

ORIGINAL DOCUMENTS IN SAFECase No. 11803Date of filing: 19/3/90

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IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE
ORIGINAL

نسخه برابر اصل

دیوان داوری دعوی ایران - ایالات متحدہ

CASE NO. 11803

CHAMBER ONE

AWARD NO. 476-11803-1

DONALD W. DAVID,
a claim of less than U.S.\$250,000
presented by
THE UNITED STATES OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	19 MAR 1990
	تاریخ ۱۳۶۸ / ۱۲ / ۲۸

SEPARATE OPINION OF HOWARD M. HOLTZMANN

1. This Case involves two separate claims. One claim is for the value of property lost when the Claimant was allegedly wrongfully expelled from Iran. I concur in the dismissal of that claim. The other claim, which is for lost wages, presents one of those situations in which arbitrators disagree concerning the credibility of witnesses and the inferences to be drawn from surrounding circumstances. The Award denies the claim for lost wages; I would grant it. I write separately to explain my reasons.

2. The Claimant in this Case is an airplane engine mechanic who failed to receive paychecks and other compensation from his employer, Iran Aircraft Industries ("IACI"), during the last two months of his contract. I believe the Claimant has succeeded in demonstrating that IACI promised to pay him the salary and benefits that were owed. It is true that the Claimant's employment contract contained a provision that required him to notify IACI of "claims to any entitlements" within 60 days after termination of employment, and it is undisputed that he gave no such notice. Nevertheless, under

the circumstances of this Case, that provision should not bar payment of wages earned. The reason is that IACI's own conduct in promising to pay the compensation that was due led employees to believe that it was not necessary to notify IACI in order to receive payment. Cf. Hidetomo Shinto and Islamic Republic of Iran, Award No. 399-10273-3, para. 38 (31 Oct. 1988), reprinted in 19 Iran-U.S. C.T.R. 321, 331 (claim based on employer's promise of payment superseded employee's claim under his contract, rendering 60-day notification clause irrelevant). IACI is therefore estopped from citing Claimant's failure to give notice of his entitlements as grounds for refusing to honor its promise to pay these amounts.

3. The Award states that "time limitations specified by contract are generally enforceable" unless there are "particular circumstances . . . [that] justify a departure from this principle." (Award at para. 19.) In my view, IACI's waiver constituted such "particular circumstances." A detailed review of these circumstances follows.

4. The Claimant's contract provided that his employment was for 18 months, ending on 17 February 1979. The crucial fact that must be recognized in this Case is that the last months of the Claimant's employment coincided with highly unusual circumstances brought about by the Islamic Revolution. Two months before the contract was scheduled to end, IACI ceased issuing paychecks on a regular, semi-monthly basis because the relevant government officials had stopped authorizing them.¹ In addition, for the last five weeks of Claimant's contract, IACI directed expatriate workers at the factory site not to report to work because of

¹Claimant received only one further paycheck during the last two months of his contract. That check was several weeks late.

threats to their safety. Given this disruption in IACI's processing of paychecks and the closing of its factory site, there was obviously a danger that the skilled workforce that IACI had recruited from abroad would decide to leave Iran. Thus, according to the affidavits of the Claimant and one of his co-workers, IACI repeatedly assured expatriate technicians that they would continue to be paid under their contracts.

5. The Claimant states, for example, that when IACI first announced that a regular paycheck would not be forthcoming for the latter part of December 1978, "Iran Aircraft officials . . . assured employees that employees would be fully paid when administrative matters were worked out." In early 1979, when Claimant returned to Iran from his Christmas vacation, he found that "while I had been on vacation, my supervisor -- Mr. Magzoudi -- had instructed workers not to report to work further until conditions became safe." Claimant's co-worker, Mr. Brian White, was working at the factory's fuel shop when this announcement was made. He states in his affidavit that "Mr. Mezoudi . . . assured us that we would continue to receive full pay, and further assured us that we would in fact receive pay increases when the turmoil eased and it became possible to return to work."

6. As the Award notes, for the first two and a half weeks of February 1979, the Claimant asserts that "he and many other American employees personally went every day to IACI's relocated offices at Mehrabad Airport to determine whether there was any work." (Award at para. 4.) I think it important also to note Claimant's further statement that, when he and his working colleagues visited the IACI offices,

[o]n occasion, an official would enter the room where the American employees were gathered and advise that . . . we could return again the next day to determine if there had been any developments. Although the Iran Aircraft officials in fact offered little substantive information, they

at all times assured us that employees would be paid in full when administrative matters were worked out.

7. Ultimately, on 17 February 1979, Claimant and the "approximately fifty" colleagues who had joined him that day at the Mehrabad Airport offices were informed by IACI officials that the fuel shop would not reopen, that their employment therefore was being terminated and that they should return to the United States as soon as possible. Claimant states that on that occasion, "officials once again assured employees, as they had before, that they would be paid in full. The officials represented that they had all employees' work records and that checks covering payment through February 17 would be mailed to employees' overseas addresses." As it happened, IACI eventually did transfer a check to Claimant, but for substantially less than the full amount owed him.

8. Claimant's co-worker, Mr. White, was not present at the Mehrabad Airport offices on 17 February 1979. Therefore, he was notified of his termination by a telephone call to the apartment where he was living in Tehran. Mr. White states in his affidavit that, "[a]t this time, IACI officials assured me that I would receive by wire transfer all the money then due me."

9. Thus, the Claimant and Mr. White independently recall several occasions when their employer promised to pay them the amounts due. Faced with this substantial record as to IACI's actions, I cannot agree with the Award's conclusion that "the Claimant has not presented any convincing evidence demonstrating that . . . IACI promised to pay him . . . the specific amounts claimed here." (Award at para. 21.)

10. Claimant's sworn written statement is not only convincing in its own right but is also supported by circumstantial evidence. The fact that a substantial number of American

employees of IACI remained in Tehran and that many of them made the difficult journey every day to the Mehrabad Airport offices is itself persuasive evidence that IACI had promised employees they would continue to receive their salaries. It is doubtful that so many of these workers would have endured the hardships of living in Iran during the Revolutionary period had they not been assured of full payment. It is also noteworthy that Mr. White, the expatriate worker who confirms in his own affidavit the Claimant's account of IACI's actions, is a British national. Because of his nationality, Mr. White has no claim before this Tribunal and therefore could have no interest in distorting the events that occurred.

11. The Award implies that Claimant acted unreasonably in construing IACI's promise of payment as a waiver because another IACI employee, whose claim has already been adjudicated by this Tribunal, did comply with the contract's notice requirement. See Theodore Lauth and Islamic Republic of Iran, Award No. 233-10335-3 (8 May 1986), reprinted in 11 Iran-U.S. C.T.R. 150. These two cases, however, differ in several important respects. The Claimant in Lauth held a clerical rather than a technical job at IACI and worked at an office that was located at a different site than the fuel shop where the Claimant in this Case worked. Mr. Lauth never alleged that IACI officials specifically told him he would be paid the salary and benefits that were owed him. Nor does it appear that Mr. Lauth was ever expressly told that his employment had been terminated. Rather, Mr. Lauth signed termination papers at IACI headquarters and simultaneously submitted a letter announcing his resignation. In a subsequent letter, Mr. Lauth reiterated that he was "compelled to terminate the employment agreement" and requested that "all payments, salaries [sic], bonus's [sic], living allowances, and full air fare . . . be paid to me by I.A.C.I." Lauth, supra, at para. 12, reprinted in 11 Iran-U.S. C.T.R. at 154. It is not surprising that an

employee in these circumstances -- one who states that he is resigning and who has received no express promise that amounts owed him will be forthcoming -- would include a demand for payment in his termination letter. But the fact that he did so has absolutely no bearing on the question whether the Claimant in this Case reasonably relied on IACI's promises of payment and therefore was excused from submitting a similar written demand.

12. The Award also draws adverse inferences from two other facts in this Case. Neither of these inferences is sustained by the record. First, the Award notes that after the contract's 60-day notice period had expired, Claimant still did not notify IACI of his claim. The Award infers from this silence that the claim in this Case was an afterthought. There are, however, other explanations for Claimant's behavior that refute the Award's adverse inference.

13. To begin with, during the first several months after the Claimant left Iran, the situation in that country remained unsettled; a former employee would have had reason to conclude, therefore, that IACI was still unable to effect payment. In such circumstances, the Claimant continued to rely on IACI's promise to pay him, knowing that it was no longer possible to give notice within the contract's 60-day period. (Claimant's reliance on that promise was partly vindicated: IACI did pay some of the money that it owed to Claimant two full years after his termination, in February 1981.) Finally, once relations between the United States and Iran worsened in the wake of the hostage crisis, it would have been futile for the Claimant to write to his former employer about his claim; the Iranian Defense Ministry (of which IACI was part) was unlikely to make any payments to an American citizen at that time.

14. The Award's second adverse inference is equally unfounded. The Award notes that, when Claimant received a

check for U.S.\$2,997 in February 1981, he "did not inform IACI . . . that this payment did not cover the full amount of his claim." (Award at para. 22.) The Award again implies that such silence undermines the legitimacy of the claim that was filed here. There is no basis for such an adverse inference because, by the time Claimant received his partial payment from IACI in February 1981, the United States and Iran had already agreed to the Algiers Accords, which established this Tribunal. Thus, in February 1981 the Claimant would have known that a special forum had been established for the resolution of claims such as his. Given this crucial development, no adverse inference can be drawn from Claimant's decision to file a claim before this Tribunal instead of pursuing that claim by writing to the Ministry of Defense in Tehran.

15. In sum, I conclude that Claimant's affidavit and that of his co-worker Brian White should be credited. The Award points to no other facts that might undermine the Claimant's or Mr. White's statements or that call into question either affiant's credibility. The Tribunal therefore should find that IACI promised its expatriate mechanics that they would be paid and that, in so doing, IACI waived the notice requirement contained in the contract. I would grant the Claimant the unpaid salary, termination bonus, air fare, compensation for unused sick leave, and storage costs to which he is clearly entitled under the contract. I would deny, however, the Claimant's request for compensation for lost property that is based on a theory of wrongful expulsion. I agree with the Award's determination that "the Claimant's decision to leave Iran was predominantly

influenced by the expiration of his employment contract on 17 February 1979." (Award at para. 24.) I therefore concur in Part IV.B of the Award, rejecting the wrongful expulsion claim.

Dated, The Hague
19 March 1990



Howard M. Holtzmann