

EIGHTY-THIRD SESSION

In re Wabitsch

Judgment 1631

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kurt Rudolf Wabitsch against the World Health Organization (WHO) on 5 June 1996, the WHO's reply of 6 September, the complainant's rejoinder of 5 December 1996 and the Organization's surrejoinder of 11 March 1997;

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, who is German, joined the staff of the WHO on 17 July 1988 under a two-year fixed-term appointment as a medical officer at grade P.5 under the Global Programme on AIDS (GPA). He had his appointment extended by two years in 1990, 1992 and 1994. After giving him notice of termination under Staff Rule 1050.1 with effect from 30 June 1995, the Administration extended his appointment first to 31 August 1995 and later to 31 December 1995. In form 172, "Notification of decision on position request", which the chief of Budget signed on 7 April 1987, the Administration had described post 1.3420 as "time-limited ... for a period of two years from date of recruitment, extension of post subject to continued need and availability of funds".

In a letter dated 26 September 1995 a senior officer of the Division of Personnel informed him that the Organization had decided to terminate his appointment under Staff Rule 1050.1 at 31 December 1995, when his post was "scheduled for abolition" for want of funding. On 22 November 1995 he gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that he was withdrawing his appeal.

B. The complainant submits that the decision to terminate his appointment was unlawful. He alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration. Though his post was originally one of limited duration, the WHO extended it without setting a new date of expiry and that made it one of indefinite duration.

He seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earning he may have had up to the actual date of reinstatement. He claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated him fairly and in full compliance with the rules. The Manual provision he relies on does not apply to his case. Nor was he entitled to a reduction-in-force procedure under Rule 1050.2: his post being one of limited, not indefinite, duration, the material rule is 1050.1. Even if his original post had been of indefinite duration, he could not rely on any acquired right to the conditions attached to a post of that nature. In any event the Organization did its utmost to find other employment for him. If the Tribunal ruled in his favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In his rejoinder the complainant rebuts the Organization's pleas and enlarges on his own. He restates his claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant joined the staff of the Organization on 17 July 1988. He was appointed to post No. 1.3420 as a medical officer (clinician) under the Global Programme on AIDS (GPA). The post had been established on 7 April 1987 under the then Special Programme on AIDS, which later became the GPA, as a "time-limited post for period of two years from date of recruitment, extension of post subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). Initially appointed for a period of two years, the complainant's contract was extended by further two-year periods ending on 16 July 1996. By a memorandum dated 29 March 1995 the chief of Contract Administration and Information, in the Division of Personnel, told him that, failing reassignment, his appointment would end at 30 June 1995 in accordance with Staff Rule 1050.1. A further memorandum informed him that his contract would be extended to 31 August 1995 and, again failing reassignment, would end at that date. On 12 June 1995 he lodged an internal appeal. He got a further extension to 31 December 1995. By a letter dated 26 September 1995 the chief of Contract Administration and Information informed him that funding for his post would cease at 31 December 1995 and the post itself would be abolished, and that his appointment would terminate at that date under Staff Rule 1050.1. That rule reads:

"The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished."

In a memorandum of 15 December 1995 to the chief of Contract Administration and Information the complainant referred to his earlier notice of appeal against the termination of appointment. By an agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS -- "to which WHO will provide the administrative framework" -- and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" -- there were 87 -- together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as he contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re Perrone*), 515 (*in re Vargas*), 891 (*in re Morris*) and 974 (*in re Birendar Singh*). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

"Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

"Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:

260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;

260.2 inter-regional or inter-country project posts;

260.3 country project posts, irrespective of the source of funds;

260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

"Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

"90.1 the date from which the post could be covered;

90.2 the funding during the current financial period;

90.3 the effect on subsequent financial periods and on the budget;

90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

"The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But -- it argues -- that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

"The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of a "time-limited post for two years from the date of recruitment". Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available. To extend a "time-limited post by another limited period it is necessary to take another decision specifying such limitation. There is no evidence of any such decision in this case.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

"The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule

1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

"A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

"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 complainant held a time-limited post that became one of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate his appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish his post, the purported termination of his appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

"No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain his plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of his appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under his previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by him between 1 January 1996 and the actual date of reinstatement. He cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of his contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re Morris*) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in *Mitastein* were not raised in *Morris*. In *Mitastein* the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above -- without actually reinstating him in a post commensurate with his grade and experience -- and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay him damages as set out in 25.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

