

EIGHTY-SECOND SESSION

In re Lebtahi

Judgment 1617

The Administrative Tribunal,

Considering the complaint filed by Mrs. Farida Nadia Lebtahi against the World Health Organization (WHO) on 20 November 1995 and corrected on 19 December 1995, the WHO's reply of 20 March 1996, the complainant's rejoinder of 24 June and the Organization's surrejoinder of 1 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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, an Algerian who was born in 1948, joined the WHO on 9 May 1983. She held a one-year appointment as a part-time technical officer at grade P.3 in the Division of Vector Biology and Control. She had her appointment extended by one year at a time and then, from 1989, by two years. From 1990 she worked full time and the WHO put her in charge of its scheme for the evaluation of pesticides (WHOPES). On 1 April 1992 she was granted a personal promotion to P.4 as a scientific expert. At the material time she was working in the Division of Control of Tropical Diseases (CTD). In May 1993 the WHO transferred her from Operational Research to Schistosomiasis Control within that division.

On 21 October 1994 she signed a report on her performance in a period ending on 31 March 1994. By a memorandum of 26 October 1994 the Director of CTD proposed in the light of the report that the Personnel Division should renew her appointment for just one year, until 31 December 1995. On 5 December 1994 she signed a form renewing her appointment for one year but reserved her "right to appeal and seek a two-year appointment". On 13 December 1994 the Director of the Personnel Division extended her appointment by one year.

On 17 February 1995 she gave the headquarters Board of Appeal notice of appeal against the decision of 13 December 1994. She entered a brief on 14 March 1995 asking the Board to declare the decision of 13 December unlawful and to recommend that the Director-General give her a five-year extension and transfer her to another department. In its report of 24 July the Board recommended rejecting the appeal. By a letter of 22 August 1995 to the complainant -- the impugned decision --- the Director-General endorsed the Board's recommendation.

By a letter of 28 September 1995 the Chief of the Administration and Staff Support Service told her that her appointment would not be extended beyond 31 December 1995.

B. The complainant submits that according to Staff Rule 1050.3 the WHO should have told her of the one-year renewal at least three months before the expiry of her appointment, i.e. by 1 October 1994 at the latest. It did so only on 13 December, 18 days before expiry. So she assumed that it was tacitly renewed on 1 October 1994 for a further two years.

She pleads several flaws in the appraisal of her performance. First, her supervisors gave her only two reports in the five years from 1 January 1990 until the date of filing this complaint. That was in breach of Staff Rule 530.2, which requires at least one report a year. Secondly, the report on her work in the period up to 31 March 1994 is flawed because it is incomplete, omitting as it does any assessment by her first-level supervisor. Lastly, the Organization failed to update the description of her post as Article 50 of the WHO Manual requires.

She submits that the impugned decision is unlawful since it overlooks material facts. In the report on her performance up to 31 March 1994 the Director of CTD said that she had managed WHOPES poorly. That that was untrue may be seen by comparing how the programme fared before and after she took over. The Organization

ignored the fact that she was promoted to grade P.4 on 1 April 1992. There is no truth in other charges about her performance, such as lateness in drawing up her programme of work for 1994-95, failure to attend official meetings and poor working relations with secretaries. The impugned decision is therefore based on clearly mistaken conclusions.

Lastly, the Organization misused its authority and offended against the principle of equal treatment by refusing, for all her requests, to transfer her and WHOPEs to another unit in the CTD or to another division.

She seeks a five-year extension of appointment, her transfer, together with responsibility for WHOPEs, to another division, an award of damages equivalent to six months' pay and 12,000 Swiss francs in costs.

C. In its reply the WHO submits that the report on the complainant's performance up to 31 March 1994 was "very bad". She was the only programme officer not to have her work plan for 1994-95 ready in time. The report shows that behind her supervisors' backs she tried to get WHOPEs transferred to another division. It was quite wrong for her to try, for her own sake, to find a department where she thought working conditions would be better.

The decision to renew her appointment for only one year came after thorough appraisal of her work and conduct. A one-year extension, which the WHO Staff Rules and Manual and her contract allowed, was warranted in the circumstances. Paragraph 550.1 of the Manual says that extension is subject to a finding of satisfactory performance. She was promoted to P.4 only because her post was to be upgraded.

Staff Rule 1050.3 prescribes a period of notice where termination is due to abolition of a post. The material rule in her case is Rule 1040, and it does not require three months' notice where an extension is shorter than the current appointment.

The WHO acknowledges that it appraised her performance in 1992-94 only once and that her first-level supervisor should have made an entry in the report she signed on 21 October 1994. But those omissions have no bearing on the merits of the case, since the impugned decision rested on comprehensive assessment of her work and conduct. As for the delay in updating the description of her post, it was partly her own fault.

D. The complainant rejoins that in its report of 24 July 1995 the headquarters Board of Appeal recommended against ruling out a transfer and in favour of updating the post description so that her work could be objectively assessed. She points out that the consultant who took over from her was transferred with WHOPEs to another unit. Citing Judgment 469 (*in re O'Connell*), she challenges the narrow construction that the WHO puts on Rule 1040.

E. In its surrejoinder the WHO maintains that the impugned decision was based on the complainant's reports, which show her many difficulties both in work and in getting on with others. She was given a one-year extension so that she could do better and her second-level supervisor could assess her work. WHOPEs was brought directly under the CTD Division in July 1996. Judgment 469 is irrelevant.

CONSIDERATIONS

1. The impugned decision is about the extension of a fixed-term contract by a period shorter than that of the current appointment. Since at the expiry of that appointment there might have been no extension granted at all, the rules on non-renewal apply *mutatis mutandis*: see Judgment 1526 (*in re Baigrie*) on the grant of a shorter extension without further renewal.

According to WHO Staff Rule 1040 a fixed-term appointment confers no right to renewal. A firm line of precedent has it that a decision not to renew is discretionary and may be set aside only if it is *ultra vires* or in breach of a formal or procedural rule, or if there is a mistake of fact or of law, or if some material fact is overlooked, or if a plainly mistaken conclusion has been drawn from the evidence, or if there is misuse of authority.

An international organisation accordingly has broad discretion in deciding whether to renew a fixed-term appointment. Having only a limited power of review, the Tribunal will not interfere in the organisation's assessment of someone's fitness for service or career prospects: see, for example Judgment 1349 (*in re Zago*) and the case law cited therein.

2. The complainant pleads that the Organization failed to tell her by 30 September 1994, i.e. within three months of the date of expiry of her then appointment, that it intended to offer her only one more year and that there was

therefore tacit renewal of her two-year appointment to 31 December 1996. The three-month limit is, she argues, set in Rule 1040 on non-renewal and in Rule 1050.3 on termination before expiry. In her submission the law of contract, which implies renewal in such circumstances, should apply by analogy. She relies on Judgment 469 (*in re* O'Connell), a case where an official had been given notice of a two-month extension only two days before expiry of the contract: the effect of failure to give notice -- the Tribunal held in 3 -- could "only be that the contract is by implication renewed for another term". So it was unlawful for the impugned decision to reduce a period of extension already granted by implication.

The WHO's answer is that it complied with the material rules. Notice is, it maintains, required only in the event of termination or non-renewal since only then does an official need time in which to put his affairs in order; the rules do not recognise renewal by implication; there must be an express decision saying, for one thing, how long the extension is to be; and, if there is a short extension and then none at all, due notice will then be given.

The Organization's reasoning is sound. The rule of contract law about implied renewal of a fixed-term appointment cannot apply by analogy to the international civil service, where contractual relations are determined by individual written decisions. Whether the case is one of non-renewal or of dismissal, the rules on notice must be observed: so say the precedents. The need for such a safeguard is ordinarily not so great when the appointment is extended, but extended by a shorter term than the current one. The official is of course entitled to be told promptly what the organisation intends so that he can make up his own mind about its offer. If he accepts he will have protection enough from the notice to be given later if a decision is taken not to renew his appointment. He is protected too if there are offer and acceptance of extension but he still appeals in order to get a longer term. But if he refuses an offer of extension and wants to seek employment elsewhere he will again need time. In that event equity may require an extension from the date of the offer by a period as long as the required notice. That would take account of the parties' legitimate interests in a way that the extraordinary implication of extension by the same term does not.

But there is no need to rule on that issue here: the complainant did not want to leave the WHO but was merely asking for a longer extension. In the event of non-renewal she has the protection of the required notice.

Her plea fails.

3. (a) The reason the Organization gave for the impugned decision is that her performance was unsatisfactory. That emerged in the report appraising her performance in the period up to March 1994 but had already been apparent to some extent even before. In sum, she allegedly fell short of expectations, failed to produce the documents her supervisors had asked for and got on poorly with secretaries and others. The Administration's reason for extending her appointment by only one year was to give her time to come up to par.

She is objecting to those strictures as mistaken in fact. She says that most of her supervisors lacked the scientific training to assess her as an entomologist. She challenges the validity of her final appraisal on several grounds. She alleges breach of Rule 530.2, which requires the administration to report on her performance at least once a year. She says that, in breach of Manual paragraph 50, her first-level supervisor did not make a single appraisal on her performance from 1 January 1992 to 31 March 1993 and, in breach of paragraphs 40 and 50, the Organization failed to update the description of her post. So, she submits, it may not rely on the final appraisal. It allegedly overlooked such material facts as the personal promotion she got in June 1992 to P.4: that, she maintains, shows that her work was good and gives the lie to the utterly different appraisal for the full period.

As the Appeals Board observed, she failed to challenge the charge that she had been unable to work satisfactorily. Instead she blamed the unfavourable conditions in which she had to work and the lack of support from her supervisors and of proper secretarial help.

(b) The WHO admits the flaws she points out but maintains that none of them is fatal to the impugned decision.

The case law she cites does not bear out her contention that the substantive decision was tainted with procedural flaws. The Organization submits that the material issue is whether the flaws went to the substance of its decision. In Judgment 448 (*in re* Troncoso) the Tribunal held that, although procedural flaws might sometimes be corrected in the course of internal appeal proceedings, for example by the disclosure of evidence, that ordinarily proved impossible when there had been no prior report at all. In this case the reporting procedure was followed and the complainant was given her say. Though there may not have been reports at least once a year as required, the report

on the final reporting period is no less lawful on that account. It is true that her first-level supervisor did not report on her work, before she was transferred, though he ought to have done so: see Judgments 10 (*in re Marsh*) and 197 (*in re Sternfield*). Yet the report on the rest of the period holds good, and the period was long enough to allow proper appraisal. So the hearing of her first-level supervisor by the Board of Appeal was a proper way of correcting the procedural flaw. Indeed the complainant fails to offer any cogent reason why it was not. The conclusion is that the flaws she objects to under this head are not fatal to the impugned decision.

(c) It is odd that the WHO granted her a personal promotion to P.4 in the spring of 1992 when she thereafter got bad reports. The Organization explains that the proposal for that promotion came from the Personnel Division, not from her own supervisors, the purpose being to make her pay match the level of attainments her post demanded.

In any event her supervisors knew of her promotion when they appraised her performance and the Director-General too must have been aware of it when he took the decision. Besides, her work may have gone into decline since then and so warranted a poor report.

The conclusion is that on that score the Director-General did not neglect any material fact.

(d) Not having the same training in entomology as she, some of her supervisors no doubt found it hard to appraise her work in that area. Yet they were still competent to say how she was meeting the Organization's requirements and, in particular, comment on her relations with others at work and, at least to some extent, on what she had achieved.

Their lack of such training does not in itself cast doubt on their appraisals.

(e) Although she did admit to the Board of Appeal that she had some shortcomings she otherwise denies the WHO's criticisms of her performance.

The WHO may rely, however, mainly on the concurring views of some of her supervisors and the opinion expressed by the Board after hearing both parties and several witnesses. The witnesses said that her relations with others at work had been especially strained and that she had failed to cope with the problems due to cuts in secretarial staff.

On the strength of the unfavourable appraisal non-renewal of her appointment may have seemed too harsh for someone who until then had had good reports which offered hope of improvement. So the WHO concluded that the right expedient was to give a shorter extension so that she might show her mettle.

In coming to those conclusions on the evidence before him the Director-General did not go beyond the bounds of his discretion and the Tribunal will not replace his assessment of the evidence with its own. Giving her a renewal for one year -- instead of none at all -- allowed for the fact that had her appraisal reports been more frequent (see (b) above) her shortcomings might have come to light sooner and she might then have been able to show improvement before the normal expiry of her contract.

4. In her comments on her appraisal report she applied for transfer to another unit. When the Organization granted her the one-year extension it did not expressly comment on that request. Again she asked the Board of Appeal to recommend that the Director-General transfer her to another unit. The Board did not comment either. She now argues that the Organization's failure to transfer her amounted to misuse of authority and breach of equal treatment.

So has the Organization taken a decision on her application for transfer and has she exhausted her internal remedies? If she were objecting to the WHO's failure to transfer her when it extended her appointment, the plea is devoid of merit, since the matter is at the Director-General's discretion.

But there is no need to rule on the issue. Rejection of a claim to transfer, or failure to take a decision on it at the time of renewal, is a matter for the Director-General's discretion. It would in any event have been admissible for him to hold over a decision on the issue until he had further information on her performance, on the scope for transfer and on the usefulness of transfer for the Organization. Since she had already been transferred, with her own consent, in May 1993 there was all the more need for such information: on that issue see Judgment 451 (*in re Dobosch*) under 12.

The plea is devoid of merit.

5. Since her main claims fail, so do her claims to damages and costs.

DECISION

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
E. Razafindralambo
Egli
A.B. Gardner