

EIGHTY-FIFTH SESSION

In re Rwegellera (No. 2)

Judgment 1775

The Administrative Tribunal,

Considering the second complaint filed by Mr. George Gregory Celestine Rwegellera against the World Health Organization (WHO) on 6 January 1997 and corrected on 28 January, the WHO's reply of 22 May, the complainant's rejoinder of 4 July and the Organization's surrejoinder of 14 October 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. Facts relevant to this case, including a summary of the complainant's career in the WHO, are set out under A in Judgment 1404, which the Tribunal delivered on 1 February 1995 on his first complaint. As was stated in that judgment, the complainant served in Uganda under a series of fixed-term contracts as a medical officer and teacher of psychiatry. Having learned from a telex of 4 December 1991 that the Organization was to abolish his post at the end of the year and was giving him three months' notice of termination under Rule 1050, he appealed to the regional Board of Appeal in January 1992.

By a letter of 26 March 1992 a personnel officer told him that the Regional Director had agreed to grant his request for leave without pay for six months in lieu of termination under 1050 and to "explore all reassignment possibilities" during that period. Thereupon, he withdrew his appeal. The WHO extended the period of leave to 8 April 1993. Its attempts to find other duties for him - which included a proposal to assign him to Brazzaville on terms he did not agree to - came to nothing, and it gave him notice of termination in a letter of 11 May 1993.

On 28 May 1993 he resumed his appeal to the regional Board. On 3 December 1993 the WHO made him an offer of assignment of a post of "Medical Officer/Psychiatry" to Swaziland, subject to clearance from the Government. By a telex of 17 May 1994 the Regional Office informed him that the Government had withheld clearance, preferring to have an epidemiologist, and that the assignment therefore fell through.

In a report dated 24 August 1995 the regional Board recommended rejecting his appeal. By a letter to him of 31 August the Regional Director did so. On 10 October he put the matter to the headquarters Board of Appeal. In its report of 2 July 1996 it found that the WHO had given him a "reasonable" expectation of 11 months' employment at Brazzaville and therefore recommended paying him the amount he would have received under the terms originally on offer but rejecting his other claims.

By a letter of 15 October 1996 the Director-General offered to pay him 5,000 United States dollars "as compensation" and towards costs; he also endorsed the recommendation of the headquarters Board insofar as it was for rejection. That is the decision he is impugning.

B. The complainant submits that the impugned decision is unlawful on three counts. He objects, first, to abolition of his post in Uganda, a decision he sees as tainted with personal prejudice and failure to take account of the facts. In his view the proper response to the proposal from the Ugandan authorities to do without a psychiatry teacher was to seek other funding and look into the whole matter. What is more, the WHO's Representative had a duty under Administrative Instruction No. 9 of 17 October 1988 to "explain to the countries the importance of staff continuity in the delivery of WHO programmes and to actively discourage further proposals to discontinue professional posts". But the Organization too hastily bowed to the authorities' wishes. In any event he was entitled to application of Staff Rule 1050.2 on the reduction-in-force procedure.

His second set of objections is about the aborted offer of employment in Brazzaville. He pleads breach of the contract under which it was to employ him for 11 months. That it entered into a contract is plain from the wording of its telex of 18 March 1993: "travel instructions will be issued upon receipt of medical clearance". But even if it were not bound by that contract, its offer of recruitment "should be respected". Besides, there were other vacant posts it could have put him on.

Lastly, he objects to the withdrawal of an offer it made him in 1993 of assignment to Swaziland. He argues that if the Brazzaville assignment had gone through there would have been no need to offer him Swaziland in the first place. Alleging personal prejudice, he blames the Organization for the Swazi Government's refusal of clearance: if the WHO had allowed its epidemiologist to stay in the country, the Government would have been willing to have a psychiatrist too.

He wants the Tribunal to treat him as if his appointment had been renewed without break from the date of abolition and to reinstate him. Failing reinstatement, he claims five years' salary in damages under all heads of injury, over and above the terminal entitlements the WHO has already paid him. He makes subsidiary claims to "all rights related to the end of the employment according to the Staff Rules" and to payment of another five years' salary in moral damages. He seeks \$15,000 in costs.

C. The WHO replies that the complaint is devoid of merit. Abolition was not prompted by any personal prejudice but a proper response to a request from a member State and in keeping with the Organization's interests too. Rule 1050.2 does not apply to posts of limited duration like the project post he was on. The Organization met its obligations to him under the applicable rules and even agreed to put him on leave without pay.

It did its utmost to find him another assignment, even after his leave without pay had run out. As to the assignment in Brazzaville, it denies the existence of a contract of employment with him, a matter which, according to precedent, requires "unquestioned and unqualified concordance of will on all terms of the relationship". But he had rejected two essential terms of the proposed assignment: its length and the pay. Indeed the proposal of a "possible" assignment in Swaziland, which arose after he had left, was not in breach of any contractual obligation. As for the official he mentions who was serving in Swaziland, had the Organization not allowed him to go, there would have been no post to offer the complainant.

D. In his rejoinder the complainant seeks to rebut the WHO's arguments in the reply and enlarges on his earlier pleas. He insists that personal prejudice was the reason why the Organization abolished his post. In any event his 13 years' satisfactory service entitled him to something better than "summary termination" on grounds of mere abolition of post. The defendant failed to abide by the rules on termination and made no genuine attempt to find him another suitable assignment. He presses his claims.

E. In its surrejoinder the WHO presses its pleas and comments on issues raised in the rejoinder. It submits that the impugned decision flowed from compliance with the rules and submits that the main reason why its efforts to find a post for him came to nothing was that there were few posts in psychiatry and mental health.

CONSIDERATIONS

1. This complaint relates to three separate administrative decisions by the complainant's employer, the World Health Organization (WHO):

- (1) the abolition, on 31 December 1991, of the complainant's post, No. 3.3322, as a medical officer and teacher of psychiatry in Uganda and the ensuing termination of his appointment on 9 April 1993, after a period of leave without pay;
- (2) the withdrawal on 22 March 1993 of an offer of employment ("the Brazzaville offer"); and
- (3) the withdrawal on 17 May 1994 of a proposed appointment ("the Swaziland proposal").

2. The complainant initially appealed against the termination of his contract to the regional Board of Appeal and later added to his appeal a new ground based on the withdrawal of the Swaziland proposal. The Board recommended dismissing the appeals and the Regional Director accepted that recommendation.

3. The complainant then appealed against the Regional Director's decision to the headquarters Board of Appeal and added, as a further ground, the withdrawal of the Brazzaville offer. In its report the Board recommended dismissing all his claims except the one relating to the Brazzaville offer. With respect to that claim it found "no evidence of legal impropriety in the fact or manner of withdrawal of the offer" but considered that the offer "had been made in such a way as to create a reasonable expectation of successful conclusion".

4. The headquarters Board also found "clear indications of a lack of consideration for a staff member of long standing, in the apparent failure of the Administration to take steps to negotiate for an extension of the post in Uganda". It recommended paying the complainant compensation equivalent to the full amount of his salary for the eleven-month contract which had been the subject of the Brazzaville offer.

5. By a letter of 15 October 1996 to the complainant the Director-General rejected the Board's recommendation regarding the Brazzaville offer but agreed to pay him 5,000 United States dollars in compensation for loss of "some expectation of employment" and in costs. The Director-General accepted the Board's recommendation that the other claims be dismissed. That is the impugned decision.

6. The following issues are raised by the complainant's pleadings:

(1) whether the abolition of his post in Uganda and the Organization's failure to reassign him to another post were tainted by personal prejudice;

(2) whether the termination of his appointment without a reduction-in-force procedure was in violation of Staff Rule 1050.2;

(3) whether he accepted the Brazzaville offer in such a way that a binding contract was formed; and

(4) whether the Swaziland proposal was an offer of employment accepted by the complainant such that a binding contract was formed.

Personal prejudice

7. On the issue of personal prejudice the complainant makes many allegations. Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as here, the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification.

8. In the present case the complainant alleges that the acting WHO Representative (WR) in Entebbe should have done more to resist the Ugandan Government's request for the abolition of his post, should have attempted to find alternative funding for the post, should have engaged the assistance and support of the regular WR (who was on medical leave at the time) and should not have taken the Ugandan Government's letter of request with him when he went to the Regional Office in Brazzaville. There is no substance to any of these allegations. Not only has the complainant failed to show that any of the acting WR's actions or failures to act amounted to a breach of duty but, even if they had, there is nothing to indicate that any of them was motivated by personal prejudice. It is likewise with regard to the Organization's withdrawal of the Brazzaville offer: the only "evidence" advanced by the complainant, amounting to no more than the retailing of scurrilous gossip about the activities of the Regional Director, simply fails to come to grips with the issue.

9. Moreover, as was indicated in 7 above, the Organization has furnished convincing evidence that the decisions both to abolish the Uganda post and to withdraw the Brazzaville offer and the Swaziland proposal were justified by objectively verifiable considerations, such as the wishes of the governments concerned. While such considerations do not, of course, eliminate the possibility of personal prejudice, they stand in stark contrast to the speculative nature of the complainant's allegations. The claim on this issue must fail.

Reduction-in-force procedure

10. The complainant's claim that the abolition of his post in Uganda required a reduction-in-force procedure is without merit. Staff Rule 1050.2, which he relies on, states that it applies only to "a post of indefinite duration". The post held by the complainant - No. 3.3322 - was designated as a "project post". As Manual paragraph II.9.260 makes plain, the reduction-in-force procedure does not apply to posts of "limited duration", a category which specifically includes country project posts. This claim also fails.

The Brazzaville offer

11. The Brazzaville offer was conveyed to the complainant by a telex dated 3 March 1993 that gave detailed daily and monthly figures for salary and post adjustment. In a telex of 12 March 1993 in reply, the complainant, after stating that the offer was "acceptable in principle", goes on to claim a different (and higher) salary step as well as a hardship allowance. In its reply of 18 March the Organization did not refer in any way to the complainant's earlier telex but simply asked him to undergo the required medical examination prior to the issuance of travel instructions. The offer was withdrawn by a further telex of 22 March 1993 from the Organization.

12. For the complainant's claim to succeed he must show an unqualified agreement and meeting of minds between the Organization and himself on the essential terms of a contract of employment. The Tribunal is unable to read his telex of 12 March 1993 as anything but a counter-offer on one of the most essential terms of the proposed contract, namely remuneration. Certainly, it cannot be said to be an unqualified acceptance and the fact that it is couched in terms of a claim of right does nothing to change its character; a potential employee does not have an automatic right to any particular grade or step and an offer which specifies one figure of salary cannot be accepted by a claim to a higher figure: see Judgment 228 (*in re Rémont*). Nor can it be said that the Organization's reply of 18 March 1993 constituted by its silence on that score an acceptance of the complainant's counter-offer. Silence does not normally imply consent and the circumstances here are not such as to give rise to any inference in the complainant's favour; the terms of the Organization's telex are fully compatible with the conclusion that the question of salary was still unresolved and subject to further negotiation.

13. In the absence of any binding contract between the Organization and the complainant in regard to the Brazzaville position, the complainant's claim under this head must fail.

The Swaziland proposal

14. The Swaziland proposal was contained in a letter of 3 December 1993 from the Organization. That letter specified in two places and in the clearest terms that it was dependent upon clearance from the Government of Swaziland. It added: "this letter does not constitute an offer of appointment and does not imply any commitment on either side at this stage". The Tribunal has no doubt that this letter does not constitute an offer capable of acceptance and that the Organization did not intend to commit itself at that stage. It was simply making a tentative proposal which, in its terms, was dependent upon the Government's subsequent approval; when that approval was not forthcoming, there was no agreement of any sort between the parties. The complainant's claim under this head must also fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner

