

EIGHTY-NINTH SESSION

In re Ochani (No. 8)

Judgment No. 1956

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 26 December 1998 and corrected on 13 January 1999, the WHO's reply of 9 April, the complainant's rejoinder of 4 May and the Organization's surrejoinder of 26 July 1999;

Considering Articles II, paragraph 5, and VII 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, a citizen of India, is a former official of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. Under circumstances explained in Judgment 1856 delivered on 8 July 1999 on his second complaint his service was terminated for misconduct with effect from 5 August 1996.

Staff Rule 1075.1 provides in part that when a staff member is dismissed for misconduct: "The staff member shall be given one month's notice. The Director-General may grant him an indemnity not exceeding one-half of that payable under Rule 1050.4. No end-of-service grant is payable".

In a letter of 16 April 1997 to the Regional Director the complainant requested payment of a termination indemnity. On 30 April the Personnel Officer at SEARO rejected his request on the Director's behalf. He pointed out that Rule 1075.1 uses the words: "The Director-General *may* grant", and that therefore the grant of the indemnity is discretionary. He further told the complainant that a final decision had already been taken on the matter and had been conveyed to him in the letter of 31 July 1996 informing him of his dismissal. On 26 May 1997 the complainant appealed to the regional Board of Appeal against the decision not to pay him the indemnity. After it had received a statement from the Organization, the Board contacted the complainant on 31 July allowing him five days to file a rejoinder. The complainant says he submitted one on 7 August but then heard no more. The Organization states that no rejoinder was received and that the regional Board sent two reminders to the complainant dated 25 August and 15 September 1997.

The parties concur that on 29 October 1998 the complainant notified his intention to appeal to the headquarters Board of Appeal. On 4 November the Secretary of the Board informed him that, before proceeding, she was contacting the regional Board to find out the status of his appeal. She wrote to him again on 6 January 1999, informing him that in the absence of an answer from SEARO by 18 January the headquarters Board would deal with his appeal.

Her inquiry revealed that as the regional Board had not received a rejoinder from the complainant it had not taken up his appeal. The Secretary informed him on 20 January 1999 that if she did not hear from him within fifteen working days the headquarters Board too would assume that he wished to withdraw his appeal. The Board heard no more from him and in the meantime he filed the present complaint.

B. The complainant says he filed his complaint directly with the Tribunal because of the inordinate delay in dealing with his appeal. He is challenging the implied rejection of his claim to the indemnity.

He submits that terminal remuneration is payable to him under Staff Rule 1050.4, and the Administration is wrong to refuse him such indemnity on the grounds of his misconduct because the charge of misconduct was never "defined".

Moreover, he objects to the Organization's arbitrary interpretation of the word "may" in Staff Rule 1075.1. Such a

negative interpretation was unwarranted particularly as the decision to dismiss him was itself flawed - a matter that he had challenged in a previous complaint to the Tribunal and which had not yet been ruled on when he filed the present complaint. He submits that it is clear from the Tribunal's case law that the authority with the power of discretion should exercise it in good faith: in this instance the decision made by the Administration was *ultra vires*.

He seeks the quashing of the decision of 30 April 1997. He wants to be paid "terminal remuneration" as set out in Rule 1050.4. He also claims 5,000 United States dollars "towards cost and compensation for suffering mental and material injury". He adds that if there has meanwhile been a favourable outcome of his complaint concerning his dismissal he would only wish to press his claim for 5,000 dollars.

C. In its reply the Organization argues that the complaint is irreceivable under Article VII of the Tribunal's Statutes. In not waiting for the opinions of the regional and headquarters Boards he has not exhausted the internal means of redress that were open to him. Furthermore, both his internal appeal and his complaint to the Tribunal were filed out of time. As the Organization informed him in its letter of 30 April 1997, it was its letter to him of 31 July 1996 which contained the final decision regarding his termination and his internal appeal should have been filed within sixty days of receiving it.

On the merits, it rebuts the complainant's pleas that it made arbitrary use of a discretionary power in not paying him the indemnity he was seeking. Under the terms of Rule 1075.1 the granting of one month's notice was compulsory whereas the grant of the indemnity was discretionary. Because of the circumstances of his dismissal the Organization considered that payment of an indemnity was not justified. It rejects his claim to an award of damages.

D. In his rejoinder the complainant presses his pleas and maintains that his internal appeal was not filed out of time. The letter of 31 July 1996 did not mention non-payment of the terminal indemnity he is claiming and he therefore contests that he had sixty days from receipt of that letter in which to file his appeal.

He maintains that two of the letters produced by the Organization were "patently fabricated" and added to the records after he had filed his complaint in an attempt to "twist" the facts of his case. The reminders of 25 August and 15 September were supposedly sent to him by the Secretary of the regional Board of Appeal, but the complainant questions their authenticity. At the same time, his own reminders addressed to the regional Board on 24 September 1997, 3 February and 12 October 1998 were passed over in silence by the Organization and it has avoided any reference to the rejoinder he filed with the Board within the five-day time limit initially allowed. In the circumstances, he wishes the Organization to state if it received his letters of reminder. He also requests the Tribunal to grant additional appropriate relief because of the Organization's "misdemeanour".

He stresses that he also has a right to terminal indemnity under the terms of Staff Regulation 9.3 which states: "If the Director-General terminates an appointment the staff member shall be given notice and indemnity payment in accordance with the terms of his appointment".

E. In its surrejoinder the Organization points out that in Judgment 1856 the Tribunal rejected the complainant's plea that his dismissal was unlawful. There is therefore no foundation for the complainant's principal argument that the charge of misconduct was never made clear to him.

The WHO rejects the complainant's allegation that it fabricated evidence. Even if the complainant did file a rejoinder as he claims, the fact remains that the regional Board of Appeal did not receive it; that is clear since it sent reminders to him. Nothing prevented him from despatching it to the Board a second time.

The decision not to pay him the indemnity was taken for objective reasons and was free from personal prejudice. Moreover, it was not taken in breach of Regulation 9.3 which the complainant refers to. That Regulation provides that in the event of termination an indemnity is made in accordance with the terms of the staff member's appointment; but Staff Rule 1075.1, which is at issue in his case, also formed part of his terms of appointment, and so refusal of the indemnity was warranted.

CONSIDERATIONS

1. The complainant joined the Organization in New Delhi, in 1988. On 31 July 1996 he was dismissed with effect from 5 August 1996. By Judgment 1856 (*in re* Ochani No. 2) the Tribunal rejected his plea that his dismissal was unlawful.

2. On 16 April 1997 the complainant claimed a termination indemnity under Staff Rule 1075.1. This claim was rejected in a letter dated 30 April 1997 on the grounds that the grant of such indemnity was discretionary.
3. The complainant appealed to the regional Board of Appeal on 26 May 1997. The Organization says that he did not respond to a request made to him on 31 July 1997 to file a rejoinder, or to subsequent reminders.
4. On 29 October 1998 he filed an intention to appeal directly to the headquarters Board alleging that he had sent a rejoinder to the regional Board on 7 August 1997 but had received no response. On 4 November 1997 the Secretary of the headquarters Board told the complainant that information about his appeal was being sought and he would be contacted.
5. The complainant filed directly with the Tribunal on 26 December 1998, claiming inordinate delay. In a letter of 6 January 1999 the Secretary of the headquarters Board informed him that, in the absence of a response from the regional Board by 18 January 1999, the headquarters Board would take up the appeal. On 14 January 1999 the Secretary of the regional Board replied that the complainant had failed to submit a rejoinder despite reminders. The Secretary of the headquarters Board then wrote to the complainant on 20 January 1999 setting out the position. The complainant did not respond.
6. Quite apart from any argument concerning irreceivability it is clear that the complaint cannot succeed on the merits.
7. Staff Rule 1075.1 provides:

"A staff member may be dismissed for misconduct as defined in Rule 110.8 and subject to the notification of charges and reply procedure required by Rule 1130. The staff member shall be given one month's notice. The Director-General may grant him an indemnity not exceeding one-half of that payable under Rule 1050.4. No end-of-service grant is payable."
8. The use of the word "may" shows that the Director-General has discretion as to whether a termination indemnity should be paid to a staff member who is dismissed for misconduct. The reason for dismissal was his attempt to defraud the Organization. Since the Tribunal ruled in Judgment 1856 that the Administration was justified in concluding that the complainant had acted improperly and therefore dismissed his complaint, it follows that the Director-General has lawfully exercised his discretion in not granting him an indemnity under Rule 1075.1. Since the complainant's case fails on the merits it is not necessary to rule on the issue of receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

