ADMINISTRATIVE TRIBUNAL

Judgement No. 692

Case No. 753: WHITE
754: LE STER
755: MAROUF
756: BEN FADHEL
757: DODINO
758: ATAR

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Michael White, Antoinette Le Ster, Louay Marouf, Omar Farouk Ben Fadhel, Victor Dodino, and Nicole Atar, staff members of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 31 July 1993 and 31 October 1993;

Whereas, on 27 August 1993, the Applicants filed applications requesting the Tribunal:

"1. ... to rule:

(a) That, since the Applicant[s] participation in the work stoppage at IMO on 6 November 1992 was an absence from duty not specifically covered by other provisions of the Staff Rules, the proper administrative response was that prescribed in staff rule 105.1(d), namely the deduction of annual leave for the period of absence from duty;

(b) That the Respondent erred in treating the absence due to a work stoppage in a manner different from that prescribed in staff rule 105.1(d);

(c) That the deduction of salary for the period in question was a disguised disciplinary sanction and was contrary to the Staff Rules and therefore constituted an infringement of the Applicant[s]' terms of appointment.

2. The Tribunal is further requested to order the Respondent to repay to the Applicant the amount deducted from [their] salar[ies] in respect of the work stoppage."

Whereas the Respondent filed his answers on 23 February 1994;

Whereas the Applicants filed written observations on 30 November 1994;

Whereas the Respondent filed observations on the Applicants' written observations on 9 February 1995;

Whereas the Applicants filed additional observations on 23 March 1995;

Whereas the facts in the case are as follows:

The Applicants entered the service of IMO on different dates, between 1 July 1976 and 18 August 1988. The Applicant White retired from IMO on 31 August 1993.

On 13 October 1992, the President of the IMO Staff Assembly convened an extraordinary meeting of the Staff Association to consider the recommendations made by the Federation of International Civil Servants' Associations (FICSA) of which the IMO Staff Association was an affiliate. The recommendations were that each staff association should send members to the meeting of the Fifth Committee of the United Nations General Assembly in New York, that there should be work stoppages and a mass lunch-time walkout to protest impending action by the Fifth Committee, perceived to be inimical to the conditions of service of staff within the United Nations common system. The IMO Staff Assembly supported the FICSA recommendations and provisionally scheduled a one-half day work stoppage for Friday morning, 6 November 1992.

In a memorandum dated 30 October 1992, the Staff Committee advised all staff members that a work stoppage would be held Friday morning, 6 November 1992. It reminded the staff that "a half day's pay may be deducted from their salaries" if they participated. In a memorandum dated 4 November 1992, the Director, Administrative Division, advised all Directors that this reminder was not correct and that "the Administration will (not 'may') deduct a half a day's pay from salaries in respect of staff members who absent themselves, without leave, for the period in question." In a memorandum dated 5 November 1992, he

similarly advised the Chairman, Staff Committee.

On 6 November 1992, a number of IMO staff members, including the Applicants, took part in the work stoppage. In a memorandum dated 11 November 1992, the Chairman, Staff Committee, informed the Director, Administrative Division, inter alia:

> "In connection with your intention to deduct half a day's pay from salaries in respect of staff members participating in the work stoppage last Friday, the Staff Committee wishes to point out that the action to be taken is specified in staff rule 105.1(d) which states that any absence from duty not specifically covered by other provisions of the Staff Rules shall be charged to the staff member's accrued annual leave, if any. Only if a staff member has no accrued annual leave is such absence considered as unauthorized, in which case pay and allowances are deducted for the period of absence.
>
> Several members of the Staff Association ... have indicated their concern at your apparent intention of dealing with the situation in a manner which differs from what is prescribed in the Staff Rules.
>
> The position taken by some members of the Staff Committee during their meeting with you, in which a preference for deductions from salary was expressed, did not fully take these considerations into account."

In a reply dated 19 November 1992, the Director, Administrative Division reaffirmed the Administration's position. He stated, inter alia, "that there is no basis on which to pay a staff member who engages in strike action, work stoppage, or who for

any other reason is absent without authorization. It therefore follows that the staff rule to which you refer (105.1(d)) is not relevant in this respect."

In memoranda to the Applicants White, Le Ster, Ben Fadhel and Atar, dated 4 December 1992, and to the Applicants Marouf and Dodino, dated 15 December 1992, the Director, Administrative Division, advised the Applicants that their "salary payment for the month of December will be reduced by one half-day's pay, on account of your unauthorized absence from duty on the morning of 6 November 1992." He noted that an argument had been made by the President of the Staff Association that the provisions of staff rule 105.1(d) should be applied to allow for the reduction of annual leave rather than deduction from pay for the absence. He explained that this rule applied only to leave "taken when authorized," and stated "it is a fact that your absence was not authorized by your supervisor."

In memoranda, dated 14 December 1992 from the Applicants White and Le Ster, 15 December 1992 from the Applicant Atar, 17 December 1992 from the Applicants Ben Fadhel and Dodino, and 20 January 1993 from the Applicant Marouf, the Applicants requested the Secretary-General to review the administrative decision not to apply staff rule 105.1(d) to the absence from duty occasioned by the work stoppage. In replies dated 18 January or 2 February 1993, the Secretary-General advised the Applicants that "correct action was taken by the Administrative Division and entirely appropriate to the circumstances."

In a memorandum dated 26 February 1993, the Applicant White advised the Deputy Director, Administrative Division, that he had been asked to represent the Applicants in an appeal to the Joint Appeals Board. He noted that they would agree to direct submission of the matter to the Tribunal. In a reply dated 14 April 1993, the Director, Administrative Division, stated "I am in a position to confirm that the Secretary-General considers it would be appropriate in this instance for the appeals of the staff concerned to be submitted directly to the United Nations Administrative Tribunal."

On 27 August 1993, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants' absence due to participation in the work stoppage is an absence covered by staff rule 105.1(d), and annual leave should be deducted for the absence, rather than pay.

2. Deduction of pay is a disguised disciplinary sanction against those

staff members who participated in the work stoppage.

Whereas the Respondent's principal contentions are:

1. Staff rule 105.1(d) applies only to authorized absences not otherwise provided for in the Staff Rules. It is not applicable to work stoppages, which should be governed by general principles of international law.

2. The intention of the Respondent, to deduct pay for staff members who participated in the work stoppage without authorized leave or take out, was communicated to and endorsed by the Staff Committee representatives at a meeting prior to the action and was made clear to all staff.

The Tribunal, having deliberated from 4 to 21 July 1995, now pronounces the following judgement:

I. The Tribunal orders that there be a joinder in this case of all the applications.

The provisions of the rule which is central to the Applicants' cases are as follows: staff rule 105.1(d) "Any absence from duty not specifically covered by other provisions in these rules shall be charged to the staff member's accrued annual leave, if any; if the staff member has no accrued annual leave, it shall be considered as unauthorized and pay and allowances shall cease for the period of such absence."

The Applicants were absent from duty for a half day on 6 November 1992. Subsequently, because of such absence, a half day's pay was deducted from their salary. Their absence from duty arose from their participation in a work stoppage that was part of a system-wide campaign by staff representative bodies.

II. The Applicants take exception to this treatment, on the ground, first of all, that since their participation in the work stoppage was an absence from duty not specifically covered by other provisions of the Staff Rules, the proper administrative response should have been that prescribed in staff rule 105.1(d), namely the deduction of annual leave for the period of absence. The further ground put forward by the Applicants is that the deduction of salary was not only contrary to the staff rule but a disguised disciplinary sanction and so constituted an infringement of the Applicants' terms of appointment.

III. The Applicants say that strikes could not be considered to be illegal and could not, in principle, result in disciplinary action; that the Administration could properly deduct annual leave for the period of the strike under staff rule 105.1(d), and only if the staff member concerned had no accrued annual leave could pay be withheld for the period of "unauthorized absence".

The Applicants contend that the meaning of staff rule 105.1(d) can scarcely be in doubt. The first part of the sentence prescribes the action to be taken in the case of absence from duty not otherwise covered by the Staff Rules where the staff member has an accrued leave balance to his or her credit (the appropriate action being the deduction of annual leave), while the second part prescribes the withholding of pay and allowances, but only in the case of staff members who have no accrued annual leave. As the Applicants had annual leave to their credit at the time, they wished to benefit from the staff rule and have their annual leave, rather than their salary, deducted for the absence.

IV. The Applicants refer to the memorandum of 4 December 1992, from the Director of the Administrative Division, in which he says that the situation in international law governing the employment of international civil servants in circumstances of a work stoppage or strike is that their salary is "generally payable only for services rendered." Therefore, he says, "there is no basis on which to pay a staff member who engages in strike action, work stoppage, or who for any other reason is absent without authorization." He contends that leave may only be taken when authorized under staff rule 105.1(d). As the Applicants' absences were not authorized by their supervisor, it would not be proper to treat them on the same basis as those of staff members who applied for and were granted annual leave.

While the Applicants do not deny the general principle invoked by the Director of the Administrative Division, that payment is not due for services not rendered, they say that it offends another principle, i.e. that an authority is bound by its own rules until such time as it has altered or abrogated them.

V. It is necessary therefore to examine the wording of staff rule 105.1(d). On the face of it, the interpretation adopted by the Applicants does appear to have validity if one looks at that rule in isolation. It does seem to give the Applicants, as persons who have accrued annual leave, the right to have the

absence charged against such annual leave.

However, the interpretation of staff rule 105.1(d), taken in isolation, is not adequate for our purpose. The rule should be looked at in context. It appears under the heading "Annual Leave" and it is preceded by the words contained in staff rule 105.1(b) "Leave may be taken only when authorized". On perusing all of staff rule 105.1, the Tribunal considers that it would be unrealistic to suggest that this stricture does not also apply to the absence from duty referred to in staff rule 105.1(d).

VI. What is the position then when absence from duty is unauthorized? Clearly it was never intended that such unauthorized leave would simply be followed by a deduction in the staff member's annual leave. It is in this context that the Administration's action in deducting pay must be examined. This is what the Applicants invite the Tribunal to do. On the basis of staff rule 105.1(d), looked at in the context of the entire staff rule 105.1, the Respondent cannot be faulted for acting as he did even though the specific wording of the rule may be regarded as ambiguous. For this reason, the Tribunal finds that the deduction of salary cannot be regarded as a disguised disciplinary sanction.

VII. There are other matters to be considered. The Applicants make reference to the action taken by the Respondent following the London Transport strike on 2 April 1993. They ask for the rationale on the distinction made by the Director of the Administrative Division between staff who did not come to work on 6 November 1992, because they were participating in the work stoppage, and staff who could not provide a satisfactory explanation for their absence from duty on 2 April 1993, the day of the London Transport strike. The Applicants are referring to the fact that the annual leave balance of staff who failed to provide an adequate explanation for their failure to come to work was debited. While the Tribunal appreciates that the Applicants can detect similarities in the two situations, it is of the view that conclusions should not be drawn from a situation which is scarcely analogous to that which obtained on 6 November 1992. The strike in April 1993 was between parties other than staff members. The Tribunal accepts the distinction made by the Respondent between the participants in the work stoppage of 6 November 1992, who had control of their actions, and the staff members affected by the London Transport strike. As the Respondent

points out, in those circumstances, IMO staff members who did provide satisfactory explanation were granted special leave with pay.

VIII. Another matter raised in these cases concerns a meeting with the Director of the Administrative Division and other representatives of the IMO Administration and Representatives of the IMO Staff Committee on 26 October 1992. The Administration's position was that absence without leave in connection with the work stoppage would be deducted from pay rather than from annual leave and the Staff Committee Representatives endorsed the pay deduction. The Applicants, subsequent to the work stoppage, stated in a memorandum that the Staff Committee Representatives did not take all the relevant factors into account.

After the meeting of 26 October 1992, a circular dated 30 October 1992 (before the work stoppage) from the Staff Committee stated that pay "may" be deducted. By memorandum of 4 November 1992 (also before the work stoppage), the Director, Administrative Division, said that deduction would be made from salaries.

IX. Because of its finding in relation to staff rule 105.1, which is decisive in the case, the Tribunal need go no further in relation to the endorsement at the meeting of 26 October 1992, by the Staff Committee Representatives, of the course of action proposed by the Administration, than to note the implied acceptance by the Staff Committee of the proposed deduction of pay from salary, now defended by the Respondent. The Committee was afforded an opportunity to discuss the interpretation of staff rule 105.1(d), and to put forward the point of view now presented by the Applicants prior to the work stoppage, but this was not done.

X. The Tribunal recalls the position adopted in Smith (Judgement No. 249 (1979)) in which it held:

> "... that staff regulation 1.2 provides that 'the whole time of staff members shall be at the disposal of the Secretary-General. The Secretary-General shall establish a normal working week'. ... It is therefore apparent that 'work' is the fundamental obligation of staff members. Receipt of salary is, moreover, the essential counterpart to work performed. ...
>
> The unauthorized absence from work or attendance at the place of work while failing to perform duties removes the basis for payment of salary."

The Respondent submits that, as in this case, the relevant UN Rules in that case were silent on the matter of work stoppages, yet in Smith it was recognized that there is no general principle of law to provide any entitlement to pay for a period during which an employee did not work.

The Tribunal cannot find that the IMO staff rule applies to work stoppages. Rather, the Tribunal finds that leave can be taken only when authorized and, in the circumstances, therefore it is proper that the unauthorized leave of 6 November 1992 was followed by deduction of salary.

XI. The Tribunal therefore rejects the Applicants' pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary