunal has already rejected he claimed 100,000 French francs; this time he wants sums that total 317,000 francs.

In any event, says Interpol, his complaint is devoid of merit. He refused its offer of transfer to an identical post in Lyons. It is free to reform its secretariat as it sees fit. Appointing an accountant to replace him and restoring the post of chief accountant in July 1990 caused him no injury since he had left over a year earlier. Besides, there was no notice of vacancy for the position, which was merely advertised in the newspapers.

Insofar as Article 101(2) of the Staff Rules refers to termination under Article 36(3)(d) of the Staff Regulations Interpol was not bound to send him any notices. Such obligation arises only where no suitable assignment can be found to replace one that has been abolished. The complainant was offered the same post, albeit at a different duty station, and he turned it down.

D. In his rejoinder the complainant goes over his various disputes with Interpol. He maintains that the Organization's sending him notices on 26 September 1990, purportedly "in accordance with Articles 101(2) and 100(4), (5) and (7) of the Staff Rules", could not but lead him to believe that he was entitled to receive all notices issued in the two years since termination and to have any application by him given priority. Being in sore financial straits, he would certainly have considered applying for his old job had he known it was vacant. Interpol caused him to forfeit a good opportunity of getting it back.

E. In its surrejoinder Interpol enlarges on its pleas. In its submission Article 101(2) of the Staff Rules, which refers to Article 100(4), (5) and (7) applies only to someone whose post was abolished and to whom the Organization could offer no other. The only other case of termination on abolition is where an official refuses an offer of an alternative post. Such cases come under Article 36(3)(e) of the Regulations, which is the material provision in this case. How could the complainant have been expected to want to apply for the very post he had refused a year earlier?

CONSIDERATIONS:

The facts

1. Interpol's shifting its headquarters in 1989 from Saint-Cloud to Lyons prompted many disputes with staff who turned down offers of transfer. One of them was the present complainant. As was explained in Judgment 1020 under 4, he filed a first complaint about the reckoning of the indemnity paid to him in lieu of notice. He later filed two others - his second and third - about termination indemnity and the grade of his post. Meanwhile disciplinary proceedings were twice brought against him on the grounds of professional misconduct. The upshot was that he filed another two complaints - his fourth and fifth - and the Tribunal dismissed them in Judgments 1085 of 29 January 1991 and 1106 of 3 July 1991.

In this complaint, his sixth, he is seeking damages for material and moral injury which he blames on his employer's behaviour since July 1988. He filed a request for review on 19 September 1991 and the Secretary General rejected it by the decision of 19 November that he now impugns.

2. In his submission this complaint rests on grievances that have nothing to do with his earlier ones; the Organization answers that it is irreceivable under the *res judicata* rule.

3. There are three conditions for sustaining the objection: the parties, the purpose of the suit and the cause of action

must be the same as in the earlier case.

The first of those conditions is met here: the parties are the same.

Identity of purpose means that what the complainant is seeking is what he would have obtained had his earlier suit succeeded. The criterion is not the purport of the decision but the complainant's true intention.

In the earlier cases the complainant sought an award of damages for the material and moral injury he attributed to Interpol's "vexatious and arbitrary treatment of him, which was one reason for his leaving the Organization". In this case he blames instead "the Organization's behaviour towards him" since July 1988. So there is no doubt but that the purpose of his suit is the same as it was before.

The first two conditions for applying the res judicata rule are met.

4. The third is identity in the cause of action, and it is a more difficult matter.

What the cause of action means is the foundation of the claim in law. It is not the same thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim.

There is no difficulty where the former claim and the new one have a different foundation in law, but in many instances the question will be whether the complainant's line of argument does not show some direct link with the earlier case.

In the light of the foregoing does the complainant's claim to damages for material and moral injury have the same foundation in law as the claims dismissed in earlier judgments?

He pleads the breach of three different provisions, and they are taken up in turn below.

Article 6(2) of the Staff Rules

5. The complainant says that in its surrejoinder on his fourth complaint - ruled on in Judgment 1085 - Interpol made new false charges over and above those he had had to answer in the earlier proceedings. In his submission the new charges constitute a breach of Article 6(2) of the Staff Rules, and the breach was not the same as the one he had objected to before.

If that is the cause of action in this case, it is hard not to treat it as distinct from the cause of action in cases dismissed in Judgments 1085 and 1106.

For one thing, the complainant is pleading breach of the same provision of the rules. For another, the evidence he cites in support is not even new. The plea is that Interpol made false charges against him after he left on 22 December 1988. As he himself acknowledges, his objections are the same as those he has been building up over the years against the Organization and which he has merely combined in a single protest. Indeed he is not denying that most of them formed part of his earlier submissions.

The conclusion is that, even though he states some of the details differently, the differences are just in points of fact and do not make the present cause of action distinct from the basis of his earlier claims, including those that Judgments 1085 and 1106 dismissed.

In this first respect the complaint is no more than a vain attempt to get round res judicata.

Article 14 of the Rules

6. The complainant objects, secondly, to the Organization's appending to the surrejoinder it filed in October 1990 on his fourth case a copy of a handwritten text dated 1985 about a warning which he was given at the time but which was withdrawn three months later. In his submission that text was calculated to discredit him in the eyes of the Tribunal and revealed that, in breach of Article 14 of the Rules, headed "Personal file", Interpol had kept an unlawful parallel file about him.

The plea again offends against res judicata insofar as it rests on an allegation in the Organization's surrejoinder on

his fourth case and the purport of an appendix to that brief. Judgment 1085 disposed of that case in its entirety.

Article 101(2) of the Rules

7. Under the third head the complainant observes that in the two years after termination he was only once sent notices of vacancy, and that was in breach of Articles 36(3)(d) of the Staff Regulations and 100(4), (5) and (7) and 101(2) of the Staff Rules.

Interpol's retort is that he raised the issue in his fourth and fifth complaints, that the dismissal of them was a ruling on the claim, that it is therefore irreceivable under the *res judicata* rule, and that in any event it is devoid of merit.

8. The claim is receivable. Though the complainant did plead breach of Article 101(2) in his fourth and fifth complaints, he did not do so until he entered the supplementary brief the Tribunal gave him exceptional leave to file on the surrejoinder on his fourth complaint. He did so again in his rejoinder on his fifth complaint. The claim was therefore out of time and, being a new one, irreceivable. Judgments 1085 and 1106 did not rule, even by implication, on the plea because it was immaterial to the claims as stated in the original complaints.

But since the complainant made the claim again in his internal "complaint" to the Secretary General, it is receivable in the context of the present complaint against the Secretary General's decision of 19 November 1991.

9. Yet he is mistaken in relying on Article 101(2) of the Rules.

That provision reads:

"If the Secretary General has terminated the appointment of an official under contract in application of Article 36(3,d) of the Staff Regulations, Article 100(4), (5) and (6) [recte 7] shall apply, *mutatis mutandis*."

Article 100(4), (5) and (7) of the Rules are about sending notices of vacancy; and Article 36(3)(d) of the Regulations allows termination following "suppression of the official's post" where there is "no vacant post which is to be filled and for which the Secretary General considers that the official concerned has the requisite qualifications".

The Organization points out that the conditions laid down in 36(3)(d) are not met in this case. Although it ended the complainant's appointment on the grounds of the abolition of his post, it offered him an identical post in accordance with Article 2 of Section 2 of Appendix VII to the Rules. There was therefore no lack of a "vacant post".

The complainant does not really challenge that point, which rests on a literal construction of 36(3)(d). But he submits that sending him notices of vacancy with a letter - the one of 26 September 1990 - that referred to Articles 100 and 101 of the Staff Rules could not but lead him to believe that his case was covered by 36(3)(d).

10. The plea fails.

For one thing, it was scarcely reasonable for the complainant to treat as an obvious and specific application of 36(3)(d) the sending of a single letter in the period of two years set in 100(4).

For another, 36(3)(d) was inapplicable because he failed to meet the conditions and, more particularly, because he came instead under Article 2 of Section 2 of Appendix VII to the Rules. Article 2(1) says that officials who have an acquired right to the location of their duty station "shall be subject to the provisions of the present Article". The complainant was. The article deals with all matters relating to the transfer of headquarters from Saint-Cloud to Lyons: the abolition of posts at Saint-Cloud and simultaneous creation of identical posts in Lyons, the procedure for transfer and termination, the period allowed for consideration before acceptance or refusal of an offer of transfer, notice of termination, termination indemnity, and so forth. The provisions of Article 2 are comprehensive and detailed. Some are exceptional and special provisions that have no counterpart in the body of the Regulations and Rules.

Article 3 says that Article 2 "shall not prevent application of the appropriate provisions of the Staff Regulations and the present Rules permitting termination of appointment for any other reason ...". In other words there may still be ordinary termination for the reasons set out in Chapter VI of the Regulations and Chapter VIII of the Rules, subject

to compliance with the prescribed general rules and procedures and independently of the special circumstances covered by Article 2. *Specialia generalibus derogant*: the transitional rules in Article 2 must prevail over the general rule about sending notices of vacancy.

Interpol therefore had no discretion to disregard the special rules that applied, on the transfer of its headquarters to Lyons, to officials like the complainant who had an acquired right to their duty station and to apply to them Article 36(3)(d), which allows termination for reasons quite different from the one covered by Article 2 of Section 2 of Appendix VII.

The Organization seems to have acted imprudently rather than in bad faith in sending the complainant just one letter enclosing notices of vacancy, purportedly to "avoid dispute". In doing so it conferred on the complainant no entitlement that he did not have under the rules anyway. In particular it was under no duty to offer him his old post, even though it was still vacant, since he had preferred losing his job to transfer to Lyons.

The conclusion is that Interpol committed no unlawful act causing him injury.

11. Since his main claims are disallowed so too is his claim to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner