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

SEVENTY-FIRST SESSION

In re DURAND

Judgment 1111

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Nadine Durand against the International Criminal Police Organization (Interpol) on 7 August 1990 and corrected on 7 September 1990 and Interpol's reply of 11 December 1990;

Considering Article II of the Statute of the Tribunal, Articles 23 and 30 of the Staff Regulations and Articles 52, 61, 121, 153 and 154 and Articles 1, 2 and 4 of Section 2 of Appendix VII of the Interpol Staff Rules;

Having examined the written evidence and decided not to order oral proceedings, 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 French citizen, joined Interpol in August 1987 as a secretary at grade C8. She then signed an oath of loyalty agreeing to her transfer if the Organization moved its headquarters and she acknowledged having been informed of the move to Lyons then planned for 1988. By an individual decision of 18 January 1989 Interpol gave her notice of transfer to Lyons on 1 June 1989 under Article 1 of Section 2 of Appendix VII of the Staff Rules. By a letter of 23 March 1989 she tendered her resignation. The Secretary General accepted it in a decision of 21 April and confirmed that her period of notice would end on 31 May.

By a decision of 31 May 1989 he informed her that she had an acquired right to have her duty station at Saint-Cloud and that the termination indemnity she was therefore entitled to under the rules came to 3,347 French francs but that he would be recommending to the Executive Committee an increase in the amount of such indemnities. She was at the same time sent a cheque for the amount already due.

By a decision of 16 June 1989 the Secretary General made her what he called a "final payment" but told her in point 2 that the amount discounted the indemnity, which had formed the subject of a separate decision. By a decision of 14 August 1989, however, he reversed his decision of 31 May and told her to pay back the 3,347 francs and disregard point 2 of his decision of 16 June.

On 23 September 1989 she made a request for review under Article 121 of the Staff Rules and the Secretary General referred it to the Joint Appeals Committee. In a report of 15 March 1990 the Committee recommended allowing it. In the opinion of the majority the decision of 31 May 1989 was based on a mistake of law, but that was not the sort of error the Secretary General was empowered to put right under Article 154 of the Staff Rules, which allowed him to correct only a "material error". The dissenting opinion, though also in the complainant's favour, was that the decision could not be reversed after expiry of the time limit for appeal.

By a decision of 17 April 1990, which she impugns, the Secretary General rejected her request for review.

B. The complainant submits that she ought not to suffer for any mistake of Interpol's. She acted in good faith all along and even pointed out orally to the Personnel Department the mistaken reference in the decision of 31 May 1989 to her acquired right to her duty station: the answer was that it was just a computer error and she should pay no heed. Besides, the Organization's treatment of her, which she describes, gave her reason to believe that she would be put on a par with others who did have a right to the termination indemnity. For example, her supervisors' letting her take time off every day to look for other employment during the period of notice implied willingness to grant her a benefit she did not strictly qualify for.

She cites the Joint Appeals Committee's reasoning in support of her claim.

She invites the Tribunal to set aside the decision of 14 August 1989; order Interpol to strike the reference to her acquired right from the text of its decision of 31 May 1989 and to stop harassing her; declare that she qualifies under Article 4 of Section 2 of Appendix VII for a 50 per cent increase in the amount of her terminal entitlement; and award her 5,000 French francs in moral damages and the same amount in costs.

C. In its reply Interpol pleads that the impugned decision is sound and the complainant's claims are devoid of merit. She acknowledges having no acquired right to her duty station and even asks the Tribunal to strike the mistaken mention of it from the decision of 31 May 1989. So she was not entitled to any terminal indemnity, as the decision of 18 January 1989 made plain. Her claim to an increase in the indemnity did not form part of her internal appeal and is therefore irreceivable. Besides, it is unfounded since the increase is due only to officials terminated under Article 2 of Section 2 of Appendix VII "who have an acquired right with regard to the location of their duty station".

That her supervisors may have misunderstood the rules implied no intention of putting her on a par with officials entitled to the indemnity.

Article 154 of the Staff Rules empowers the Secretary General to correct any obvious material error at any time. Had the Joint Appeals Committee known how the decision of 31 May 1989 had come about it would not have treated the mistake as one of law. There was no misunderstanding of the legal distinction between categories of officials; it was just a typing error.

The complainant's claim to an award of moral damages is irreceivable because she did not make it in her request for review. In any event telling her to pay back money that she was not entitled to caused her no moral injury.

CONSIDERATIONS:

1. The complainant joined Interpol on 17 August 1987 as a secretary in the accounts unit. On 18 January 1989 Interpol gave her notice of transfer to its new headquarters at Lyons on 1 June 1989. In a letter of 23 March 1989 she answered that she did not want to go and by a decision of 21 April the Secretary General took note of her resignation and said that the period of notice would end on 31 May.

By a decision of 31 May he told her that she had an acquired right to her duty station at Saint-Cloud and entitlement to payment of termination indemnity and that the sum came to 3,347 French francs. On 16 June she received "final payment" but was told that it discounted the amount of the indemnity. By a decision of 14 August the Secretary General reversed his decision of 31 May and told her to return the sum, which had been mistakenly paid to her.

On 23 September she made a request for review and it was referred to the Joint Appeals Committee. In its report of 15 March 1990 the Committee recommended allowing her request, but by a decision of 17 April 1990, the one impugned, the Secretary General confirmed his decision of 14 August 1989.

2. The only material issue is whether it was lawful for the Organization to order repayment under Article 30 of the Staff Regulations and Article 52 of the Staff Rules. The complainant herself admits to having no acquired right to her duty station and so no right to the indemnity, and the Secretary General's decision to claim the sum back from her is a discretionary one. In deciding whether to demand full or part repayment he takes account of such factors as the staff member's good or bad faith, the sort of mistake that has been made, the Organization's own and the staff member's negligence and the inconvenience which the demand, made necessary by the Organization's own oversight, will put the staff member to. So the Tribunal will exercise only a limited power of review over the decision and will interfere only if there are particular flaws such as a formal or procedural irregularity or a mistake of fact or of law.

3. The nub of the complainant's case is that the Joint Appeals Committee found in her favour and recommended setting aside the decision to cancel her indemnity.

Insofar as she is objecting to the refusal to act on the Committee's recommendation she is mistaken: according to Article 153 of the Staff Rules the Secretary General shall merely " take into account" the Committee's recommendation and "shall not be bound by it". But in fact she is just citing what the Committee said about how to construe the Staff Rules, and presumably her intention is to take over its arguments as pleas in support of her complaint.

The Committee's objections turned on the application of Article 154 of the Staff Rules, which is about the correction of errors. It reads:

"The Secretary General may, at any moment, correct any error in respect of an addressee or a calculation or any other obvious material error which may have occurred in a decision on an individual case. ..."

The Committee held that what the Secretary General had done, and wittingly, was to apply Article 2 of Section 2 of Appendix VII to the Staff Rules ("Officials of the Organization who have an acquired right with regard to the location of their duty station") instead of Article 1 ("Officials of the Organization who have no acquired right with regard to the location of their duty station") and that that was not a material error but a mistake of law. The Committee added that even if there was a material error it was not an "obvious" one since only a reading of the Staff Regulations could explain what the "termination indemnity" was and revealed that "termination" meant something different from what had happened in the complainant's case.

4. The Organization's answer is that it did make a material error. The text of the decision was, it says, drawn up by a stand-in typist taken on in July 1988 who was not aware of the distinction between someone with an acquired right to the duty station at Saint-Cloud and someone with no such right. All the typist did was to make out a standard text based on a routine form drawn up beforehand.

The argument fails. Whatever form the decision of 31 May 1989 may have taken it bore the Secretary General's signature and it was up to him to check the language and contents. Besides, it is immaterial how the text came to be typed up since the same error cropped up in the decision of 16 June 1989 about final settlement of the complainant's entitlements and that decision was in another form altogether.

5. Yet the Committee's view cannot be sustained either.

Its argument was that the mistake was one of law and consisted in deliberately paying the complainant a termination indemnity which, since she had resigned, she was not entitled to under the material provisions of the Staff Regulations and Staff Rules.

That argument is unsound.

In his letter of 18 January 1989 offering the complainant transfer the Secretary General pointed out that she had known from the terms of her oath of loyalty that Interpol was to move to Lyons and that Article 1 of Section 2 of Appendix VII and Article 23(1)(b) of the Staff Regulations would apply to her. He added:

"If you do not take up the offer of transfer to the post in Lyons you will have your appointment terminated ... under Article 36(3)(a) of the Staff Regulations and will thereby forfeit entitlement to termination indemnity under 38(g)".

That letter makes plain the Secretary General's full awareness of the complainant's legal position and of the material rules. The decision of 31 May 1989, taken at the end of the period of notice, was at odds with the one of 18 January in that, with no evident explanation, it allowed her entitlements she had earlier been denied. But the very inconsistency between the two decisions shows that the later one, which had no basis in law, was a mistake.

What is more, it was clearly a material error. As the complainant herself observes, she noticed the inaccurate reference in the decision of 31 May to an acquired right to her duty station at Saint-Cloud, she pointed it out to the Personnel Department, and the Department answered that it was just a computer error. So, contrary to what the Committee held, Interpol did make an "obvious material error" and there was nothing wrong with the Secretary General's correcting it under Article 154 of the Staff Rules.

6. Since the decision of 31 May 1989 was materially wrong Interpol was entitled under Article 30 of the Staff Regulations to claim payment back from her.

7. The complainant objects and makes out that the sum it has claimed back was paid in consideration for what she did towards the end of her appointment and in fulfilment of a promise by the head of the Administrative Division, that the staff of the accounts unit would be rewarded for their extra work before the move to Lyons. Interpol's answer is that there was no such promise.

There is not a shred of evidence to bear out the allegation of a promise.

8. Citing the case of another former colleague, Mrs. Michel, the complainant further alleges discriminatory treatment.

As the Organization contends, the plea is mistaken. Unlike the complainant Mrs. Michel did have an acquired right to her duty station and was therefore entitled to the termination indemnity and also to the additional indemnity paid under Article 61(5) of the Staff Rules. Since the complainant was not in the same position in fact and in law she was not discriminated against.

Nor may she properly rely on the case of Mr. Vermot, who, though mistakenly paid the indemnity, was not required to return it. The Organization explains that that was because it made him a mistaken offer of early retirement which induced him not to go to Lyons and so cost him his job. It refrained from claiming back the sum paid to him because it wanted to make good the injury its mistaken offer had caused him. So his position is not the same as the complainant's either.

9. The conclusion is that the decision of 14 August 1989 shows no fatal flaw and the complainant's claims to redress must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

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