SIXTY-SIXTH SESSION

In re ANTAL

Judgment 967

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lajos Antal against the Interim Commission for the International Trade Organisation/General Agreement on Tariffs and Trade (ICITO/ GATT) on 16 August 1988 and corrected on 5 September, the GATT's reply of 29 November 1988, the complainant's rejoinder of 3 February 1989 and the GATT's surrejoinder of 27 February 1989;

Considering Articles II, paragraphs 4, 5 and 6, and VII and the Annex of the Statute of the Tribunal, Articles 28, 31 and supplementary Article B (Part X) of the Regulations of the United Nations Joint Staff Pension Fund and Regulation 11.2 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. The complainant, who was born in Hungary on 25 August 1926, is a refugee resident in Switzerland and married to an employee of another international organisation in Geneva. On 10 October 1978 he began work in the snack bar of the GATT. On 5 February 1979 Mr. von Holzen, the head of the budget section of the Organisation, wrote to him confirming his appointment and setting out the terms of his employment: he was to be paid some 1,900 Swiss francs a month net, "including all allowances and compensation for any contributions to the AVS [the Swiss state scheme of old-age and survivors' benefits] based on a rate of earnings of 12.50 francs an hour".

On 20 December 1979 Mr. von Holzen wrote again to say that on termination he would be paid a service benefit; he was to hold the identity card the federal Swiss authorities grant to employees of international organisations - the carte de légitimation - but was neither a GATT official nor subject to the United Nations Staff Regulations and Staff Rules, which apply to GATT staff; he did not qualify for membership of the United Nations Joint Staff Pension Fund or of the health insurance fund.

As from 1 January 1984 supplementary Article B (Part X) of the Pension Fund Regulations made it compulsory to admit someone in his position to the Fund. On 12 December 1983 the manager of the bar wrote informing him of changes made in the terms of his appointment as from 1 January 1984: though not GATT officials and not subject to the UN Regulations and Rules, the bar staff might join the Pension Fund. "You are a member of the Fund", said the letter, and it explained that pension contributions would be withheld from his wages and that the bar too would be contributing.

In February 1986 he fell ill and was unfit for work. On 28 February the Chief of Personnel wrote to say that his appointment would end on 31 August 1986 - just after his sixtieth birthday - and he would then retire. In a letter of 26 March 1986 to the Chief of Personnel he pointed out that, not being a GATT official, he came under Swiss law and could therefore stay until he reached sixty-five, in 1991. In a reply of 21 May Mr. Croome, the head of the Co-ordination and Administration Department observed that, though not an official, he was exempt from payment of income tax and was a member of the Fund; employees in his position were seldom kept on after sixty and only at the Director-General's discretion. He told Mr. von Holzen that he was willing to leave. Mr. Croome put that to him in writing on 6 June, he wrote "Agreed" in the margin of the letter, signed, and sent the letter back. He accordingly left on 10 July 1986.

In a letter of 2 December 1987 to the Chief of Personnel his counsel alleged that he had been promised membership of the Fund for at least five years - the minimum period entitling him to a pension under Article 28 of the Fund Regulations - and asked that he be paid the pension he was entitled to. The manager of the bar answered on 15 December that since he had been in the Fund for only two years and eight months he had not qualified for a pension; he had never been promised five years' membership; and, in keeping with Article 31 of the Fund Regulations and his own instructions of 20 August 1986, he had been paid back his pension contributions on 22

October 1986; the matter was settled.

On 23 November 1987 he had applied for unemployment benefit to the unemployment insurance fund of the Canton of Geneva, but on 17 December that fund told him that he did not qualify.

B. The complainant submits that, though he was not an official of the GATT, the Tribunal is competent. Article II(4) of its Statute applies by analogy because the GATT has recognised its jurisdiction under II(5) and because the parties' intention of referring disputes to the Tribunal may be implied. Otherwise the complainant would have no means of redress.

His complaint is receivable. He is not challenging a decision but claiming damages for the financial injury the GATT is wrongfully causing him: the time limit will start only when the amount of such injury - partly in the future - may be determined.

As to the merits he contends that social security is a universally acknowledged right enshrined in international instruments on human rights. When the terms of his appointment changed in December 1979 and he got the carte de légitimation - which was of no use to him since he already had permits for residence and work in Switzerland - he lost the benefit of Swiss social security protection. By its negligence the GATT left him in the lurch. Letting him join the Fund in 1984 was no remedy since it should have let him do so earlier. It applied the UN rules arbitrarily: it refused him the benefit of them until he fell ill and then got rid of him by citing the retirement age.

He asks the Tribunal to order the GATT to pay to him as from 1 September 1986 and, after his death, to his widow the sum of 2,500 Swiss francs a month, which he regards as the minimum livelihood of a married couple in Geneva. He claims costs.

C. The GATT submits that the Tribunal is not competent because the complainant was not an "official" within the meaning of Article II(6) of the Statute. Nor does II(4) apply: the contracts it concluded with him did not provide for the Tribunal's competence.

His complaint is, besides, irreceivable under Article VII. He says under point 6 of the complaint form that he is not challenging any administrative decision: he purports to be challenging under VII(3) an implied decision to reject the claims in his letter of 26 March 1986. But the time limit for challenging any such decision has passed long ago. Besides, he agreed to leave on 10 July 1986, gave instructions in August 1986 for the repayment of his contributions by the Fund, and is estopped from going back on what he consented to then.

The GATT's pleas on the merits are subsidiary. The carte de légitimation did confer advantage on him in exemption from tax. In accordance with the terms of his appointment he was paid sums he could have contributed to the AVS if its rules so allowed. He could not have joined the Fund any earlier because its Regulations did not admit him. He held only a fixed-term appointment from 1984 and so had no legitimate expectation of five years' membership. The GATT met all its obligations and complied with all the material rules.

D. The complainant rejoins that either the UN rules did not apply to him, in which case the GATT was wrong to retire him at sixty, or else they did, and he was entitled to retire with a pension. He contends that the Tribunal is competent either under Article II(4) of its Statute or because it has decided to apply the UN Regulations and Rules by analogy to employees in the complainant's position, and Article 11.2 of the Regulations provides for recourse to the Tribunal.

His complaint is receivable because there is no challengeable administrative decision: his claims rest on the GATT's contractual liability towards him. The time limits cannot have expired because the financial injury is still unknown.

He develops his pleas on the merits, contending in the main that the Organisation acted negligently and in breach of its contractual obligations towards him by leaving him without social security coverage.

E. In its surrejoinder the GATT contends that the complainant's rejoinder offers no new argument. It sums up the pleas in its reply in support of its contention that the Tribunal is not competent to hear the case. It submits that Article II(4) of the Statute cannot apply to organisations other than the ILO. In any event the complaint is irreceivable because it is time-barred and because the complainant's separation formed the subject of an agreement. It is devoid of merit because the GATT cannot be held liable either for the complainant's failure to obtain Swiss social security coverage or on any other count. Nor is there any foundation for the amount the complainant claims.

CONSIDERATIONS:

1. Under Article II, paragraph 5, of its Statute the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any intergovernmental international organisation other than the International Labour Organisation, approved by the Governing Body, which has addressed to the Director-General of the ILO a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure. The GATT is such an organisation.

2. The complainant was never an official of the GATT, but was employed in its snack bar. His contract of employment specified that he was not considered to be an official of the GATT and was not subject to the applicable Staff Regulations. That was confirmed even when he was later admitted to membership of the United Nations Joint Staff Pension Fund.

3. The complainant therefore may not and indeed does not base the Tribunal's competence to hear his complaint on his status as an official. Instead he submits that para- graph 4 of Article II of its Statute applies:

"The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution."

The complainant argues that the choice of forum is implied in his contract of employment.

4. In its surrejoinder, though not in its reply, the GATT disputes that II(4) may apply, even mutatis mutandis, to organisations other than the ILO by virtue of the Annex, which provides that the Statute "applies in its entirety" to other organisations that have recognised the Tribunal's jurisdiction. But it is not necessary to invite further submissions from the complainant on that point because the GATT made the case in its reply that under II(4) the choice of forum must be an express term of the contract, and that view is correct.

5. There will be an implied term when any reasonable person may infer that at the time of concluding the contract the parties must have had that term in mind and intended it, even though it was not expressed, to form part of the contract.

No such term may be implied in this case. The choice of the Tribunal as the forum in cases in which it would not otherwise have jurisdiction is a term which by its very nature may not be implied but must be expressly agreed between the parties.

6. The complainant's alternative argument is that the GATT itself applied the Staff Regulations to him because it made him retire at sixty, the age of retirement prescribed in the Regulations.

That argument too is mistaken. It draws an unwarranted conclusion from the fact of his retirement, to which he himself consented; the Staff Regulations state that they apply to officials, and the complainant was not an official; and their application to him was expressly excluded by his successive contracts of employment.

Having only the limited jurisdiction that is conferred on it, the Tribunal is, regrettably, not competent to hear the complaint.

DECISION:

For the above reasons,

The complaint is dismissed.

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 27 June 1989.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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