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

EIGHTY-SIXTH SESSION

In re Tissot

Judgment 1819

The Administrative Tribunal,

Considering the complaint filed by Mr. Albert Félicien Tissot against the Interim Commission for International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) on 3 January 1998 and corrected on 24 February, the Interim Commission's reply of 7 May, the complainant's rejoinder of 5 June and the defendant's surrejoinder of 1 July 1998;

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 is a French citizen who was born in 1939. In 1965 he joined the staff of ICITO/GATT - the "Interim Commission" - in Geneva as a messenger at grade G.1. He later moved to the Technical Services and Buildings Unit as a technician. He there reached grade G.6.

On 1 July 1993 he suffered an injury while doing carpenter's work. It left him with a permanent disability in his left hand and he had to be transferred to other duties as a sound technician.

By a letter of 13 December 1994 to the Director of the Personnel Division he asked "how GATT would be discharging its liability and what course it had in mind to work out a fair settlement". In a memorandum of 16 December 1994 the Director acknowledged that the accident had been service-incurred and so "warranted an award of compensation under Appendix D" to the Staff Rules of the United Nations (which apply *mutatis mutandis* to the staff of the Interim Commission); to set the amount the Joint Medical Service of the United Nations in Geneva would be in touch with his own doctor.

Article 11.3(a) of Appendix D says that in the case of "injury ... resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General" according to the schedule in 11.3(c). The schedule sets the award for loss, or total loss of use, of a limb or function at a percentage of an amount equal to twice the annual pensionable remuneration applicable to grade P.4, step V. For staff in the General Service category the executive head may, still under 11.3(c), adjust the amount of compensation set in the schedule "taking into account the proportion which the staff member's salary or wage bears to Headquarters rates".

In a letter of 27 October 1995 to the Director of the Personnel Division the complainant said that he wanted to know the outcome of the memorandum of 16 December 1994 and that he had undergone check-ups by a surgeon at a hospital at Annecy, in France, and by a neurologist at the university hospital of Geneva.

There followed talks between him and management about the possibility of his taking early retirement at the end of 1996; he would get special unpaid leave covering the whole of that year and an award of 12 months' pay in compensation. But nothing came of the talks.

The findings of the check-ups were that he was suffering from 25 per cent permanent disability. On 6 May 1996 the Interim Commission offered him 41,075 United States dollars in compensation. He accepted the amount, though he objected to the reckoning of it.

In a letter of 14 May 1996 he asked the Deputy Director-General to sort out the dispute with Personnel over the construction of Appendix D and to put the case to the Joint Appeals Board.

In a memorandum of 22 May 1996 Personnel explained to him how the Interim Commission had reckoned the amount due under Article 11.3(c) of Appendix D: it had taken the figure of 25 per cent loss of function and applied that percentage to a sum equivalent to twice the yearly amount of pensionable remuneration at grade P.4, step V.

In a letter of 31 May 1996 to the Deputy Director-General he said that 11.3(c) empowered the executive head to raise the amount in the schedule; he asked that he should in time benefit under 11.2(d) too, which provided for compensation for loss of earning capacity for any staff member partly disabled at the time of termination.

In a memorandum of 19 August 1996 Personnel told him that the amount in the schedule held good and that for anyone still on the staff it was too soon to claim compensation for loss of earning capacity.

In a letter of 11 November 1996 to the Director-General he argued that the amount of his compensation had been worked out as if he were in New York, whereas 11.3(c) required taking account of disparities in pay between Geneva and New York. He asked for review of the reckoning.

In a letter of 18 November the Director-General confirmed the decision of 6 May.

On 12 December 1996 the complainant asked that the dispute over the reckoning be put to the Joint Appeals Board. In a report of 4 September 1997 the Board recommended review of the decision of 18 November 1996 on the grounds that "where, as here, rights and liabilities turn on a rather hard job of interpretation, Personnel should have either made up its own mind about how to construe 11.3(c) or, failing that, recommended any construction to the staff member's advantage that did not offend against some overriding interest of the Commission's".

By a letter of 8 October 1997, the decision now impugned, the Director-General again upheld the decision of 6 May 1996.

B. The complainant submits that in reckoning the compensation due to him the Interim Commission failed to act under Article 11.3(c) of Appendix D and put up the amount. He wants it to do so.

Secondly, he claims the payment as from 1 December 1997, the date of termination of his appointment, of compensation under Article 11.2(d) of Appendix D for his loss of earning capacity.

He explains that he meant to go on working as a carpenter after retirement by doing up old furniture and had built up a big stock of wood for the purpose. That would have been his main source of extra income, but he has had to drop the idea.

He is claiming damages under all heads of injury.

C. In its reply the defendant points out that the amount it paid the complainant in compensation on 8 October 1997 covered loss of function. As to the reckoning of it, although any adjustment must take into account the proportion which the staff member's pay bears to headquarters rates, the Interim Commission has its headquarters in Geneva and not, like the United Nations, in New York, and so the United Nations Staff Rules must be construed to suit its own needs.

Since the intent of 11.3(c) is to bestow the same compensation on anyone who may have suffered the same loss of function, whatever the duty station, and since all employees of the Interim Commission are at headquarters in Geneva, they must get the same amount in compensation for the same loss of function. And there are no valid grounds anyway for raising the amount due to someone in the General Service category: for one thing, pay is at Geneva rates so that comparison with headquarters rates makes no sense, headquarters being in Geneva; for another, 11.3(c) cannot mean that someone in that category is to fare better than staff in other categories at the same duty station.

In answer to the complainant's second claim - to compensation for loss of earning capacity - the defendant submits that it is irreceivable. He did not make it until 28 November 1997 and it was refused on 18 December 1997. He did not challenge that refusal in internal appeal proceedings and so has failed to meet the requirement of Article VII(1) of the Tribunal's Statute.

Besides - says the defendant - the claim is devoid of merit. Under 11.2(d) compensation is due for loss of earning capacity only if disability leads to termination of appointment. If the staff member can still work for the

organisation it is better that he should. Even were that not so, the complainant took early retirement on 1 December 1997 under an agreement which he struck with the Interim Commission on 31 October 1997. The pension he is thus entitled to draw must be deemed to include any compensation that may be due to him for partial incapacity for work.

D. In his rejoinder the complainant enlarges on his pleas about the reckoning of the compensation.

In answer to the defendant's objections to the receivability of his second claim he submits that he could not make it while still on the staff. So indeed did he learn from the Director of Personnel's letter of 19 August 1996 and such was the Joint Appeals Board's view in its report of 4 September 1997.

On the merits he contends that his termination did take the form of dismissal, and that it was at his own request and in line with the Staff Regulations and with the interests of both sides. As for the amount of the compensation he got on leaving, it was reckoned, not on the strength of the consequences of the accident, but in keeping with the Interim Commission's practice in the event of early retirement.

E. In its surrejoinder the defendant presses its pleas on both claims.

CONSIDERATIONS

1. The complainant, a French citizen, was born on 19 February 1939. He joined ICITO/GATT on 23 October 1965. His appointment ended on 30 November 1997 when, by agreement between both parties, he took early retirement.

A clause in his contract of service, which was regularly renewed, read:

"This appointment is subject to the following conditions and governed by the provisions of the Staff Regulations and Rules of the United Nations, as applied to the staff of ICITO."

He was employed in the General Service category. He began at grade G.1 and rose to G.6. He was in the Technical Services and Buildings Unit. He did carpentry, among other things.

On 1 July 1993 he had an accident at work and injured his left hand. Despite treatment he was left with a permanent partial disability. He could no longer work as a carpenter and had to move to other duties.

There were discussions and, from him, objections about the award of compensation for the accident and disability.

2. By a decision that the "Contracting Parties" took on 3 December 1970 the Interim Commission declared the United Nations Staff Regulations and Staff Rules to apply *mutatis mutandis* to its own staff: see Judgment 380 (*in re* Bénard and Coffino) under 5.

According to Staff Rule 106.4 staff members "shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, in accordance with the rules set forth in Appendix D".

Under Article 11.3(c) of that appendix a staff member is entitled to compensation for loss of function as corresponds with the degree of disability applied as a proportion of twice the annual pensionable remuneration at grade P.4, step V. At the material time that figure was 82,150 United States dollars. Since the complainant's disability was found to be 25 per cent the amount he got came to a quarter of twice that figure, or $41,075. That particular reckoning is not at issue.

But 11.3(c) further provides:

" In the case of General Service personnel, manual workers and locally recruited mission personnel whose salaries or wages are fixed in accordance with staff rules 103.2, 103.3 or 103.4, appropriate adjustments in the amounts of compensation provided for in this schedule may be made by the Secretary-General, taking into account the proportion which the staff member's salary or wage bears to Headquarters rates."

Relying on that rule, the complainant claims adjustment of the amount of compensation on the grounds that the term "headquarters" means United Nations headquarters in New York. The defendant replies that the text must be

taken to refer to its own headquarters, which are in Geneva, and that because that is where the complainant was employed no adjustment is due.

Having exhausted his internal means of redress, the complainant has raised that issue in his complaint to the Tribunal.

3. Article 11.2(d) of Appendix D reads:

"Where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1(c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience."

The complainant claims the benefit of that provision too.

The Interim Commission argues that on that score he has failed to exhaust his internal remedies.

It is right. The sole point at issue in the internal proceedings for review and appeal and in the impugned decision was the claim that the complainant rested on 11.3(c). In its report of 4 September 1997 the Joint Appeals Board refrained from entertaining his claim under 11.2(d) on the grounds that he was still employed and it was therefore premature. That was implied in the Director-General's decision too.

Although the complainant had already made the claim, the Interim Commission had, by the time the Board reported, said more than once that it would decide later. According to precedent such statements were not decisions on the merits against which internal appeal would lie: see Judgment 1694 under 7(c) and the others there cited.

Not until 18 December 1997 did the Interim Commission rule on the merits: it rejected the claim on the grounds that retirement meant that one stopped working. That rejection is not under challenge and indeed the complainant has failed to show that he has exhausted his internal remedies on that score.

That being so, his claim is irreceivable.

4. The only material issue, then, is whether he may have his award of compensation "adjusted" under 11.3(c) on the grounds that at his duty station, Geneva, the cost of living is higher than in New York where the United Nations has its headquarters.

He argues that the conditions that 11.3(c) sets are met: in applying the term "headquarters" to its staff the Interim Commission must, he says, take it to mean United Nations headquarters in New York. In his submission it is only fair to put him on a par with General Service staff of the United Nations in Geneva, who might get their award adjusted. Equity requires, too, that all such staff should, whatever their duty station, get financially equivalent compensation for loss of function by adjustment of the award if need be.

The Interim Commission demurs: 11.3(c) must, it says, apply *mutatis mutandis* to its own staff, so the word "headquarters" means Geneva, not New York. In its view the rule cannot apply if the duty station is headquarters, as indeed it is for all its own staff. Besides - it goes on - the Director-General has discretion in the matter and did not abuse it by declining to act under 11.3(c).

5. (a) The Executive Secretary of the Interim Commission reported on the Executive Committee's Second Session (13 July 1948). The report said that the Executive Secretary had agreed that the United Nations Staff Rules should apply so far as possible to the secretariat of the Interim Commission.

In a paper dated 29 September 1970 the Director-General said that at least since 1958 he had been applying the Staff Regulations and Rules of the United Nations and seeking the contracting parties' approval of any departure therefrom. The chairman of the staff council had pointed that out - said the paper - and asked the Director-General to confirm that those Regulations and Rules still applied. No difficulties having arisen, the Director-General recommended no change. On 18 December 1970 the Council endorsed his recommendation .

The secretariat has been wont to apply the Staff Regulations and Rules of the United Nations insofar as they met its needs. The Director-General has also been proposing that the Interim Commission disregard any amendment made by the United Nations if it was at odds with the interests of ICITO staff or meant heavy extra costs.

The Joint Appeals Board went into the whole issue and in its report to the Director-General held that -

"all provisions of the Staff Regulations and Rules of the United Nations apply in full, *mutatis mutandis*, to ICITO staff save where the Director-General has told the Contracting Parties of any amendment in applying them."

All that is common ground. Both parties agree that the Staff Rules apply *mutatis mutandis* to the staff of the Interim Commission. But they differ as to whether in this case the text should be adapted by taking "headquarters" to mean, not New York, but Geneva. The complainant says that it should not, the Commission that it should.

The contract that the complainant concluded with the Commission in 1965 is plain enough: it is subject to the United Nations Staff Regulations and Rules as applied to staff of the Interim Commission.

(b) Does 11.3(c) apply to General Service staff employed at the Interim Commission's headquarters?

Taken quite literally, it may, since taking account of differences in pay rates is not a condition of application but a rule that the Director-General must abide by in applying it. But such a reading would offend against the intent of the text: the term "adjustment", particularly as used in the context of pay rates, obviously means the post adjustment that is calculated to make for equal purchasing power in the pay of staff at different duty stations. Any other reading of the term would mean little since it would not fit into any other context. So the rule applies only where the staff member is not stationed at headquarters and where there is a difference in the purchasing power of pay between the duty station and headquarters. It cannot therefore apply to anyone employed at "headquarters", and the material issue is whether in this case the term means New York or Geneva.

(c) It appears from the foregoing that the Director-General has discretion to determine which provisions, if any, of the Staff Regulations and Rules to adapt; only for derogation does he have to get the contracting parties' approval.

Where the Director-General exercises his discretion only in applying 11.3(c) to a particular case the staff member cannot tell what the outcome will be. Yet that is just what was intended, and he cannot tell how the Director-General will apply any other rule either that calls for interpretation.

Where the United Nations Staff Rules refer to "headquarters", does that mean, so far as they are to apply to the staff of the Interim Commission, the Commission's headquarters? More is at stake for staff in the General Service category because their pay is adjusted, not by means of the post-adjustment allowance to the cost of living at the duty station, but according to the state of the local employment market. So it stands to reason to take as the point of comparison the place where the Commission has its headquarters, and which is in this case also the duty station.

The conclusion is that the Director-General did not act *ultra vires* or abuse his discretion in taking "headquarters" to mean Geneva. It is immaterial that in so doing he robbed the rule of any purpose: all the Commission's staff are at headquarters and the rule serves no purpose for United Nations staff in New York either.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Julio Barberis

Jean-François Egli

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 19 October 2004.