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

EIGHTY-THIRD SESSION

In re Meyers

Judgment 1669

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guy Armand Yves Paul Mutien Marie Meyers against the Customs Cooperation Council (CCC) on 22 April 1996 and corrected on 22 May, the CCC's reply of 11 August, the complainant's rejoinder of 11 September, the Council's surrejoinder of 21 October 1996 and its further observations of 4 April 1997;

Considering Article II, paragraphs 5 and 7, 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, a Belgian who was born in 1931, is a former employee of the CCC, which he joined in 1972.

His health seems to have gone into decline after an operation for a slipped disc in 1993. He suffered temporary paralysis in 1994 and is still suffering after-effects. After three months off work in early 1993 he resumed duty half time in April and full time in May. After further sick leave starting on 24 January 1994 he went back to work in July but had to stop again on 8 August 1994. He got full pay until 28 February 1995.

The Council's insurance companies are Assurance Générale de France (AGF) and VITA, which are represented by a firm of brokers, Van Breda. At the insurers' insistence the complainant underwent examination by their doctor, who declared him wholly unfit for work. That finding entitled him to the grant of a permanent invalidity benefit equal to half pay as from 1 March 1995. By a letter of 31 March the head of the Council's administrative services told the complainant of his entitlements: an invalidity pension to be paid by the insurance companies, equal to half his pay from 1 March 1995; a terminal allowance reckoned up to 28 February 1995; and payment for the balance of annual and special paid leave. That letter did not reach him until 26 April.

On 9 May 1995 his counsel lodged a "complaint" on his behalf under Staff Regulation 26. In its report of 12 January 1996 the Appeals Board recommended allowing his claim to payment of a lump sum equal to three years' salary. But it held that "the main and indeed sole issue of the appeal turned on a dispute between appellant and insurance company" and that his other claims were devoid of merit.

By a letter of 19 January 1996 - the impugned decision - the Secretary General informed the complainant of his final decision. He noted that the Appeals Board agreed with him that the "claim to payment of a lump sum equal to three years' salary fell outside the Secretariat's competence" and he rejected the other claims as devoid of merit.

B. The complainant has two pleas.

The first is breach of Staff Rule 18.1(a) and (c)(i) in that his permanent total incapacity was overlooked. The Council refused to pay him the lump sum equal to three years' salary provided for in 18.1(c)(i); yet he can no longer carry on any normal sort of day-to-day life.

His second plea is breach of Staff Rules 14.1, 18.1(c), 18.4 and 18.10(a). The defendant overlooks the fact that at his age he was near the end of his career and so about to qualify for the benefits provided in Rules 14.1,

18.4 and 18.10(a). Since he was made to leave early he was entitled to compensation equal to the terminal allowance provided for in 18.4; to an indemnity for loss of employment equal to one month's pay for each year of service because the Council unilaterally ended his appointment; and to the "double pay" he would have got for his last three months' service had he been able, as he wanted, to finish his career.

He asks the Tribunal to quash the decision of 19 January 1996 and to order the Council to pay him a lump sum equal to three years' salary under the insurance policy; an indemnity for loss of employment equal to one month's pay for each year of service, or a total of 23 months; compensation equal to the terminal allowance he has lost because he was terminated early; the "double pay" he would have got for his last three months of service had he worked until the age of 65; and costs.

C. In answer to his first plea the Council submits that the rules that the complainant cites are quite general provisions and that it is the actual terms of the insurance policy that determine just what staff are entitled to. He does not qualify under clause 16 of the policy to a lump sum equivalent to three years' salary. So say the insurance companies; and the dispute, if dispute there be, is therefore between him and the companies, the Council being only a third party. On that score his complaint is misconceived: it is irreceivable because the Tribunal lacks jurisdiction.

The Council's answer to his second plea is that the reason why his appointment ended was "not his reaching the age of retirement" but his permanent incapacity. "So there was no breach of Rule 14.1"[(1)]: it is immaterial. *A fortiori* he is not entitled to compensation in lieu of notice of termination on grounds of his reaching the age of retirement.

Contrary to what he maintains, he was not "made to leave"; his appointment ended because of his permanent incapacity. He therefore has no claim to "compensation equal to a terminal allowance". Entitlement to that allowance lapsed after 28 February 1995, when he left the Council's employ.

Lastly, he is not entitled to an indemnity for loss of employment since he was not terminated on any of the grounds set out in Rule 18.10(a).

D. In his rejoinder the complainant submits that the contract between the Council and Van Breda is a "contract to confer benefit on a third party", namely himself. So the Council cannot be a third party to the dispute between him and the insurance companies.

He submits that "the terms 'incapacity' and 'invalidity' are synonyms of disability" and maintains that the Council did act in breach of Rule 18.1(c)(i).

He contends that under Rule 12 the Secretary General may terminate an appointment only after referral to an advisory body. There was breach of due process. Moreover, in reckoning the amount of the complainant's terminal allowance the period of notice of termination was not, as Rule 12.1 requires, taken into account.

Lastly, he is entitled to an indemnity for loss of employment because his post was abolished.

He seeks payment of interest at the rate of 8 per cent a year on all amounts due as from 1 March 1995.

E. In its surrejoinder the Council concedes that "incapacity" and "invalidity" are synonyms. But in its view that is not the point: although the complainant meets the first condition ("permanent incapacity assessed at two thirds or more"), he does not fulfil the second ("permanent total incapacity"). Rule 12 does not mean what he says and is in any case immaterial.

The notion of a "contract to confer benefit on a third party" is immaterial.

Lastly, his post was not abolished.

CONSIDERATIONS

1. The complainant, a Belgian who was born on 4 July 1931, joined the staff of the Customs Cooperation Council on 16 January 1972. When he left he held a grade B3 post in charge of supplies and his main duties were clerical.

In 1993 and again in 1994 he underwent surgery for a slipped disc. He spent time in hospital because of temporary paralysis of the left side. He suffered afterwards from speech impediments, loss of concentration, despondency and partial deafness in both ears.

Though sometimes on sick leave, he went on working until 8 August 1994. He was on full pay until 28 February 1995. Two companies, AGF and VITA, insured the Council's staff under a group policy. They appointed Dr. Vanderijst to examine him. The doctor's report of 28 February 1995 declared him to be suffering from total permanent occupational invalidity and from 50 per cent permanent functional invalidity. Neither the insurers nor the Council nor the complainant nor his own doctor challenged those findings.

In a letter of 31 March 1995, which he did not get until 26 April, the Council told him that he would be paid:

(a) a permanent invalidity pension equal to half of his salary, to be paid by the insurers as from 1 March 1995;

(b) a terminal allowance reckoned up to 28 February 1995;

(c) compensation for the balance of annual and special paid leave.

Appended to the letter were a breakdown of the terminal allowance, including the balance of leave, taking 28 February 1995 as the date of termination, or 8,542,730 Belgian francs, and a breakdown of the balance of leave, which accounted for 175,857 francs.

2. The complainant's counsel claimed over and above those amounts:

1.a lump-sum indemnity, equal to three years' pay, for permanent total invalidity, under Rule 18.1(c)(i);

2.an indemnity for loss of employment, equal to twenty-four months' pay later reduced to twenty-three months, corresponding to twenty-four years (or rather twenty-three) of service, under Rule 18.10(a), on the grounds that the organisation had terminated his appointment;

3. a terminal allowance equal to what he would have been paid had he left at the age of sixty-five, under Rule 18.4;

4. an indemnity equal to the three months' additional pay he would have got had he left at the age of sixty-five.

The Appeals Board held his first claim to be sound, but said it was a matter for the insurers. It held his other claims to be devoid of merit.

The Secretary General rejected his appeal by a decision of 19 January 1996 on the following grounds:

1. His claim under Rule 18.1 was of concern only to the insurers, not to the Council. Subsidiarily, the conditions set in the insurance policy were not met: his invalidity was not total within the meaning of that policy, his functional invalidity being only 50 per cent.

2. He did not qualify for the other sums he was claiming.

That is the decision he impugns.

3. In his complaint Mr. Meyers presses the same claims and pleas as before. In his rejoinder he adds that he ought to have been given notice of termination, that he should get full pay for the period of notice and that it should be taken into account in reckoning his terminal allowance.

The Council again replies that it may not entertain his claim to a further indemnity for total invalidity, that being a matter of concern only to the insurers. In its submission the insurance policy prescribes the payment of such indemnity only to a staff member who is suffering from total functional invalidity. The complainant is not. Nor is he entitled to an indemnity for loss of employment: his appointment was terminated on other

grounds, namely invalidity, and besides, his post was not abolished. He may not claim payment of the terminal allowance due up to the age of sixty-five: the rules obviously preclude that. Nor is he entitled to the three months' double salary: it is due only when the staff member retires at sixty-five. As for his plea that the Council failed to give him notice, it argues that the rules he cites are immaterial. Like death, permanent total invalidity is a "fact" that frustrates fulfilment of the appointment; so there was no need for the Secretary General to terminate his appointment. Nor would there have been any point in giving him notice since he had no need of time to look for alternative employment.

***The claim to an additional indemnity for total invalidity*4.Rule 18.1, which is about insurance, reads:**

"(a) Officials ... are entitled to certain benefits as described in general terms in the following paragraphs under insurance contracts entered into by the Council. Details of these contracts are set out in the Secretary General's Staff Instructions. This Rule does not confer any benefits beyond those provided by the contracts concerned.

...

(c) Permanent incapacity

(i). Resulting from natural causes. In the event of permanent incapacity assessed at two-thirds or more, a pension equal to half emoluments will be paid up to the age of sixty-five. ... In the event of permanent total incapacity, a lump sum equal to three years' emoluments will be paid in addition to the pension."

The Organization took out a group insurance policy for its staff with the insurance companies represented by Van Breda. Clause 16 of the policy says:

"If an insured person suffers from total and permanent invalidity attributable to illness and is on that account unable to carry on any kind of occupational activity and is reliant on another person for assistance in carrying on normal day-to-day life, the insurers shall make him in advance the lump-sum payment that according to clause 12 is guaranteed in the event of death.

Any declaration of invalidity shall be addressed to the insurers and accompanied by a certificate from the insured person's own doctor giving full particulars."

Clause 19 says in the first paragraph:

"The degree of permanent incapacity of the insured person shall be ... determined by agreement between his own doctor and the doctor named by the insurers or, in the event of disagreement, by a third doctor freely chosen by the parties or, failing that, appointed on the nomination of whichever of the parties acts first."

5. The nub of the complainant's first plea is that Rule 18 directly conferred on him rights that the Council was bound to observe by securing adequate coverage from the insurers or, failing that, itself providing such coverage.

The plea does not fit the wording of Rule 18.1. According to that provision no benefits are conferred "beyond those provided" by the insurance policy. Although the Council has, arguably, itself the duty of insuring its staff, any such duty would be confined to the contingencies insured against since the text of 18.1 allows the Council much discretion in determining those contingencies.

Here the Council did not misuse its authority by concluding with the insurers the policy on insurance against permanent total invalidity. True, the definition of such invalidity in the policy is more detailed and seemingly narrower than the one in the Rules. But there is an objective reason for the narrowing of the definition. Someone who is suffering from occupational invalidity will be much worse off if he is also suffering from total functional invalidity that makes him dependent on others in day-to-day life. So additional compensation is only reasonable.

6. The complainant is asking the Council to get the insurers to abide by the terms of the policy. The Council's answer is that it may not do so, the insurers themselves being liable.

It is not clear from the text of the policy whether it is up to the Council, to the insured person or to both of them to put a claim to the insurers when the contingency occurs. Clause 1 of the policy says that it is subject to French law, namely the Insurance Contract Act of 13 July 1930, although there is an arbitration clause in 11(a) which says, in the third paragraph, that the arbitrator shall apply Belgian law or Belgian rules of

international private law. Under the French Act -- subject to special rules on life insurance in sections 56 to 83 -- an insurance policy may, according to sections 6 and 9, be concluded for a third party. And in that event the policy allows the "beneficiary" to claim directly from the insurer.

The complainant was therefore free to put his claim directly to the insurance companies with which the Council had taken out the group sickness and accident insurance policy if he took the view that the terms of the policy were not being observed. Whether as a party to the policy the Council too was free to do so, and whether the complainant might have asked it to intercede on his behalf, are issues that need not be entertained.

As things stood, there was no reason for the Council to approach the insurers on the complainant's behalf. For one thing, he had not clearly asked it to; for another, it had no evidence at its disposal to suggest that the insurance policy had not been observed. According to the findings of the insurers' own medical expert -- which the complainant did not challenge -- he was not suffering from total permanent invalidity within the meaning of clause 16: his functional invalidity was only 50 per cent and there was no question of his needing constant attendance.

The conclusion is that the Council properly left it to the complainant to approach the insurers himself if he thought them liable.

7. That conclusion holds good also insofar as the complainant is contending that the Council is itself liable to its staff for benefits due under the policy.

8. The complainant objects to the Council's failure to bring in a third doctor to examine him.

The substantive conditions in the first paragraph of clause 19 of the policy were not met, however. There was no disagreement between the insurers' doctor and the complainant. Moreover, the complainant had not at once challenged the findings of the insurers' doctor.

That being so, there is no need to take up the plea.

Indemnity for loss of employment

9. Rule 18.10, headed "Indemnity for loss of employment", provides in (a) that such indemnity is to be paid to an official in the event of:

"(i) suppression of his budget post;

(ii) changes in the duties of his budget post ...

(iii) general staff cuts, including those due to a reduction in or termination of the activities of the Council;

(iv) withdrawal of the Member of which the official is a national;

(v) transfer of the Headquarters of the Council or of any of its units to another country ...

(vi) refusal by the official ... to be permanently transferred to a country other than that in which he is serving."

The complainant submits that he qualifies under the rule for the indemnity, the Council having unilaterally terminated his appointment.

10. (a) He may not rely on any of the above-mentioned contingencies because on any literal construction Rule 18.10 does not apply to his case.

(b) If what he means is that there is a lacuna and that his own case is analogous to those the text mentions, then he is quite mistaken.

The indemnity for abolition of post is payable only where termination is attributable to some radical change of circumstances that is of the Council's own making and that it may impose on a staff member without his consent.

Termination of employment for invalidity, for which the staff member is not to blame, is not comparable since it is wholly attributable to his personal circumstances, not to the Council. Such termination is covered elsewhere in the Rules and there is another sort of protection for it. So leaving it out of the list in Rule 18.10 was assuredly intentional.

(c) The complainant says that after his appointment had been terminated his post was abolished and that he may therefore rely on Rule 18.10. The Council denies abolishing the post, the duties it carries being essential, and points out that it terminated his appointment on other grounds.

There is no proof of abolition.

The termination of his employment for invalidity was no pretext: he had indeed become an invalid, and he does not deny it. It was in the Council's interests to terminate someone who was no longer fit for duty.

The plea fails.

Indemnities granted from the age of sixty-five

11. Rule 14.1 reads:

"The appointment of an official shall terminate with effect from the first day of the month following that in which his sixty-fifth birthday occurs. Such termination shall entail the payment of an indemnity by virtue of Regulation 12(b) and (e) and Rule 12(c)."

The indemnity corresponds to the period of notice and is over and above salary.

A staff member who leaves at sixty-five, the age of retirement, is also entitled under Rule 18.4 to payment of a terminal allowance that takes account of full length of service with the Council.

12. The complainant claims those benefits. In his submission he should have got an indemnity equal to three months' pay and the full terminal allowance: the Council's unilateral termination of his appointment denied him those payments.

The Council cites the text of the provisions in support of its rejection of his claims.

13. As the complainant acknowledges, he did not strictly qualify since he stopped working before the age of sixty-five.

Nor is there any omission to be made good to his advantage. The early termination of an appointment for invalidity, a reason not attributable to the Council, is not comparable to retirement. Early termination is covered by particular rules that need no rectification by the Tribunal. The terminal allowance takes into account actual length of service and the text sets the method of reckoning it. Nor is such termination analogous to a case in which an organisation is liable in damages for injury to the staff member.

His claims are therefore without merit.

Pay for the period of notice and the effect of notice on the terminal allowance

14. In his rejoinder the complainant argues by the way that the Council should have given him notice of termination, that he was entitled to pay during the period of notice and that the length of that period should count in reckoning the terminal allowance.

In its surrejoinder and a supplement thereto the Council answers that Regulation 12 and Rule 12.1 do not apply; the Secretary General need not give notice of termination to a staff member unfit for work because of permanent invalidity; and, like death, such invalidity terminates the appointment *ipso facto*.

This claim is receivable because it falls within the ambit of the claims to financial compensation that he made in his internal appeal and that form part of his complaint, even though the grounds are different.

15. Regulation 12 says:

"(a) The Secretary General may, after consulting the appropriate advisory body, terminate the appointment of an official:

(i) If ... the official ... is unable to perform his duties;

...

(b) The termination of an appointment by the Secretary General shall be notified in writing to the official concerned, with a statement of the grounds for such termination and on a period of notice, according to grade and length of service.

...

(d) If an official is on sick leave at the time of the notification of the termination of his appointment, the period of notice provided for in accordance with paragraph (b) shall be increased by the number of days during which such official is actually on sick leave after the notification.

(e) Instead of giving the notice provided for in paragraph (b), the Secretary General may pay an official whose appointment is terminated the salary and allowances due for the period of notice."

Rule 12.1 says:

"(c) The period of notice provided for in Regulation 12(b) shall be:

- four months for an official of category A or L or of grade B6, B5 or B4, or C6;

- three months for an official of any other grade.

...

(e) The salary and allowances payable under Regulation 12(e) shall be:

(i)salary specified in Rule 16.2, subject to deduction of the official's contribution in respect of the Terminal Allowance as specified in Rule 18.4(b);

(ii)allowances specified in Regulation 16(d)(i), (ii), (iii), (v), (vi), (vii) and (viii).

The period of notice in respect of which salary and allowances are paid under Regulation 12(e) shall be taken into consideration in calculating the official's Terminal Allowance due to him under Rule 18.4(b)."

16. The Council's pleas in reply rest on the assumption that there are omissions in its written rules that need to be made good in that the rules on termination do not apply to permanent invalidity.

(a) The assumption is belied by the text of Regulation 12(a)(i), which requires that notice of termination be given to an official "unable to perform his duties". And according to 12(b) notice must be given in all the cases of termination set out in 12(a). The Regulation draws no distinction as to the cause or duration of incapacity.

As the Council says, when permanent incapacity is due to illness there is no question of applying 12(d), which extends the period of notice by the number of days of sick leave granted after notice has been given. Else the appointment could never be terminated at all. Yet that restriction on the application of 12(d) does not relieve the Council of compliance with the rules in 12(a) and (b) on termination and on notice in the event of permanent invalidity.

(b) There are no grounds for inferring any lacuna in those rules that the Tribunal need make good. The rules on termination of employment in the event of invalidity are so explicit and clear as to preclude imputing any oversight to the draughtsman. They also serve the purpose of enabling the staff member to prepare for the future. Indeed it is not a foregone conclusion that his unfitness for work with the Council will doom him to idleness. Regulation 12(e) acknowledges, by allowing the staff member to leave, that he may be unfit to serve the period of notice.

The Council's contention that permanent invalidity ends the appointment *ipso facto* also overlooks general

precepts on the free exercise of consent.

Its plea therefore fails.

17. One principle of international civil service law is that a decision on a staff member's status may not work to his detriment before the date at which he had notice of it: see Judgment 1589 *(in re* de Assis) and the precedents therein. The grant of an invalidity pension does not empower the organisation to make the termination retroactive as from the date set for the start of payment and to disregard the requirement of notice in the rules (*ibidem*).

18. Here the Council failed to observe the rules. The complainant had notice of termination on 26 April 1995 and, since Regulation 12 expressly requires notice of termination for incapacity, it was from that date that the period prescribed in 12.1(c) should have run. The Council has afforded no just cause for withholding or reducing the complainant's pay in that period. Although 12(e) allows waiver of notice the staff member's financial interests must still be observed. Of course the invalidity pension is not supposed to be a source of unjust enrichment. Until his appointment ends the staff member may expect no more than his pay. And it is plain from Rule 12.1 *in fine* that the terminal allowance should take account of the prescribed period of notice as set out above. There the Council erred: the document telling the complainant of his entitlement to terminal allowance takes 28 February 1995 as the date of termination.

Since his complaint succeeds on the two points, the Council must take a new decision in the light of this judgment.

19. The complainant further argues that the procedure was flawed because the Secretary General failed before terminating his appointment to consult the advisory body referred to in Regulation 12(a).

He does not deny, however, that his invalidity afforded grounds for termination, nor does he challenge the termination itself.

So he has no cause of action in claiming consultation of that body.

His plea therefore fails.

20. Since his complaint succeeds in part he is entitled to an award towards costs.

DECISION

For the above reasons,

1. The impugned decision of 19 January 1996 is set aside insofar as it took effect at 28 February 1995.

2. The case is sent back to the Council so that it may pay the complainant his entitlements in accordance with this judgment.

3. It shall pay him 100,000 Belgian francs in costs.

4. His other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Mella Carroll
E. Razafindralambo
Egli
A.B. Gardner

1. That Rule reads: "The appointment of an official shall terminate with effect from the first day of the month following that in which his sixty-fifth birthday occurs. Such termination shall entail the payment of an indemnity by virtue of Regulation 12(b) and (e) and Rule 12(c)".

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