

**SEVENTY-SIXTH SESSION**

***In re* MADINGAR (No. 2)**

**Judgment 1335**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jérôme Alngar Madingar against the World Health Organization (WHO) on 27 January 1993, the WHO's reply of 25 March, the complainant's rejoinder of 27 April and the WHO's surrejoinder of 2 June 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 630.2, 630.8, 830.1, 1040, 1050, 1060, 1070, 1230.1.1 and 1230.1.3 and WHO Manual paragraph II.12.550;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a citizen of Chad who was born in 1949, was employed by the WHO from 13 July 1988 as a consultant administrative officer at grade P.2, initially for two months. The Organization sent him to Kinshasa to take charge of administrative preparations for a project in Zaire which the Organization was to execute for the United Nations Development Programme (UNDP). His appointment was extended by three months as from 12 September 1988.

Before joining the WHO he had worked as an assistant with the United Nations Volunteers in the UNDP's office in the Comoros.

By a memorandum of 8 December 1988 the WHO's Representative in Zaire told him that his consultancy appointment, which was to expire on 11 December, could not be extended. He tried in vain to get the WHO's Regional Director in Brazzaville to review the decision of 8 December 1988, but by a memorandum of 28 December a personnel officer told him on the Regional Director's behalf that his appointment would be extended to 11 January 1989.

On 22 March 1989 he filed his first complaint with the Tribunal seeking the quashing of the decision of 8 December 1988 and reinstatement in his post or an equivalent one or, failing that, awards of material and moral damages for wrongful termination and of costs. He withdrew that complaint on 5 September 1989 and the Tribunal recorded the withdrawal of suit in a judgment of 23 January 1990.

Meanwhile he had appealed on 12 January 1990 to the WHO's regional Board of Appeal against the decision of 8 December 1988. He sought the quashing of the decision not to renew his appointment; reinstatement in the same project and the same post or, failing that, in another project or department in an equivalent or more senior post; and payment of his entitlements and damages.

In its report of 20 July 1990 the Regional Board recommended that the Regional Director should, if possible, consider granting him a similar post. By a letter of 12 February 1991 the Regional Director offered him employment in a similar post at grade P.2 for eleven months. In his reply of 26 February to the Regional Director the complainant observed that the post should be graded P.3 at least and that the letter said nothing of his entitlements and of damages.

In a letter to him of 6 May 1991 the personnel officer confirmed on the Regional Director's behalf that the available post was graded P.2 and said that the Regional Board had made no recommendation about paying entitlements and damages.

In a letter of 17 December 1991 he filed an appeal with the headquarters Board of Appeal against the decision

taken on 6 May 1991 on the Regional Director's behalf.

In its report of 3 September 1992 the Board recommended confirming the Regional Director's offer but raising the grade to P.3 and paying him his terminal entitlements and damages equivalent to the amount of his salary from 12 January 1989 to 12 February 1991.

The Director-General informed the complainant in a letter of 20 October 1992 that he was confirming the Regional Director's offer of 12 February 1991 but saw no reason to change the grade, the right one for the post; he was asking the Director of Personnel to make sure the complainant had received the terminal entitlements; but he was granting no sum in damages.

That letter is the decision he challenges.

B. The complainant has three pleas.

First, the WHO failed to keep its promise to employ him as an administrative officer in the Professional category of staff. The post was classified in that category and the project was to last four years. Consultancies are by definition temporary; so the Organization failed to keep its promise. He would not have resigned from his job with the United Nations Volunteers had he known that the WHO appointments would confer consultancy status, particularly since his prospects in the UNDP office in the Comoros were good.

Secondly, his termination was wrongful, arbitrary and unjustified. The decision of 8 December 1988 was taken "unilaterally, in gross breach of the material rules and procedure, and without prior consultation of the other parties to the project, namely the Government of Zaire and the UNDP, who had to agree to recruiting him". So the decision comes under Staff Rule 1230.1.3, which covers "failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules, or the terms of [his] contract".

The grounds on which the WHO seems to have founded the termination - his unsatisfactory performance - are mistaken. His supervisors consistently found his work satisfactory and he got on well with the other staff.

The Organization was in breach of the general principle in Rules 1040, 1050, 1060 and 1070 that an official must be given notice of non-renewal or non-confirmation of appointment. It asked him to leave less than 24 hours after it had taken the decision of 8 December 1988.

It has not yet granted him the benefit of Rule 630.2, which entitles him to annual leave at the rate of two-and-a-half working days for each full calendar month on "pay status". Nor has it paid him in accordance with Rule 630.8 for each day of accrued annual leave up to a maximum of 60. Lastly, it has not paid him the daily allowance for authorised travel provided for in Rule 830.1.

Thirdly, there was "personal prejudice on the part of a supervisor" within the meaning of Rule 1230.1.1, since he was removed without any proper explanation and replaced by someone unqualified.

He seeks the quashing of the decision of 8 December 1988; appointment to a similar post at grade P.3 and an award of 720,063 United States dollars in settlement of his entitlements, material and moral damages and costs.

C. In its reply the WHO denies promising to appoint the complainant to a post as administrative officer since it did not yet exist. Correspondence from the UNDP misled him, but, as the evidence shows, the WHO always made quite clear the type and length of the appointment it was offering him. From the start it was to be a consultancy for a specific job and project, and the Organization constantly stressed the need for strict observance of the recruitment procedure. The post he left in the Comoros was not in the Professional category and he knew that the WHO would not give him such a post. So his appointment as consultant caused him no financial or professional injury.

There was neither wrongful termination nor breach of the Staff Regulations and Rules and the complainant's contract. His appointment to the post of administrative officer was subject to the usual selection procedures, and his application was unsuccessful. His appointment ended once he had completed the tasks set out in his contract, so he cannot allege withdrawal of offer or wrongful termination. As for the requirement of notice, the provisions in the Staff Rules do not apply to consultants, whose appointments end ipso facto upon expiry. The Organization offered him an eleven-month appointment at grade P.2 on the strength of the Regional Board's report but was under no obligation to do so. That offer and the payment of his terminal entitlements give him satisfaction.

He did not suffer from prejudice. Although the WHO's Representative in Zaire did say that "he has not been able to fit into the team and ... his contribution to this sensitive project has, on balance, been negative", there is no reason to question that opinion. When the procedure for recruiting an administrative officer at grade P.3 started the complainant's application went to the Selection Board. It failed because preference is given to members of staff and - in line with approved WHO policy - to qualified women.

The Organization asserts that none of the complainant's pleas is founded and asks the Tribunal to dismiss the complaint as a whole.

D. The complainant submits in his rejoinder that the internal appeal bodies never challenged the soundness of his "claim". They agreed on compensating him for injury, and the only difference of opinion was over how to do so.

What the WHO says about the nature of his post is wrong: the only reason why he resigned from the Volunteers was that he felt sure of getting from the WHO an appointment in the Professional category. The UNDP's office in the Comoros had set about creating a P.3 post so as to keep him on.

E. In its surrejoinder the Organization develops the pleas in its reply.

#### CONSIDERATIONS:

1. The background to this dispute, which goes back to 1988, and the material facts are set out in detail under A. The complainant is impugning a decision which the Director- General of the World Health Organization took on 20 October 1992 and of which the gist is given at the end of A.

2. The complainant wants the Tribunal to quash a decision of 8 December 1988 by the WHO's then representative in Zaire; have him appointed to a post at grade P.3; and order the payment of a total of 720,063 United States dollars in settlement of his entitlements and in material and moral damages and costs. He puts forward three pleas: breach of the promise the WHO made to appoint him to a post as an administrative officer in the Professional category; wrongful, arbitrary and unwarranted termination; and blatant discrimination against him on the part of his supervisor.

3. Before taking up those pleas the Tribunal observes that decisions to renew or extend fixed-term appointments are at the discretion of the executive head, on the understanding, however, that he shall exercise it for the good of the organisation and in its interests. The Tribunal may review a decision of that kind and set it aside if it shows a fatal flaw.

#### The alleged breach of promise

4. The complainant alleges breach of a firm promise to put him on a Professional category post as the administrative officer of a project, and he says that granting him a contract for consultancy made no difference. The Organization denies such breach: it contends that the only post it ever offered him was as a consultant for a specific limited assignment with no prospects of further employment once he had finished the job it took him on for.

5. The evidence before the Tribunal bears out the Organization's contention. The correspondence it had with the complainant shows that the WHO never offered him anything but a consultancy. If in the discussion that preceded his acceptance of the terms of the Organization's offer of appointment there was any question of granting him any other sort of contract the WHO seems not to have known anything about it.

6. The Organization's position is plain enough from the telex of 25 April 1988 which its Representative in Brazzaville sent to the Representative of the UNDP in the Comoros asking him to tell the complainant that he was being taken on as a consultant for two months. On 13 May 1988 the Representative confirmed his "appointment initially for two months as consultant" and said that "recruitment for the post will be subject to administrative selection procedure and no commitment can be made at this stage".

7. So it is plain that the WHO's only commitment to the complainant was to employ him as a consultant for two months and, after that preparatory stage, take up his application for a P.3 post as administrative officer in keeping with the proper procedure for recruitment. The WHO fully discharged its obligations: it concluded with him the contract of 27 July 1988 for consultancy and in December 1988 put his application to the Selection Board it had set

up in the meantime. It committed no breach of promise.

The allegations of wrongful and arbitrary non-renewal

8. The complainant argues that for two reasons the decision not to extend his appointment was wrongful and arbitrary. First, he says, the decision of 8 December 1988 was taken "unilaterally, in gross breach of the material rules and procedure, and without prior consultation of the other parties to the project, namely the Government of Zaire and the UNDP, who had to agree to recruiting him". His other objection is that the WHO failed to comply with the general rule that it must give notice to someone whose appointment is not being renewed or confirmed.

9. The objection about failure to consult the other parties to the project cannot be upheld. On the evidence the Tribunal is satisfied that there is no requirement in the rules on consultancy or in the project agreement that all the parties must consent to recruiting project personnel. The provisions of the Staff Rules that the complainant relies on are therefore irrelevant to his case. Even if the proper implementation of the project did require the parties' consent breach of the requirement could not affect the intrinsic validity of a decision to appoint - or not to reappoint - the complainant, the lawfulness of such decision depending solely on the material rules of the WHO as the appointing authority. That is borne out by what the UNDP Representative said in a telex of 15 December 1988, namely that it was "in spite of his own opposition" that the Organization had recruited the complainant under the contract dated 27 July 1988. The Representative's disapproval in no way impaired the lawfulness of the appointment. By the same token the lack of prior approval from the other parties is utterly immaterial to the lawfulness of the decision not to renew his appointment.

10. The only relevant provision on notice is Manual paragraph II.12.550, which says:

"The appointment of consultants may be terminated by the Organization at any time upon thirty days' notice, unless otherwise specified in the offer of appointment."

The complainant's contract of 27 July 1988 said nothing of notice. Besides, it is plain that paragraph 550 provides for notice only when the Organization is terminating the appointment "at any time": those are terms that denote termination before the normal expiry of the appointment. Staff Rule 1040, which is about the completion of temporary appointments, requires no notice when the period of service expires in the usual way. Such is the instant case, the impugned decision being refusal to extend the complainant's appointment beyond the date of expiry. The plea about notice accordingly fails.

The plea that the decision is unjustified

11. The complainant submits that the decision not to renew his appointment was unjustified because the reasons given for it - that his work was unsatisfactory and that he was not fit for the international civil service - were mistaken. He says that he did his job properly, came up to his supervisors' expectations and was on good terms with the national and international staff.

12. In a memorandum of 2 November 1988 the WHO's Representative in Zaire stated as follows the reasons for not extending the complainant's appointment:

"the project ... is entering a decisive phase and must therefore call on highly qualified experts with ample knowledge of the WHO's project-management practices. ... Despite the discussions we have had with Mr. Jérôme Madingar we are of the opinion that he has not been able to fit into the team and that his contribution to this sensitive project has, on balance, been negative."

Those remarks are not necessarily at odds with the complainant's acknowledged qualifications and strengths since what the Organization really wanted was "highly qualified experts with ample knowledge of the WHO's project-management practices". Under the circumstances the Director-General was merely exercising his discretion and, since his decision shows none of the flaws that might warrant quashing it the Tribunal will not replace the Director-General's appraisal with its own. The plea fails.

The charge of prejudice

13. The complainant alleges, lastly, that the Organization showed blatant prejudice against him. He observes that a candidate he describes as a "mere typist and secretary who did not have the stated qualifications for the job" was

chosen instead, "in defiance", he says, "of the most rudimentary rules of due process".

14. The WHO observes that the candidate it put on the permanent post that he wanted was, like him, one of the 51 applicants whose names went to the Selection Board; she was the only woman on the shortlist - there were also two men - and so the Administration's policy of giving women preference for vacancies in the Professional category worked in her favour.

15. There is no evidence nor indeed any suggestion that the selection procedure was flawed. So the WHO had no reason to reject the applicant picked by the Board and its decision to appoint her shows not a trace of prejudice against the complainant. Besides, the Director-General endorsed the Regional Director's offer to him of an eleven-month contract, even though, as he said in the impugned decision, the WHO was under no obligation towards him. What is more, the Director-General accepted the headquarters Board of Appeal's recommendation to grant him terminal entitlements. Again his plea under this head is groundless.

16. Since his claim to the quashing of the impugned decision fails so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda  
E. Razafindralambo  
Michel Gentot  
A.B. Gardner