



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1236

Case No. 1320

Against: The Secretary-General
of the International Maritime
Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Ms. Jacqueline R. Scott;

Whereas at the request of a staff member of the International Maritime Organization (hereinafter IMO), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 28 February 2003 and twice thereafter until 31 October 2003;

Whereas, on 31 October 2003, the Applicant filed an Application requesting the Tribunal:

“to order the Secretary-General of the [IMO] to approve the payment of £30,000 to the Applicant by way of compensation for the economic loss sustained by the latter as a result of the unjust and discriminatory treatment to which he was subjected during the retirement process and the irregularities committed during that process”.

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 9 June 2004;

Whereas the Respondent filed his Answer on 28 May 2004;

Whereas the Applicant filed Written Observations on 27 November 2004 and the Respondent commented thereon on 10 February 2005;

Whereas the statement of facts contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“[The Applicant entered the service of IMO on 14 April 1986, as a Translator in the Spanish Translation Section, Conference Division, at the P-3, step 1 level. At the time of the events that gave rise to this Application, he had a permanent appointment and held the position of Senior Translator/Reviser at the P-4, step 12 level.]

... [T]he [Applicant] gave notice in a memorandum dated 4 May 2001 that he would like to take early retirement with effect from 1 September 2001.

... The Head, Personnel Section, confirmed in a memorandum dated 9 May 2001 that the separation procedures had been set into practice and that the [Applicant's] last day in office would be Friday 31 August 2001.

... In a memorandum dated 30 May 2001, ... the [Applicant] inform[ed] the Head, Personnel Section, that ... [his request had been motivated by a desire to relocate to Spain with his daughters, of whom he had custody, but that the move was conditional upon his receiving approval of the court to take them out of English jurisdiction. He noted that, if he did not receive such approval, he ‘would have to consider staying in London for a longer period’ and would ‘request to postpone the date of [his] separation from service to 31 December 2001’, his normal date of retirement.]

...

... However, [as he received no response] ... *he was therefore entitled to believe that that choice still existed.* The [Applicant's] belief that he still had a choice was [apparently] reinforced by a phone call from the Director, Conference Division, [on] 5 July 2001, asking the [Applicant] *to make the choice.*

... The [Applicant, having withdrawn his legal petition on 4 July.] ... inform[ed] the Head of Personnel Section in a memorandum dated 6 July that he request[ed] hi[s] retirement date to be 31 December 2001. [Prior to the receipt of this letter, on 11 July the Administrative Division had sent the Applicant details of the administrative formalities concerning his early retirement.]

[On 17 July 2001, an inter-office memorandum from the Secretary-General was issued, announcing both the Applicant's retirement as of 31 August and the promotion of another staff member to the post.]

... [On] 19 July 2001 ... the [Applicant was] informed that his separation date [was] confirmed to be 31 August 2001.”

On 20 July 2001, the Applicant wrote to the Secretary-General, IMO, requesting review of IMO's refusal to permit him to rescind his request for early retirement. The Secretary-General responded on 9 August that he endorsed the decision that the Applicant's date of separation would be 31 August. On 16 August, the

Applicant asked the Secretary-General to reconsider. On 23 August, the Secretary-General replied that he was unable to change his decision.

On 30 August 2001, the Applicant lodged an appeal with the IMO JAB. In its undated report, the JAB concluded as follows:

“.. **Conclusion**

...

5.2 Although the appellant's original letter requesting early retirement should be taken into consideration, it must be balanced against the fact that the Personnel Section never responded to the appellant's memorandum of 30 May 2001, and furthermore the phone call, 5 July 2001 from the Director, Conference Division, indicated that there was still a choice to be made: *that call could be considered a recognition that the appellant was still entitled to chose which date he wished to retire.*

5.3 The appellant did not inform the Personnel Section of his ... [change of heart] ... until he sent his memorandum dated 6 July 2001. The JAB is of the opinion that at the end of May 2001 communication between the appellant and the Personnel Section fell short of expectation. At this time, the matter should have been clarified from both sides and a warning should have been given immediately by the Personnel Section.

5.4 In his own interest, the appellant should have communicated with the Personnel Section immediately after 30 May 2001 in order to clarify his retirement date.

5.5 Taking into account the respective responsibilities of the appellant and the Personnel Section, and given the facts presented, the JAB can not support the appellant's case.”

On 19 July 2002, the Secretary-General, IMO, transmitted a copy of the report to the Applicant and informed him that he agreed with the JAB's conclusion and had decided to accept its unanimous recommendation.

On 31 October 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. IMO was inflexible in refusing to permit the Applicant to remain in its employ until his normal date of retirement.
2. The Applicant was treated in an unjustified and discriminatory manner.
3. The Applicant sustained economic loss of four months' salary as well as a reduction in his annual pension.

Whereas the Respondent's principal contentions are:

1. The Applicant's original request was clear and unconditional.
2. Once the Applicant's resignation was accepted by the Head of Personnel on 9 May 2001, both parties were bound by their agreement.
3. The Applicant was not discriminated against, nor was his case managed in an irregular manner.

The Tribunal, having deliberated from 27 June to 22 July 2005, now pronounces the following Judgement:

I. This is an apparently simple case: on 4 May 2001, the Applicant asked for early retirement with effect from 1 September, and, on 9 May, IMO answered him, informing him that the necessary separation procedures had been put into motion and indicating that his last day in the office would be Friday 31 August. It would thus appear that the agreement of the parties regarding the Applicant's early retirement was perfected and all that remained was the completion of the necessary administrative demarche and the passing of time. In fact, the Applicant's date of early retirement was only four months earlier than his regular retirement, which would have taken effect on 31 December 2001.

However, the Applicant changed his mind about taking early retirement and asked the Administration to permit him to work until his regular date of retirement. The JAB found that, in fact, the Administration had acted in such a way that it led the Applicant to believe that he "was still entitled to choose which date he wished to retire", but that

"at the end of May 2001, communication between the [Applicant] and the Personnel Section fell short of expectation. At this time, the matter should have been clarified from both sides and a warning should have been given immediately by the Personnel Section."

The JAB found that, "[i]n his own interest, the [Applicant] should have communicated with the Personnel Section immediately after 30 May 2001 in order to clarify his retirement date" and, finally, concluded that "[t]aking into account the respective responsibilities of the [Applicant] and the Personnel Section, and given the facts presented, the JAB [could not] support the [Applicant's] case".

II. The Tribunal shall now examine the facts alleged by the Applicant to have altered the effects of the exchange of communications in early May. On 30 May, the

Applicant sent the Organization a letter in which he announced that, due to intervening circumstances, he might “have to consider staying in London for a longer period”, in which case he would “request to postpone the date of [his] separation from service to 31 December 2001”. This letter was followed by a long silence from the Administration, a silence only interrupted on 5 July by a telephone call from the Director, Conference Division, placed in order, as explained in the Respondent’s Answer, “to obtain clarification as to his situation”, *i.e.*, to find out from the Applicant whether or not he was going to take early retirement. The Respondent contends that this call was simple curiosity on the part of the Director and was prompted by an important upcoming event which required the office to have a full complement of staff. Here the versions of the Applicant and the Respondent differ: the former says that, during this conversation, he confirmed that he had changed his mind, whereas the latter claims that the conversation did not prove definitive. At any rate, the following day (6 July) the Applicant sent a letter in which he clearly stated that he would like to retire upon his ordinary retirement date instead of taking early retirement. The Tribunal is inclined to believe that, in such a short period of time, nothing happened which changed the Applicant’s situation from indeterminate to clearly determinate. Whatever the Director understood to be the Applicant’s response on 5 July is, however, not that relevant when one considers that the answer to her query regarding his situation came, loud and clear, the very next day.

At this stage, the Administration was diligent and answered the Applicant by letter dated 11 July. Curiously enough, in this letter the Administration refers to its communication of 9 May as an “interim reply” and thus casts a more provisional status upon the period between 9 May and 5 July than might otherwise have been understood. It is as if the Administration had decided to stay its action from 30 May (the date of the ambiguous announcement from the Applicant) until the moment in which the Applicant answered the phone call. The Respondent now explains the expression “interim reply” as follows:

“The term ‘interim reply’ was not employed in the Respondent’s memorandum of 9 May. Moreover, it is clear that the term as employed in the Respondent’s memorandum dated 11 July ... does not refer to any pending decision on the Respondent’s part regarding the acceptance of the Applicant’s request for early retirement, but simply to the relevant administrative arrangements to be put into effect as a consequence of the acceptance of this request. This is the reason the Respondent used the term ‘interim reply’ in his memorandum.”

The Tribunal must confess to some difficulty in understanding this explanation but if any sense may be extracted, it seems to qualify the *administrative arrangements* consequent to the acceptance of the Applicant's early retirement as provisional; the Tribunal finds, however, that it equally classifies the early retirement *per se* as provisional.

Be that as it may, another factor induces the Tribunal to find that IMO had a somewhat "soft" approach to changes in early retirement arrangements. The Applicant has alleged, but not proved, that cases similar to his were dealt with more benevolently by the Administration. The Respondent does not deny this contention, claiming only

"In the other requests for early retirement ... the separation process and consequential measures taken by the Administration affecting other members of staff had not yet started. Therefore the facts of the case under consideration are different in some important ways from those in previous ones."

The clear inference is that there were other cases where requests for early retirement were permitted to be withdrawn. The Respondent did not say that they were withdrawn prior to their acceptance by the Administration but, rather, before "the separation process and consequential measures taken by the Administration affecting other members of staff had ... started". The Tribunal finds, however, that the Respondent has proved neither that the separation process and consequential measures affecting other staff members had not been taken in those other cases, nor that any such measures which had been taken in this case were irreversible. In this respect, it must be pointed out that, in the instant case, such measures were only published on 17 July, *i.e.*, well after the Administration had notice of the Applicant's memorandum of 6 July announcing his desire to withdraw his request for early retirement.

III. There are two periods in the chronology which attract the Tribunal's attention, namely from 30 May to 5 and 6 July, and from 6 to 17 July, during which timeframes there was no specific response from the Respondent, notwithstanding important announcements made by the Applicant. As to the first of these periods, the Applicant's announcement that he might change his mind about taking early retirement if certain circumstances presented themselves provoked no reaction from the Administration. The Respondent alleges that it was due to the fact that the memorandum

"did not contain a request to revise the *status quo* arising out of the previous agreement between the Applicant and the Respondent on early separation. On the contrary, the memorandum of 30 May was couched entirely in hypothetical

terms, that is, of what action the Respondent might take if certain events did or did not happen.”

The Tribunal does not agree. It is satisfied that if the Administration intended to adopt a more rigorous position regarding the Applicant’s case, in apparent contrast with others, it ought to have answered immediately that it was - or would soon be - too late to halt the Applicant’s early retirement, particularly if other measures had been taken in the interim, the reversal of which would affect other staff members. The Administration did not do this, of course, choosing inaction instead.

The telephone call from the Director, Conference Division, revealing her ignorance as to the Applicant’s future, also supports what seemed to be an understanding among staff members regarding IMO’s “soft” or flexible approach towards the withdrawal of requests for early retirement. Whilst the Director may not have been competent to decide on the Applicant’s future with IMO, the fact that, as Director of the Conference Division, she considered the situation still fluid is considered by the Tribunal to have justified, when taken together with the other circumstances of the situation, the Applicant’s belief that his change of heart would be favourably considered.

Moreover, the Applicant’s letter of 6 July also merited an immediate answer by the Respondent and the Administration’s silence in this respect cannot but provoke certain suspicions as to its real motives. Curiously enough, that letter did not reach the authorities competent to make a decision until after various administrative steps had been taken which created a seemingly irreversible situation, in particular the appointment of a staff member (who the Applicant alleges, and the Respondent does not deny, jumped two levels) to replace the Applicant. In this context, the Tribunal wishes to recall that, as a general principle, it has decided that the relevant date for receipt is the date of first reception of the communication by the Organization, rather than the date upon which the decision-making party or specific unit may open the letter. (See Judgement No. 1094, *Al-Hafiz* (2002).)

IV. The Tribunal takes note of its Judgement No. 990, *Abu Sirdaneh* (2000), para. III, wherein it concluded that

“[a] notice period is in favor of the Agency. It provides the Agency with sufficient time to take the necessary measures to prevent an interruption of the flow of the work. If a unilateral right to withdraw a resignation at any time within the notice period existed, the Agency’s replacement process would be

interfered with, particularly when a withdrawal is attempted towards the end of the notice period.”

In the specific circumstances of the instant case, however, the Tribunal finds that IMO proceeded in such a manner as to give the Applicant a legitimate expectation that he could withdraw his request for early retirement and that it failed to act in good faith towards him. Accordingly, it orders the payment of three months’ net base salary as compensation for the unfair and discriminatory way in which he was treated.

V. In view of the foregoing, the Tribunal

1. Orders the Respondent to pay the Applicant compensation in the amount of three months’ net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Spyridon Flogaitis
Vice-President

Jacqueline R. Scott
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary