

SIXTY-FIRST ORDINARY SESSION

***In re* PEREIRA DA CRUZ**

Judgment 807

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Victor Pereira da Cruz against the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) on 21 August 1986, the GATT's reply of 18 November, the complainant's rejoinder of 18 December 1986 and the GATT's surrejoinder of 19 January 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 9.1(a) and 9.3(b) of the United Nations Staff Regulations and Articles 109.1(c)(i) and 109.3 of the United Nations Staff Rules;

Having examined the written evidence and rejected the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Portuguese citizen born in 1938, joined the secretariat of the GATT on 13 January 1969. He was granted a permanent appointment at grade G.6 in the Technical Services and Buildings Section on 17 February as from 1 January 1978 as a sound-technician. Until then his work had been found satisfactory. On 19 November 1979 the head of the section wrote a minute reallocating duties and setting out a hierarchy in the section. The complainant raised objections to the minute and from then on he was on bad terms with his supervisors. The GATT was dissatisfied with his work while he was displeased at being given duties that he felt were beneath him. He told the Administration he wanted responsibility for the conference rooms, but they refused because someone else at his grade whose work was up to standard was already in charge. They took the view that his post no longer served any purpose and talked over with him, though to no avail, the possibility of finding him another assignment. In a letter of 30 September 1985 the Director of the Personnel Office informed him that he was dismissed on the grounds of abolition of post and put on specialleave with pay as from 30 September up to 31 December 1985 in accordance with Article 109.3 of the United Nations Staff Rules. On 18 December 1985 he appealed to the Joint Appeals Board. In its report of 28 April 1986 the Board recommended that the Director-General reinstate him and give him suitable duties. By a letter of 27 May 1986, the impugned decision, the Director-General rejected the Board's findings and recommendations.

B. The complainant submits that his troubles at work began in October 1977 because of a dispute with his supervisor, whose policy was to give him fewer and fewer duties in order to make his position untenable. As the evidence before the Tribunal makes plain, the upshot was that he was dismissed on the grounds of abolition of post. The GATT's intention was to make use of the opportunity, provided for in Article 9.1 of the United Nations Staff Regulations and Article 109.1(c)(i) of the Staff Rules, of ending a permanent official's appointment on the grounds of the "necessities of the service". In fact his post was not abolished at all, either in theory or in practice, and the termination was therefore unlawful. Minutes written at the time show that the purpose was to get rid of him for personal reasons, which, though they continued to be such, were misrepresented as reasons related to his duties. The GATT has never made out that it needed fewer posts in the Technical Services and Buildings Section. Indeed the section recently obtained promotion for some of its staff to duties that the complainant would have been quite fit to perform himself. His post is still provided for in the budget for 1986. He was dismissed in such circumstances that the GATT committed a blatant abuse of authority.

He has a subsidiary argument to the effect that the GATT made no real effort to transfer him to suitable duties.

He asks the Tribunal to quash the decision of 27 May 1986 confirming the dismissal of 30 September 1985 and to order his reinstatement in suitable duties. He seeks a fair amount in costs. Subsidiarily, he claims an award of 1,550,582 Swiss francs for material injury, which he sets out in detail, and for moral injury.

C. In its reply the Organization gives a detailed account of the facts and examines the case law on abolition of post. It maintains that it did abolish the complainant's post and it explains that what the budget may say does not determine whether a post really exists in any particular department of the Organization. The material issue is whether the work he was doing warranted preserving the post in the Technical Services and Buildings Section or the post might be put to better use elsewhere. It contends that either his duties were no longer necessary to the section or else they had been transferred to some other member of the section because of his awkward attitude. The list of posts for 1987 makes it clear that his post no longer exists. Although the budgetary provision for a post was not transferred until 1 June 1986, a post may be abolished and its incumbent dismissed before the budgetary provision actually disappears. No-one has since been taken on to do his work, which has been split between other staff members.

The GATT affirms that it went to great trouble to try to transfer him or find some expedient short of dismissal. But there are only thirty-odd posts at his grade and in any event there is no job for a sound-technician outside the Technical Services and Buildings Section.

The charge of abuse of authority is devoid of merit. He simply felt frustration at being refused the duties he wanted, and bit by bit isolated himself from the work of the section until he rendered no service at all. Although the GATT showed great forbearance, in the long run it had no choice but to end his appointment.

The GATT maintains subsidiarily that the claims to damages, even supposing they were well founded, are grossly inflated.

D. In his rejoinder the complainant contends that the Organization's narrative is tendentious and prejudiced in that it seeks to show him up as an incompetent grumbler. What really happened was that his post was emptied of content and he was given no chance to show his mettle. In support of that contention he enlarges on his own account of the facts and his arguments. In his view the point is that, as the Joint Appeals Board observed, there is no evidence to suggest that the GATT carried out any review of the work of the section that led it to conclude that the staff must be reduced; or that there was any objective determination of the post or posts that had to be abolished; or that only after such objective review did it decide to get rid of the G.6 post for a sound-technician. The complainant again affirms that it failed to make any serious attempt to work out a solution. His charge of abuse of authority rests on the many inconsistent allegations in the GATT's pleadings. He presses his claims in full.

E. In its surrejoinder the GATT submits that the rejoinder says nothing new and scarcely warrants comment. It maintains and develops its account of the facts and its arguments and invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. Before he was dismissed the complainant was a grade G.6 official of the GATT. He was a sound-technician and mechanic in the Technical Services and Buildings Section. There being no Staff Regulations peculiar to the GATT, the terms of his appointment were governed by the Staff Regulations and Staff Rules of the United Nations, and he is challenging his dismissal on the grounds of abolition of post in accordance with Regulation 9.1.

