

SIXTY-FOURTH SESSION

***In re* PEREIRA DA CRUZ (No. 2)**

Judgment 907

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Victor Pereira da Cruz against the Interim Commission for the International Trade Organisation/General Agreement on Tariffs and Trade (ICITO/GATT) on 11 December 1987 and corrected on 17 December, the GATT's reply of 29 January 1988, the complainant's rejoinder of 3 March and the GATT's surrejoinder of 12 April 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 9.1 and 10.2 of the United Nations Staff Regulations, which apply to the staff of the GATT;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Facts material to this case are summed up in Judgment 807 under A and 1 to 4.

In that judgment, which it delivered on 13 March 1987, the Tribunal set aside the Director-General's decision, taken on 30 September 1985 and upheld on 27 May 1986, to dismiss the complainant on the grounds of abolition of post. It remanded the case for a new decision.

On 31 March 1987 the GATT communicated to the complainant its decision to resume the dismissal proceedings and to terminate his appointment under Regulation 9.1 of the United Nations Staff Regulations on the grounds of unsatisfactory service as from 31 May 1986, the date on which he had actually left the Organisation.

The complainant lodged an internal appeal against that decision on 18 May 1987. In its report of 10 August 1987 the Joint Appeals Board recommended reinstating him in a suitable post or else offering him a settlement. By a letter of 6 October 1987, the decision now impugned, the Chief of Personnel told him that the Director-General was confirming the decision to dismiss him but was willing to discuss settlement. Discussion did follow, but to no avail.

B. The complainant submits that the GATT disregarded his right to a hearing because the dismissal proceedings were secret. Before dismissing him for the second time the GATT committed a breach of the fundamental rules of administrative law by failing to let him state his case and adduce evidence. He was given no opportunity to comment on the various criticisms of him, which he was unaware of. Indeed he was never shown the main minutes making categorical and serious charges against him. The decision was also in breach of the rules because his performance had always been up to standard, and there was abuse of authority. The GATT steadily eroded his duties and itself fabricated reasons for doing away with his post.

He alleges serious material and moral injury. At his age he has little prospect of other employment in another international organisation and he does not have a work permit for Switzerland. He will therefore have to go back to Portugal, where the outlook is no brighter.

He puts the injury at 153,710 Swiss francs for loss of pension entitlements and 873,420 francs for loss of earnings. His dismissal causes indirect injury to his wife, who will also have to go to Portugal and leave her job in Switzerland, and will thereby lose 363,300 francs in earnings and 137,189 francs in pension entitlements. He estimates his total material losses at 1,527,619 francs.

He asks the Tribunal to quash the dismissal of 31 March 1987 and order the Organisation to reinstate him.

Subsidiarily, he asks it to award him 1,527,619 Swiss francs in material and moral damages. He seeks costs.

C. In its reply the GATT brings out the facts it believes important, explaining how relations worsened between the complainant and his supervisors and repeating the criticisms made of him.

It says that on 8 January 1988, after he filed this complaint, it ordered the payment to him of 36,233.30 Swiss francs: the amount due to him in pay for the period from 1 June 1986 to 31 March 1987 less the amount already paid to him in compensation for his dismissal for abolition of post.

It submits that his work grew worse, making difficulties for many others. Everyone made an honest attempt to sort things out but he stubbornly refused to help. The Organisation contends that it cannot be held liable for his unsatisfactory performance. He was not asked to do any work he was not qualified for and even though some technical duties were beneath his grade he had no reason not to perform them properly.

His charge of breach of his right to a hearing is absurd. There were many conversations with him and much writing of minutes from January 1980 up to the date of his dismissal for abolition of post, and he must have known what the criticisms of him were. Indeed he stated his case at great length. All the material papers were put to the Joint Appeals Board and to the Tribunal itself in the first case and he made ample comment. By the time the Director-General took his final decision he was fully aware of the complainant's point of view.

The GATT has a subsidiary argument that, if the Tribunal allows the complaint, it should not order reinstatement: there being no suitable post vacant, the complainant cannot be reinstated. Insofar as his claims to damages are not unfounded they are overblown. His reckoning discounts earnings he might obtain from other employment and takes account of alleged indirect injury to his wife, which according to the general rules of liability is not imputable to the Organisation.

D. In his rejoinder the complainant takes up in turn the pleas in the reply. He contends that he was given no chance to prove himself since when the new decision was taken he was already absent and the GATT did not reinstate him after Judgment 807. There was breach of his right to a hearing because he ought to have been given a say when the criticisms of him were made, not just in the internal proceedings. Moreover, the talks that did take place were at his own prompting, not the Administration's. He presses his claims.

E. The GATT contends in its surrejoinder that there is no new material argument in the rejoinder. The period in which his work was found to be below par came before his dismissal for abolition of post. How can he say his right to a hearing was disregarded when he always knew full well what constant disruption his poor performance was causing?

CONSIDERATIONS:

1. By a decision of 30 September 1985 the Director-

General of the GATT dismissed the complainant on the grounds of the abolition of his post. He lodged an internal appeal but the Director-General upheld the dismissal on 27 May 1986. In Judgment 807 of 13 March 1987 the Tribunal set aside the two decisions for abuse of authority because their sole purpose had been to get rid of someone who the GATT thought was below par and was disrupting the work of his section.

After the judgment had been made known, on 31 March 1987, the Chief of Personnel sent him a new decision: the Director-General was terminating his appointment on the grounds of unsatisfactory service under Regulation 9.1 of the Staff Regulations as at 31 May 1986, the date of termination by the first dismissal.

The complainant filed an internal appeal against the new decision. Although the Joint Appeals Board recommended allowing it the Director-General rejected it on 6 October 1987. He is asking the Tribunal to quash the decisions of 31 March and 6 October 1987, order his reinstatement in his former post with duties matching his qualifications and, subsidiarily, award him material and moral damages. He claims costs.

2. Judgment 807 goes into the case at some length and the Tribunal refers to the text of its reasoning and its decision in that judgment.

In sum, although it allowed the first complaint to the extent of quashing the decisions to dismiss him it did not

order reinstatement. It sent the case back to the GATT for a new decision as to whether to reinstate the complainant in a post corresponding to his grade and responsibilities or else resume the procedure for dismissal on some other grounds that the rules allowed. It reserved the issue of any damages that might be due to the complainant from the start of the proceedings up to the date of the judgment in the hope that the parties might reach a settlement.

The lawfulness of the second dismissal

3. As was recounted in 1 above, the Organisation has again dismissed the complainant, but this time more or less on disciplinary grounds in that it cites Regulation 9.1(a) of the Staff Regulations of the United Nations, which apply to the GATT. The regulation authorises the Director-General to end the appointment of a permanent official, in particular "if the services of the individual concerned prove unsatisfactory". The GATT explains in the text of its decision why it is holding to the dismissal it first decided on in 1985, its reasons being indeed those which were summed up in Judgment 807.

The complainant submits - and the Joint Appeals Board held - that the procedure the Organisation followed did not enable him to state his case and there was breach of his right to a hearing. After Judgment 807 was delivered the Organisation gave him no formal opportunity to express his point of view and to provide supporting evidence: indeed in the 18 days between the publication of the judgment and the second dismissal it did not get in touch with him at all. Nor, says he, did he know in the period preceding Judgment 807 what the criticisms of him were because the proceedings were secret and he never saw the main internal minutes making serious formal accusations against him. In his submission his right to reply was disregarded at all times.

The Organisation's answer is that he must have known what he stood accused of. It cites the many talks that took place and letters that were written between January 1980 and the date of his dismissal for abolition of post. All the material evidence, it points out, was put to the Joint Appeals Board and to the Tribunal in the earlier case and so he was able to address it and did address it in his pleadings. After Judgment 807 the Director-General consulted his subordinates and reviewed the case and his new decision took account of all the material facts, including the arguments the complainant had put forward before and in the course of the proceedings that had ended in the judgment.

4. The general rule is that no decision adverse to a staff member may be taken unless he has been made aware of the Organisation's intention and been given an opportunity to state his case. Regulation 10.2 does allow an exception in the case of "serious misconduct", but that is not material here and the Organisation does not say it is.

As was said above, there were no adversarial proceedings after Judgment 807 set aside the first dismissal. So the only question is whether in the earlier period there was due observance of the complainant's right to state his case.

The reason why Judgment 807 quashed the first dismissal was abuse of authority: the abolition of post was just a pretext for getting rid of someone whose work was no longer found to be up to standard and whose presence was allegedly disrupting his section. Thus the grounds were administrative reform, and the ratio decidendi - abuse of authority - means not just that the Administration made a mistake of law but that its decision ran counter to the Organisation's own interests. What went on before the first dismissal and Judgment 807 is now immaterial because the purpose was not the same as that of the decision impugned in this case. The Organisation may not plead what led up to the first dismissal because the staff member is entitled to know at the time the reasons for the Administration's position, including the basis in law for its action.

The GATT does say that in taking his former decision the Director-General acted considerately by saving the complainant's face and letting him have generous compensation and that when he pressed his suit the Director-General could not but dismiss him for unsatisfactory service. But allowing such a plea would be tantamount to gainsaying the staff member's right to take exception in some instances to the Organisation's decision: there is no misconduct in exercising the right of appeal and asking that the decision be lawful.

In Judgment 807 the Tribunal remanded the case for a new decision. It gave due instructions, observing that the complainant had not had the opportunity of answering the allegations about his work and the disruption of his section; it said that the Organisation might resume the dismissal procedure on some other grounds provided for under the Staff Regulations. There were, quite plainly, supposed to be adversarial proceedings before the new decision was taken.

5. Since the complainant was not allowed to state his case the decision of 31 March 1987 and the confirmatory one of 6 October 1987 were unlawful and cannot stand.

That being so, there is no need to take up the complainant's other objections to the lawfulness of the dismissal.

The consequences of the quashing

6. The GATT shall pay the complainant 12,000 Swiss francs in damages for the moral injury he has sustained.

7. Since he has twice had his dismissal set aside it should reinstate him in a post equivalent to the one he held. If it does it shall pay him for the period from the date of his departure up to the date of his reinstatement, the amount to be reduced by the sums it has already paid him and any earnings he may have been paid during the period. His pension rights shall be fully restored.

The GATT may, if it so wishes, resume dismissal proceedings provided it takes care to respect his right to a hearing and does not prejudice the outcome.

8. His reinstatement may prove undesirable or even impossible because much time has passed since he left. If so he shall be paid in material damages: (1) for the period from the date of his departure up to the date of this judgment, the sums reckoned as stated in 7 above; and (2) for the period subsequent to the date of this judgment, an amount that shall take account of the salary he would have been paid had he been kept on until the date of retirement, of any reduction in his pension due to premature termination and of his prospects of other employment.

9. He is not entitled to damages for his wife's loss of salary and pension rights. Even if proven the injury would not be directly attributable to the unlawful decisions.

10. If he does not believe he has been offered a fair amount according to the above reckoning he may file another complaint stating in full the figures the tally requires.

Costs

11. He is awarded 4,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Tribunal sets aside the decision of 31 March 1987 dismissing the complainant and the confirmatory decision of 6 October 1987.

2. The GATT shall pay him 12,000 Swiss francs in moral damages.

3. If it reinstates him it shall pay him the further amount of damages reckoned as set out in 7 above.

4. If it does not it shall pay him the further amount of damages reckoned as set out in 8 above.

5. It shall pay him 4,000 Swiss francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

