

SEVENTY-EIGHTH SESSION

***In re* RWEGELLERA**

Judgment 1404

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. George Gregory Celestine Rwegellera against the World Health Organization (WHO) on 6 January 1994, the WHO's reply of 17 March, the complainant's rejoinder of 30 March and the Organization's surrejoinder of 24 June 1994;

Considering Articles II, paragraph 5, and VII, paragraphs 1, 2 and 3, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Tanzanian citizen who was born in 1936, is a doctor of medicine. He joined the staff of the WHO on 16 August 1978 as a medical officer at grade P.4 and held a series of two-year contracts. In 1984 he was stationed at Kampala, in Uganda, as professor of psychiatry and mental health. In 1986 the Organization promoted him to grade P.5.

By a telex of 4 December 1991 the WHO's Regional Office for Africa at Brazzaville told him it was abolishing his post on 31 December 1991 and terminating his contract under WHO Staff Rule 1050. He was to "consider this telex as three months notice" of termination.

By a telex which he sent on 24 January 1992 to the Regional Office and others, he announced his intention of filing an appeal with the regional Board of Appeal against the termination of his appointment. On 30 January he did so in keeping with Rules 1230.1.2, 1230.1.3 and 1230.8.1. On 5 March he corrected the appeal.

In a memorandum of April 1992 he informed the chairman of the Board that since the Administration had cancelled the termination he no longer saw any reason for the appeal and accordingly wished to withdraw it.

By a telex of 3 March 1993 the Regional Office offered him an eleven-month contract as regional officer for mental health in Brazzaville at rates of pay that were explained. In a telex of 12 March he answered that the offer was "acceptable in principle" but stated reservations. By a telex of 18 March the Regional Office asked him to undergo a medical examination, forward the results to Geneva and await travel instructions.

A personnel officer sent him a letter of 11 May 1993 on the Regional Director's behalf. After referring to his "leave without pay which expired on 08 April 1993" the letter said that the Organization had cancelled the offer of appointment at Brazzaville and confirmed the terms of a "letter of 01 April 1992" saying it would terminate his appointment on 9 May 1992. On 28 May 1993 he appealed to the regional Board of Appeal. On 10, 18 and 29 June and 15 September he entered further submissions.

The regional Board not having reported, he went to the headquarters Board on 7 October. In a letter of 8 October the headquarters Board told him it could not yet take up his case. Its chairman confirmed that in a letter of 2 November 1993, which is the decision he is impugning.

B. The complainant submits that his complaint is receivable. It was filed within the time limit in Article VII(2) of the Tribunal's Statute and challenges a final decision that affected him adversely.

Rule 1230.3.3 says that "a Board shall report its findings and recommendations to the Director-General or Regional Director, as appropriate, within ninety calendar days of the date on which the appellant's full statement of his case is received by the Board ...". The complainant appealed to the regional Board for Africa on 28 May 1993 and filed

further submissions later. Despite the reminders he sent neither the regional Board nor the Administration met the requirements of the Staff Rules, the administrative Manual and the Board's Rules of Procedure. Under the circumstances he could not but infer rejection from the Board's attitude and the Regional Director's failure to take a decision. That is supported by Judgment 791 (in re Klajman). The headquarters Board disregarded not just the case law but also the provisions in its own Rules of Procedure on receivability, for example Rule 34(a), which says that hearings on receivability may include "a short statement by the Appellant or his/her representative, dealing in particular with the Administration's formal reply".

The complainant has four pleas on the merits.

His first is breach of Administrative Order No. 9 of 17 October 1988 and Staff Rule 1050. The order asks representatives of the Organization to "explain to the countries the importance of avoiding breaks in the work of the WHO's programmes there and to discourage actively any proposals designed to abolish professional posts". There is no evidence of attempts by the WHO to avoid abolishing the complainant's post. Again, Rule 1050.2 says that "When a post of indefinite duration - or any post held by a staff member with a career- service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ...". The Organization never applied the reduction-in-force procedure in the complainant's case: it merely terminated his appointment as if the mere abolition of the post meant ending the appointment of its incumbent.

His second plea is misuse of authority and breach of good faith. The Administration's sole intention in going back on the decision to terminate his contract, after he first put his case to the regional Board, was to avoid the consequences of its breach of 1050.2 in failing to follow the reduction-in- force procedure.

Thirdly, he alleges breach of the law of contract. On 12 March 1993 he accepted the WHO's offer of 3 March to reassign him; that created a binding contract and the law of contract and the WHO's own rules and regulations required that both sides abide by it. So both the cancellation of reassignment and the consequent termination of contract are unlawful.

Lastly, he charges the Organization with breach of Staff Rule 630. Under that rule his accrued leave came to 71 days, not 34 as the WHO makes out. He is therefore entitled to compensation for 71 days' accrued leave.

He wants the Tribunal to declare unlawful the WHO's decision of 11 May 1993 to cancel its offer to him of eleven months' employment and its decision of 4 December 1991, which obliged him to take unpaid leave. His main claim is to reinstatement in the entitlements he would have had if he had not been put on leave without pay from February 1992 and not had his appointment terminated by the letter of 11 May 1993, i.e. payment of all amounts due to him since his forced separation at the end of February 1992 and immediate action to reinstate him. By way of subsidiary relief he claims the 11 months' pay provided for in the WHO's offer of 3 March 1992 in damages for unlawful cancellation, and the equivalent of five years' pay - i.e. up to the date of his retirement - in damages for breach of contract. In any event he claims 80,000 United States dollars in damages for the moral injury attributable to the WHO's handling of his case and the delay in settling it. He seeks \$9,000 in costs.

C. In its reply the WHO contends that the complainant has failed to exhaust the internal means of appeal. So it has not had the opportunity to state its defence. It cannot tell the chronology of events, their effect in law or the broader context to which they belong. He has therefore infringed Rules 1230.8.3, 1230.8.4, 1230.8.5 and 1240.2 and Article VII(1) of the Tribunal's Statute.

To take the complainant's own account, he lodged his appeal with the regional Board on 28 May 1993 and some four months later, in early October, he went to the headquarters Board without waiting for the regional Board to report. During that period Brazzaville was shaken by political dissension and riots that disrupted work in the Regional Office. So the Board can scarcely be blamed for being about a month late or accused of improperly obstructing proceedings. The complainant may still seek internal remedies and the WHO is willing to consider his case in keeping with the rules and procedure.

It asks the Tribunal to dismiss the complaint as irreceivable.

D. In his rejoinder the complainant denies that his complaint is in breach of the Staff Rules. The material question on receivability is whether an appeals body, once a case has been filed, may shilly-shally as long as it likes.

The WHO may not properly rely on "supposedly extraordinary circumstances". It has never, even at the best of times, complied with the time limit in Rule 1230.3.3, as the complainant seeks to show by reference to a case pending with the headquarters Board. Should the WHO deny that, the Tribunal need only order it to produce a list of appeals filed over the last few years to set the record straight. In any event politics in Brazzaville are irrelevant because they do not prevent the regional Board from doing what it should.

The WHO is mistaken to argue that only an "express" final decision is challengeable: under Article VII(3) of the Tribunal's Statute implied rejection too may be challenged without having to exhaust the internal means of redress. The case law bears out that the obligation to exhaust those internal means is not absolute. So the complainant was free to drop his internal appeal and go straight to the Tribunal because the regional Board had not reported in time and had no intention of doing so within a reasonable period. He wants the Tribunal to order the Board and the Regional Office to abide by the rules in future and at least respect the time limits for dealing with internal appeals.

E. In its surrejoinder the WHO maintains that the complaint is premature and so irreceivable.

As to the time that elapsed between his appeals to the regional and headquarters Boards, it argues that "it is in the very nature of board hearings that they cannot be squeezed into tight time limits". Besides, no-one can objectively maintain that there was no prospect of a reasonably early end to the proceedings.

The Organization denies saying that only an express decision is challengeable. But the rule in VII(3) is "immaterial because there is no question of the Administration's failing to take a decision on a claim submitted to it". In fact "it is because the complainant acted prematurely and did not allow the regional Board time to report that there was no recommendation from it for the Regional Director to act upon and the Administration was unable to take a decision".

CONSIDERATIONS:

The facts

1. The WHO recruited the complainant as a medical officer on 16 August 1978. The reports on his performance consistently reflected his supervisors' satisfaction. In a telex dated 4 December 1991 the Organization's Regional Director for Africa at Brazzaville, told him that his contract was to terminate on grounds of abolition of post and he was given three months' notice. He objected on 10 January 1992. Despite a reminder of 24 January he got no reply and he appealed to the regional Board of Appeal on 30 January 1992. But the Organization told him it was reversing the termination and so he withdrew his appeal in April 1992.
2. On 3 March 1993 the Organization did indeed make him an offer of an appointment for eleven months as a regional officer for mental health. But by a decision of 11 May 1993 a personnel officer of the Regional Office cancelled the offer. On 28 May the complainant again appealed to the regional Board against termination. After sending the Board several reminders he told it on 8 July 1993 that he was engaging counsel. On 20 July his counsel gave the Board notice of the filing of an appeal under Staff Rule 1230.8.3 and asked for a copy of its Rules of Procedure. By a letter of 15 September he filed his complaint in final form with the Board. On 25 September he received a copy of the Rules of Procedure, which he had been sent under cover of a letter dated 10 September. But without waiting for the Board to report he put the matter on 7 October to the headquarters Board of Appeal in Geneva. The next day the chairman of that Board told him that it could not take up his case before the Regional Director had taken a decision. On 12 October the chairman of the regional Board acknowledged receipt of the complainant's letter of 15 September. On 21 October the complainant filed a brief and by a letter of 2 November the chairman of the headquarters Board confirmed its decision not to entertain his appeal until it had a decision, even a late one, by the Regional Director on a recommendation from the regional Board. That is the decision under challenge.
3. The WHO pleads that the complaint is premature and therefore irreceivable because it was filed before the internal means of appeal had been exhausted. The internal procedure is set out in Staff Rules 1230.8.3, 1230.8.4 and 1230.8.5. Under those provisions any member of the regional staff who wishes to appeal against a final decision must go to the regional Board of Appeal, which submits a recommendation to the Regional Director for decision. The official may then appeal against the Regional Director's decision to the headquarters Board of Appeal. Rule 1230.3.3 gives the Board 90 days in which to report its findings and recommendations to the Regional Director.