2. After several appointments in various posts the complainant was granted a permanent one on 17 February 1978 and promoted to G.6. But soon his relations with his supervisors grew strained. His disputes with management arose over a minute the head of his section wrote on 19 November 1979 setting out a hierarchy in the section which determined the duties of its members.

3. The complainant raised and continued to raise objections to the minute. Broadly speaking, they come under two heads: he felt that his own duties did not match his job description, and he wanted to be made "responsible for the conference rooms", a duty that had been allocated to someone who had the same grade as he but greater seniority and who was regarded as a better technician.

4. As for his own duties the Administration was of the view that his performance of them was not up to standard. It says he really lost all interest in his work and was spending most of his time in idle recrimination. Things grew steadily worse, says the GATT, and several solutions were tried, but he was stubbornly determined to get the other staff member's duties and to ignore the hierarchy of authority in the section. Unavailing attempts were made to find him other duties but since his attitude isolated him from the work of the section the Administration at last decided

to do away with his post, which no longer served any purpose, and dismiss him.

5. The Director of the Personnel Office accordingly wrote him a letter on 30 September 1985 conveying the Director-General's decision to end his appointment on 31 December 1985 on the grounds of the abolition of his post and putting him on special leave with pay until 31 December 1985, the date of expiry of the period of notice.

6. The Administration told him he would be paid one year's salary, the termination indemnity he was entitled to under the Staff Regulations. They also offered him, in return for surrender of his right to appeal, half that sum in further compensation under Article 9.3(b) of the Regulations.

7. The complainant turned down the offer and appealed to the Joint Appeals Board. After thorough study of the case the Board submitted on 28 April 1986 a report signed by two of its members, the third dissenting.

8. The majority of the Board found:

(a) that the material fact, the abolition of the complainant's G.6 post in accordance with the Staff Regulations, was not proven;

(b) that the Administration's contention that "the necessities of the service required abolition of the post" was unconvincing because abolition had been founded on the incumbent's personal attributes rather than on objective assessment of the GATT's needs;

(c) that no genuine search had been made for other suitable employment for the appellant; and

(d) that the decision to dismiss him was therefore tainted with abuse or misuse of authority, the real motive for it being a desire to end his employment for reasons pertaining to his personal qualifications, his response to the unfairness of his plight and his relations with some of his supervisors.

9. The Board recommended that the Director-General "set aside the challenged decision, reinstate the appellant in his post and give him duties that match his qualifications".

10. The dissenting member took the view that the Administration's decision was warranted but he recommended offering the complainant "suitable financial aid" on account of the length of his service.

11. Having read the Board's report the Director-General confirmed the dismissal by a letter dated 27 May 1986.

12. The complainant's main claim is to the quashing of the decision of 30 September 1985 and the final one of 27 May 1986. He also asks the Tribunal to order his reinstatement in his post with duties that match his qualifications. He has a subsidiary claim to an award of 1,550,582 Swiss francs in damages for material and moral injury. He seeks the award of a fair amount in costs.

13. Article 9.1(a) of the United Nations Staff Regulations, which apply mutatis mutandis to the staff of the GATT, reads:

"The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if he is, for reasons of health, incapacitated for further service."

14. Thus the holder of a permanent appointment may be dismissed in only specific instances: "abolition of the post or reduction of the staff, if the staff member's services prove unsatisfactory, or for reasons of health".

15. The Regulations distinguish between dismissal for abolition of post or reduction of staff and dismissal for reasons pertaining to the staff member himself. The difference is this. In the former case the post disappears whatever the incumbent's merits may be and because of administrative reforms such as rationalisation or reduction of the work or new methods of management. In the latter case the incumbent is dismissed for reasons that relate to his own behaviour or person.

16. As the Board said, the abolition of post which caused the complainant's dismissal was wholly due to his own

behaviour. The Administration's explanations do not suggest that there was any real policy of reorganising or rationalising the work in his section. The sole and obvious purpose was to get rid of someone whose work was, in the Administration's view, no longer satisfactory and whose presence was disrupting the section.

17. The dismissal is therefore tainted with abuse of authority and the decisions challenged must be set aside.

The effects of quashing

18. What the complainant wants, besides the quashing of the dismissal, is reinstatement in his post with duties that match his qualifications. The Tribunal disallows the claim.

19. The conclusion is that the real reason for the dismissal was the Administration's assessment of the complainant's performance and the disruption his behaviour was causing in the section. But the Tribunal will not rule on those issues because they did not form the subject of the decisions under challenge and so the complainant has not had his say.

20. The Tribunal will send the case back to the GATT for a decision on whether to reinstate the complainant, his post being determined in keeping with his grade and duties, or to institute the procedure for dismissal on some other grounds that the rules allow.

21. As to the complainant's financial entitlements from the start of the proceedings up to the date of this judgment, the parties are invited to seek an amicable settlement which will take full account of the circumstances.

22. Since the challenged decisions are quashed the complainant's subsidiary claim to an award of damages has no substance, but he is awarded 6,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The decision of 30 September 1985 dismissing the complainant and that of 27 May 1986 confirming the dismissal are quashed.
2. The GATT shall pay him 6,000 Swiss francs in costs.
3. The case is sent back to the GATT for a new decision.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel
Jacques Ducoux
Pierre Pescatore
A.B. Gardner