

## FORTY-THIRD ORDINARY SESSION

### *In re* FLORES-ARAUZ

#### Judgment No. 390

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Esteban Flores-Arauz on 7 July 1978 and brought into conformity with the Rules of Court on 4 September, the WHO's reply of 4 December, the complainant's rejoinder of 12 February 1979 and the WHO's surrejoinder of 28 February 1979;

Considering Article II, paragraph 5, and Article VII, paragraph 2, of the Statute of the Tribunal and WHO Staff Rules 420.4, 540.1, 540.2 and 960 (now 1060) and WHO Manual provision II.9.450;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Having held several successive short-term appointments from 10 May 1976, on 1 October the complainant was given a two-year appointment as an administrative assistant at grade G.8 in the Pan-American Centre for Human Ecology and Health in Mexico City. On 12 April 1977, while still on probation, he was given an unfavourable appraisal report by the Director of the Centre, Dr. Bennett, who recommended that his appointment should not be confirmed. On 18 April 1977 the complainant appealed to the Director of the Pan American Sanitary Bureau, which is the secretariat of the Pan American Health Organization and the Regional Office of the WHO. The Chief of Administration of the Bureau answered on the Director's behalf that the one-year probationary period ought to have begun on 1 October 1976, the date of appointment, and ended one year later, on 30 September 1977, not in May 1977. The decision whether or not to confirm the appointment would therefore be taken in September 1977 after the complainant's supervisor had made a new appraisal report. On 31 August 1977 Dr. Bennett wrote to inform the complainant of his intention to recommend, in accordance with Staff Rule 960, that on the grounds that he was unsuited to international service the complainant should not have his appointment confirmed. (Staff Rule 960 reads: "If, during an initial or extended probationary period, a staff member's performance or conduct is not satisfactory, or if he is found unsuited to international service, the appointment shall not be confirmed but terminated. The staff member shall be given one month's notice. No indemnity is payable.") Further explanation, Dr. Bennett added, would be provided in the performance appraisal report. The report form was given to the complainant so that he could fill up the section for self-appraisal. Several conversations then took place between Dr. Bennett and the complainant, particularly from 12 to 15 September. At first they agreed to withdraw the appraisal report on the understanding that the complainant would resign on 31 December 1977 for "personal reasons", but on 15 September the complainant said that he had changed his mind. Dr. Bennett thereupon upheld his decision not to recommend confirmation. A few days later the complainant sent back the form with the "self-appraisal" section filled up. On 26 September Dr. Bennett sent him back the form with his own appraisal. He said that, although the complainant demonstrated competence in accounting, his performance in administrative matters had been seriously lacking, and he was anxious to seek greater authority, critical of others and rude to other employees. At that point it was open to the complainant to add his own comments and send the report back to the Administration. He did not do so. He ought then to have appealed in the first instance to the Director of the Bureau, but on 28 September he appealed directly to the Director-General of the WHO. In his reply on 5 December 1977 the Director-General disregarded that procedural error and simply dismissed the appeal, upholding the decision not to confirm the appointment in accordance with Staff Rule 960. "It is correct that a final decision to terminate your appointment should not have been taken before Dr. Bennett's appraisal report had been communicated to you for your perusal and comments, if any, and before your comments had been taken into consideration. However, I note that you have yourself delayed the appraisal process in September 1977, when you kept the report 26 days in order to complete Part 1. Since 28 September 1977, when the report completed by your supervisor was handed to you, for your comments, you have not submitted any such comments in spite of numerous reminders, but you have retained the report. I therefore find that you have been given ample opportunity to reply to the appraisal report of your supervisor, and I consider that the Organization's obligation to give you such opportunity has now been fulfilled."

B. The letter of 5 December 1977 was not delivered and came back to the WHO. It was sent off again to the complainant by registered mail on 29 March 1978 and he received it on 8 April. Meanwhile, on 10 January 1978, Dr. Bennett had written to the complainant sending him a copy of the Director-General's letter of 5 December, and Dr. Bennett's letter was handed over to the complainant's servant on 13 January. Having received no answer, Dr. Bennett wrote again on 14 February, and the complainant acknowledged receipt of the second (registered) letter on 21 February. He says that the first one - of 10 January - never reached him and that the second one contained only a copy of the covering letter of 10 January, but no copy of the Director-General's letter.

C. The complainant maintains that according to Manual provision II.9.450 the grounds for the termination of his appointment should have been communicated to him and he should have been invited to reply by a given date. His reason for taking so long to fill up Part 1 of the appraisal report was that he was discussing the possibility of resignation. He never received the many reminders which the Director-General said had been sent asking for his comments. It is true that he was given "ample opportunity to reply", but only after the decision not to confirm his appointment had been taken. Lastly, Dr. Bennett said in the first appraisal report that the complainant was "an honest and good person". If he did not really mean it, doubt is cast on everything else he says, and if he did then it is wrong to say that the complainant was unsuitable for international service.

D. In his claims for relief the complainant asks the Tribunal to quash the decision to terminate his appointment and to order the defendant organization to honour his appointment until the date of its expiry, to pay his salary and allowances in full up to the date on which the Tribunal gives its decision and to give him a written certificate of satisfactory work and conduct.

E. The WHO contends that the complaint is time-barred because it is dated 7 July 1978. The letter of 5 December 1977, the letter of 10 January 1978 - which was delivered on 13 January - and the letter of 14 February 1978 were all sent to the address given by the complainant. Besides, even if, as he alleges, a copy of the Director-General's letter of 5 December 1977 was not appended, the letter of 14 February 1978 made it plain to the complainant that a decision had been taken and that it was not favourable to him. It may therefore be presumed that the impugned decision was communicated to him not later than the end of February 1978, i.e. over four months before he filed his complaint.

F. As to the merits the Organization admits that the complainant ought to have been given a written statement - in the appraisal report - of the reasons for non-confirmation and an opportunity to comment before the termination procedure had begun. The decision ought also to have been reviewed by the Director of the PASB. That was a procedural error, and it was also an error for the Director-General's decision of 5 December 1977 to state that the complainant had delayed the appraisal by keeping the report form for 26 days. Nevertheless those errors do not afford sufficient grounds for quashing the decision: (a) the complainant knew quite well what his supervisor's criticisms were. For months they had been discussing the subject, for example in September 1977. (b) By hesitating over resignation the complainant did not facilitate matters. He could have sent back the self-appraisal section of the report as early as 15 September 1977. (c) the Director-General should enjoy broad discretion in deciding whether or not to keep a probationary official. If the official's services appear inadequate, the Director-General should be able to dispense with them notwithstanding procedural errors. (d) The complainant got the report after 26 September. Instead of adding his own comments he appealed directly to the Director-General of the WHO. Had he made comments, the Director-General would have had them when he took his decision. Hence the complainant is mistaken in alleging that his comments would have made no difference. The Organization therefore asks the Tribunal to dismiss the complaint.

G. In his rejoinder the complainant states that the Director of the PASB was not consulted and he himself was not given any opportunity to express his views before Dr. Bennett sent him the letter of 15 September 1977 upholding the non-confirmation. The conversation held in September 1977 before Dr. Bennett sent that letter did not relate to his performance but to the possibility of his resigning. Dr. Bennett's only criticism of him was for lack of administrative skill, but how could Dr. Bennett judge when, in a letter of 14 May 1977 to the Chief of Personnel of the PASB, he admitted that he was himself not trained in administration? The complainant concedes that Dr. Bennett was not prejudiced against him, but believes that he was merely trying to correct the error which he thought had been made in appointing the complainant instead of a candidate supported by the Chief of Personnel.

H. In its surrejoinder the WHO confirms that the conversations in September 1977 did relate to the complainant's performance and it produces a handwritten note by the complainant recounting what happened in September.

## CONSIDERATIONS:

Paragraph 2 of Article VII of the Tribunal's Statute provides that to be receivable a complaint must have been filed within ninety days after the complainant was notified of the decision impugned. The decision impugned is dated 5 December 1977, but owing to mishandling at the Regional Office the original was not delivered to the complainant until 8 April 1978. If that was the date of its first notification, the complaint filed on 7 July 1978 was just within the ninety day period.

The Organization, however, contends that a letter containing a memorandum from the Director, to which a copy of the decision was annexed, was delivered by hand at the complainant's residence on 15 January 1978 and received there by a person believed to be the complainant's servant. A note to this effect was made at the time on a copy of the memorandum retained by the Organization.

The Tribunal is satisfied that the letter was delivered in this manner. The complainant says that it "never reached" him. But he does not deny that the letter was accepted at his residence nor offer any explanation as to what could thereafter have happened to it. Moreover, on 14 February the Director wrote to him to say that he had not heard from him regarding the memorandum "that was delivered to your house". The complainant admittedly received this letter; he did not reply to it denying receipt of the memorandum. In these circumstances the Tribunal finds that the complainant was notified of the decision on 13 January and that consequently the complaint was not filed in time.

## DECISION:

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel  
Devlin  
H. Armbruster

Bernard Spy