4. That is the procedure which in the Organization's submission the complainant has failed to follow. His appeal of 28 May 1993 was still before the regional Board on 7 October, when he went to the headquarters Board. The headquarters Board informed him on 8 October that it could not yet take up the case since its competence was as set out in Rule 1230.8.5, namely to consider an appeal against a decision taken by a regional director on a recommendation by a regional board. The WHO further submits that although the 90-day time limit had run out a month before he appealed to the headquarters Board it was not a mandatory one and there was nothing wrong or inadmissible about the delay. The Organization concludes that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

5. The complainant demurs. He points out first that the only way of extending the 90-day limit is the one stated at the end of Rule 1230.3.3: upon agreement between Administration and appellant. But he never consented to any extension. Indeed he sent the Board several reminders, among them the one of 15 September 1993, demanding prompt action. He observes that the only reaction was the letter of 10 September 1993 sending him the Rules of Procedure of the Board and another sent on 12 October at the instance of the chairman of the headquarters Board. So the regional Board took too long over the appeal and its failure to act within a reasonable time entitled him to go straight to the headquarters Board. He pleads precedent.

6. As the Tribunal held for example in Judgment 499 (in re Tarrab No. 9):

"Article VII(1) does not lay down an absolute rule. A complainant may abandon the internal proceedings even before a decision is taken and may appeal directly to the Tribunal when the appeals body fails to report and there is no reason to suppose from the evidence that it is likely to do so within a reasonable period. But it must be quite clear from the evidence that there is no decision, and only in quite exceptional cases will the Tribunal find that the condition is met."

Here the condition is not. That is plain if the material facts and evidence are taken in chronological order. Though the complainant filed notice of appeal with the regional Board on 28 May 1993, not until 20 July did his counsel tell the Board's secretariat that he would be handling the case and filing an appeal under the Staff Rules and he therefore asked for a copy of the Board's Rules of Procedure. By a letter of 10 September 1993, which the complainant says he did not get until the 25th, the chairman of the Board - newly appointed after a change in membership - sent him the rules. But in the meantime, on 15 September, counsel had filed his appeal in final form without even waiting for the text of the rules. On 12 October the chairman acknowledged receipt.

7. So the regional Board did answer the complainant by letters of 10 September and 12 October 1993. Though it did so after expiry of the 90-day time limit, the reason no doubt was that it had received his counsel's letter of 20 July announcing that he would be filing an appeal. But, as has been said, the text of the Rules of Procedure was not sent to him until 10 September. What is more, at the same time there was a change in the Board's membership. Yet as early as 7 October, before the Board had reported, he went off to the headquarters Board.

8. The conclusion is that the complainant's own behaviour affected the regional proceedings and made for delay in the regional Board's report and recommendation to the Regional Director. Not to be ignored either is the effect of the change in membership, which fell within the time allotted for hearing the case. On the evidence the complainant has failed to show that the Board did not intend to report within a reasonable time. He has also failed to establish that it was not his own premature appeal to the headquarters Board that prevented the regional Board from reporting.

9. What is more, there are other facts beyond the regional Board's control that seriously hampered the proceedings. According to a document the WHO has duly submitted there was political upheaval in the Congo in 1992 and 1993. Brazzaville was shaken by riots, and the Regional Office, at Djoué, was cut off and business interrupted, notably from 14 to 28 June 1993, from 7 to 28 July 1993 and from 3 November 1993 to 3 February 1994. Since that was when the complainant's appeal was with the regional Board there was undoubtedly impediment of calm and orderly hearings. The Tribunal is satisfied that the delay in the Board's handling of his appeal was not wholly due to any shortcomings of its own and in any event did not warrant direct referral to the headquarters Board. So the WHO succeeds in its objection that the complaint is irreceivable for failure to exhaust the internal means of redress. The complaint must fail.

10. Since the complainant's main claim, to the quashing of the impugned decision, is rejected, so too are all his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner