

FORTY-SEVENTH ORDINARY SESSION

In re LAKEY

Judgment No. 475

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Intergovernmental Council of Copper Exporting Countries (CIPEC) by Miss Julienne Myrna Lakey on 14 August 1980, the organisation's reply of 23 September, the complainant's rejoinder of 20 November, the organisation's surrejoinder of 29 December 1980, the complainant's additional observations of 26 February 1981 and the organisation's observations thereon of 20 March 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Chapter X of the Staff Regulations of the organisation;

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 organisation on 28 June 1977 as a bilingual (English-French) secretary. When she received a telegram from her mother in Zambia she suddenly left for Zambia on 15 April 1980 to motor to Zimbabwe, where her grandmother had died. She had a friend inform the organisation orally the next day. During her stay in Zimbabwe she fell ill and on 9 May sent a telex to the organisation to say that she was sending a medical certificate. On 19 May the organisation sent her a registered letter informing her that she had been dismissed under Regulation 10.1 b) of the Staff Regulations on the grounds of unjustified absence, with effect from 5 May 1980. She did not collect the letter. On 21 May she returned to Paris and reported for work the following day. The organisation states that a copy of the registered letter was handed over to her on 23 May, but she says that she did not get it before 27 May.

B. In her complaint she impugns the decision notified by the registered letter of 19 May 1980. She contends that the decision is ill-founded because her absence was justified by a death in her family and then by her own illness, which kept her in Zimbabwe and which was duly certified. She is surprised to find that, if the decision was indeed taken on 5 May, it was not notified to her until 19 May, at which date she was on sick leave, and also that she was not sent a copy of the letter of 19 May until 27 May, when she had reported for work as early as 22 May. In her claims for relief she asks the Tribunal to declare that the dismissal was unjustified and that she should be reinstated in her post as a bilingual secretary, without loss of seniority and with due regard to recent adjustments in the cost of living, plus compensation for the loss of earnings suffered since 5 May 1980. Subsidiarily, should she not be reinstated, she claims compensation for unjustified dismissal, to be determined on the basis of the earnings which she has lost between 5 May and the date of the Tribunal's decision and with due regard to the wrong she has suffered and recent cost-of-living increases in salaries in the organisation.

C. In its reply the organisation points out that the complainant was absent from work for 37 consecutive days without any valid reason. The illness referred to by the complainant occurred after 5 May 1980, the date on which the decision was taken to dismiss her on the grounds of absence without justification. The reason why the decision was not notified to her until 19 May was that the Secretary General was absent until that date and the letter could not be signed until he came back to Paris. The organisation questions the complainant's explanations, which it finds unconvincing or inadequate, and objects that the date of the medical certificate has clearly been tampered with. It accordingly contends that the decision was taken in full accordance with Regulation 10.1 b) and that the complainant's claims should be dismissed in their entirety.

D. In her rejoinder the complainant maintains that her absence was in fact justified. She provides written evidence by Mr. Claude Labbé in which he states that the day after the complainant's departure, 16 April 1980, he went to see the Chief of Personnel and explained to him personally, and to other members of the staff whom he knew

personally, the reasons for Miss Lakey's sudden departure, and showed them the telegram which she had received. On her return she gave explanations to the Chairman of the Executive Committee in a letter dated 30 May 1980. The final period of her absence was due to a serious illness which is attested to in a medical certificate. She had very serious difficulties in communicating with Paris; yet, several days before the letter of dismissal was despatched, she put through a telephone call to the organisation on 7 May and sent a telex on 9 May informing it of the circumstances of her illness. On the eve of her departure she also telephoned another colleague to inform her. She explains that she went to Zambia so that she could motor to Zimbabwe, where her grandmother had died. She returned to Paris one week after the expiry of the medical certificate because of an outbreak of cholera in Zambia and she had to wait until there was enough vaccine for her to be vaccinated, on 20 May. The date of the medical certificate was not tampered with but altered by the doctor himself because he had made a mistake. In accordance with Regulation 10.1 her immediate supervisors ought to have been consulted before the decision was taken to dismiss her. In any case she seriously doubts whether the decision was taken on 5 May. She maintains that in fact she was dismissed because she had complained about being discriminated against, a bilingual secretary who had been appointed after her having been given a much higher salary. She invites the Tribunal to quash the decision and to order the defendant organisation to pay her 13,665.69 French francs, or three months' salary, as compensation in lieu of notice of dismissal, 200,000 French francs as compensation for loss of salary between 5 May 1980 and the date of the Tribunal's judgment, account being taken of salary adjustments and wrongs she has sustained by reason of the wrongful termination of her appointment, 48,000 French francs in respect of retroactive alignment of her remuneration with that of her colleague who is performing equal work, and 4,000 French francs in costs, making a total of 265,665.69 French francs.

E. In its surrejoinder the defendant organisation points out that the complainant does not deny the fact that she took it on herself to be absent without leave. That fact alone warrants the imposition of a disciplinary sanction, and the severity of that sanction is a matter in the discretion of the Secretary General. In imposing the sanction the Secretary General took account of the complainant's poor record of punctuality, which on two occasions had prompted express reprimands. Mr. Labbé did not give the secretariat the telegram, let alone the complainant's written explanation. The Chief of Personnel never said that he accepted the *fait accompli* in which the complainant put the organisation. She ought to have sent an explanation either to the Secretary General or to the Chief of Personnel, not to third parties, whether they were members of the staff or not. As regards the complainant's illness, which occurred twenty days after her unwarranted departure, the organisation observes that the certificate expired on 15 May at the latest and that the complainant had already made preparations for arriving no earlier than 20 May. Contrary to what she maintains, the Secretary General did consult her supervisors. She has greatly altered her claims for relief in her rejoinder. The period of notice of dismissal is one month, not three, and the other claims for relief should also be dismissed since they have no bearing on the complainant's contract of appointment. The organisation categorically rejects the complainant's submissions, including the written evidence by Mr. Labbé, which has not been filed in accordance with the Rules of Court of the Tribunal, and it invites the Tribunal to order the complainant to produce a copy of the visas in her passport, her airline tickets and attestations of the dates on which those tickets were purchased, the date and method of payment of the tickets, including the ticket for the return air journey from Zimbabwe to Zambia, and lastly all official documents required by legislation in Zimbabwe concerning the death of the complainant's grandmother.

F. In a further memorandum the complainant explains that in order to obtain a new passport from the State of Zimbabwe she had to surrender to the authorities of that country her British passport, which expired on 27 June 1980. She cannot provide a copy of that passport. She maintains, however, that she clearly did go to Zambia: that is borne out by the date of the cholera vaccination recorded on her international vaccination certificate. Nor can she produce her airline tickets, since she disposed of them on her return to Paris. She gives, from memory, details of her itinerary. Her tickets were paid for by a relative living in London. She left from London because there is only one flight a week from Paris to Lusaka. She appends a copy of the letter she sent to Zimbabwe on 16 February 1981 asking for an official certificate of her grandmother's death. She explains that the village where her grandmother was buried is in an area where disturbances have been reported. She has not yet received any reply to her letter, and the inquiries her father has made in Zimbabwe have proved of no avail.

G. In its observations on the complainant's further memorandum the defendant organisation observes that she has produced no evidence of the dates of her arrival in or departure from Zambia or of her visit to Zimbabwe. She has produced no irrefutable evidence of having taken flights to or from those countries, or of her illness, or of the other facts on which she bases her claims, and only belatedly - on 16 February 1981 - did she take the trouble of seeking to obtain a certificate of her grandmother's death.

CONSIDERATIONS:

The receivability of the claims for relief

1. In her original memorandum the complainant claims, principally, reinstatement and compensation for loss of earnings since 5 May 1980. Alternatively, should reinstatement be refused, she claims compensation for unfair dismissal, the amount to be based on earnings lost from 5 May 1980 up to the date of the Tribunal's decision.

In her rejoinder she claims: 13,665.69 French francs "in compensation for [her] notice period"; 200,000 francs in compensation for loss of earnings from 5 May 1980 up to the date of the Tribunal's decision; 48,000 francs representing the difference between her remuneration and that of one of her fellow-employees; and 4,000 francs in costs; or a total of 265,665.69 French francs.

In so far as the claims in the rejoinder are based on loss of earnings, they come within the scope of those in the original complaint and are therefore receivable. The claim to payment of the difference between her own remuneration and that of another staff member is new and therefore irreceivable. Under an exception to the rule her claim for costs is receivable, though new, since the Tribunal awards costs proprio motu.

The nature of the impugned decision

2. The impugned decision is based on Regulations 10.1 b) and 10.2 d). Under the former "absence without justification" is an offence which is subject to disciplinary sanctions. The disciplinary sanctions set out in the latter include "dismissal without loss of entitlement to the Provident Fund".

Both provisions contain imprecise terms, and so in applying them there is discretion to choose between several interpretations which they will bear. Being based on these provisions, the impugned decision was therefore taken by the Secretary General in the exercise of his discretionary authority. The Tribunal will therefore quash it only if it was taken without authority or in breach of a rule of form or procedure, or if it was based on a mistake of fact or of law, or if it left essential facts out of account, or if it was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

The Tribunal will consider whether the impugned decision was tainted with any flaw which falls within the scope of review by the Tribunal.

The validity of the impugned decision

3. According to Regulation 10.1 and the second paragraph of Regulation 10.2 a disciplinary sanction is imposed by the Executive Director. It is true that the impugned decision was signed by the Secretary General and not by the Executive Director, but the Secretary General clearly acted in this case as Executive Director and accordingly within the limits of his authority.

4. According to Regulation 10.1 disciplinary sanctions are imposed on the proposal of or after consultation with a head of division. The complainant objects that the Secretary General did not seek the advice of two heads of division for whom she was working and whom she considers to have been her immediate supervisors.

It is immaterial whether those officials were consulted or not. In any event it is clear on the evidence that the Secretary General acted in agreement with the head of Personnel who, bearing the title of chief administrator, acts as head of division. Thus the Secretary General's decision was not in breach of Regulation 10.1, which requires a proposal or opinion from one head of division, not several.

5. The impugned decision is to be found in a letter addressed to the complainant on 19 May 1980, which reads: "Since 16 April 1980 we have received no justification of your extended absence. I am sorry to inform you that, in accordance with Regulation 10.1 b) of Chapter X of the Staff Regulations, we are terminating the employment contract signed on 28 June 1977. The termination takes effect on 5 May 1980." Since the stated grounds for dismissal were brief, the Tribunal will seek in the parties' submissions a more detailed statement of the reasons for the decision. On the evidence it cannot attribute any error of fact to the Secretary General.

First, inasmuch as the parties are relying on more or less the same facts, the complainant cannot properly object that the organisation committed any error of fact.

Secondly, although the versions given by the parties differ on some points, such as the notification of the letter of 19 May 1980 and the significance of the written warnings addressed to the complainant on 13 October 1977 and 17 January 1980, these differences are immaterial to the Tribunal's decision and therefore need not be resolved.

6. The first paragraph of Regulation 10.2 prescribes four kinds of disciplinary sanction: (a) verbal reprimand; (b) written reprimand; (c) dismissal with notice or with immediate payment of the salary which would have been due to the member during the period of notice; and (d) dismissal without loss of entitlement to the Provident Fund. In this case the Secretary General imposed the last and thereby made a choice afforded by the Regulation. He committed no error of law.

7. It is clear from the evidence that the organisation thoroughly reviewed all the facts material to its decision. It therefore did not overlook any essential facts.

8. The complainant contends that she was dismissed not because of absence without justification but because she had complained about a difference between her own salary and that of one of her colleagues. The implication is that the organisation acted on improper grounds, i.e. misused its authority.

This plea fails. Not only is her allegation of discrimination not established, but it is scarcely likely in an organisation with several member countries and citizens of several different countries on its staff.

9. It does not appear on the evidence that the Secretary General drew clearly mistaken conclusions from the facts. In any event the complainant was in double breach of her obligations.

First, on the evening of 15 April 1980 she left for London and Zambia without herself informing the Chief of Personnel that she would be absent for an indefinite period. She merely sent an apology through a friend and, so she alleges, telephoned another staff member. She could have written to the organisation, if not on 15 April, then at least the next day, from London, or else from Zambia, from which she herself maintains that a letter would have reached Paris in at most ten days. Her attitude does not show the degree of scrupulousness normally to be expected from a conscientious official.

Moreover, she protracted her stay in Zambia or in Zimbabwe beyond reasonable limits. On the evidence she arrived in Zimbabwe on 17 April, where she states that her grandmother had died on 14 April. It is immaterial whether that statement, which has not been proved, is true. Any funeral must have begun not later than 17 April and, even if it had not ended by the last days of April, the complainant had time by that date to pay her last respects. Since she did not have formal leave of absence, she ought to have returned to Paris in any event at the beginning of May. In fact she did not arrive in Paris until 21 May.

The Secretary General was therefore right to terminate her appointment on 19 May with effect from 5 May. It is true that, instead of simply dismissing her under Regulation 10.2 d), he could have imposed a less severe sanction, such as the one prescribed in c): dismissal with notice or with immediate payment of the salary due during the period of notice. Considering the complainant's behaviour, however, he did not exceed the limits of his discretion in applying the most severe sanction.

Since the decision is justified by what happened before 5 May, the Tribunal need not consider whether the complainant was really prevented by illness or by an epidemic of cholera from returning to Paris after 9 May.

The Tribunal's decision

10. It appears from the foregoing that the impugned decision is not tainted with any flaw which entitles the Tribunal to set it aside and that the complaint should therefore be dismissed.

The complaint being dismissed, the complainant is not entitled to any of her costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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