FORTY-FIFTH ORDINARY SESSION

In re WATTERS

Judgment No. 422

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Gregor Watters on 14 November 1979 and brought into conformity with the Rules of Court on 18 January 1980, the WHO's reply of 3 April, the complainant's rejoinder of 25 July and the WHO's surrejoinder of 15 August 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 310.5.1, 310.5.2 and 1230.9 and WHO Manual section II.2.335.3;

Having examined the written evidence, 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. On 4 January 1978 the complainant, a British subject employed by the WHO in its European Regional Office in Copenhagen, married another member of the staff who had been recruited locally and belonged to the General Service category. His wife had legal custody of a daughter who held Danish nationality. On 18 January 1978 the personnel administration branch informed the complainant that the child would not be regarded as his dependant unless he adopted her. The complainant then submitted evidence to show that under Danish law he was required to support his step-daughter. The WHO confirmed its rejection of his application and he appealed to the Regional Board of Inquiry and Appeal. The Board held that adoption would be unfavourable to the child but that the complainant bore responsibility for her. It recommended paying him the child allowance less the alimony paid by the child's natural father - a negligible sum amounting to 366 Danish kroner a month. The Regional Director rejected that recommendation and the complainant appealed to the headquarters Board of Inquiry and Appeal, which recommended that the Director-General should recognise the child as the complainant's de facto dependant. By a letter dated 16 August 1979, which contains the decision impugned, the Director-General rejected that recommendation on the grounds that the child was her mother's dependant, that her mother was therefore entitled to child allowance and associate benefits due for a dependent child, and that the child was not de facto fully dependent on the complainant. On 12 October 1979 the complainant asked the Director-General to reconsider his decision. The Director-General confirmed his decision in an undated letter which reached the complainant in Ankara, his new duty station, on 17 January 1980. Meanwhile the complainant had filed an appeal with the Administrative Tribunal by a letter dated 14 November 1979. Because of delay in correspondence with the Registry caused by the complainant's transfer to Turkey and his confinement in hospital, it was not until the end of January 1980 that the Registry received the complaint in a form amended to bring it into conformity with the Rules of Court.

B. WHO Staff Rule 310.5.2 reads: "... the children, if determined dependent, shall be recognized as the dependants of that parent holding the higher level post. For the purposes of this Rule, 'child' shall include a child recognized by the Organization to be de facto fully dependent upon a staff member for its support". The complainant argues in his complaint that the Rule takes account only of the de facto, not of the de jure position. Adoption is a legal act. In any event the child could not be adopted under Danish law unless her natural father consented, and in fact he refused. There is no merit in the WHO's argument that the child is not fully dependent on the complainant because her mother is receiving alimony from her father and allowances from the WHO. The alimony is a negligible sum and might in any event be deducted from the WHO allowance, as indeed the Regional Board of Inquiry and Appeal recommended. To take account of the allowances received by the mother is a blatant misinterpretation of Staff Rule 310.5.2.

C. In his claims for relief the complainant asks the Tribunal to order the WHO to recognise the child as his de facto dependant and his consequent entitlement to benefits, including education grant and home leave.

D. In its reply the WHO does not challenge the receivability of the complaint. On the merits it argues that since the complainant is not the adoptive father he and his wife would be entitled to have the child recognised as his dependant only if the WHO recognised her as wholly dependent on him. Under Manual section II.2.335.3, which

states the conditions under which a child may be recognised as de facto fully dependent, the child may be so recognised only when taken in charge by a staff member in a country where there is no law permitting legal adoption, and the staff member has to provide evidence to show that in fact the child is fully dependent on him for care and maintenance. The conditions have not been fulfilled in this case since, before her marriage to the complainant, Mrs. Watters was supporting her daughter out of her own earnings and the child did not become the complainant's dependant by reason of the marriage. The complainant's obligations towards the child under Danish law are immaterial since the only applicable provisions are the WHO Staff Regulations and Staff Rules. The WHO therefore asks the Tribunal to dismiss the complaint.

E. In his rejoinder the complainant strongly objects to the WHO's narrow interpretation of the Staff Regulations and Staff Rules. The Organization, he believes, is ignoring the spirit of the Rules, the purpose of which is to ensure the best possible upbringing of children in the sometimes difficult circumstances facing parents in the international civil service. Although his wife's duty station is in Denmark and his own in Turkey, the family, which is British, has had to incur the heavy expense of sending the child to school in Great Britain. In such cases the International Labour Office and other organisations merely determine whether the child is dependent on the spouses, not on one of them, and if so the child is then recognised as entitled to benefits as the dependant of the spouse holding the higher grade. The complainant appends to his memorandum copies of accounts and other items intended to show that the child is de facto fully dependent on him. In any event, he points out, Danish law requires him to meet such expenses. He maintains, furthermore, that the internal appeal proceedings were tainted with flaws. For example, the original decision by the Regional Director was improperly influenced by headquarters. The Regional Director took the final decision entirely on his own responsibility whereas under Staff Rule 1230.9 he ought first to have consulted the Director-General. That flaw is serious enough to invalidate the subsequent decisions. The internal appeals were therefore largely pointless, and the complainant asks the Tribunal to award him the costs he incurred because of them. He argues that reference to municipal law is inescapable in this case since it is Danish law which determines the relationships, rights and duties of members of the family. The WHO cannot properly contend that on matters of matrimonial law and adoption the Staff Regulations and Staff Rules are the only material provisions. In a further statement of his claims the complainant asks the Tribunal to quash the decision of 16 August 1979 and to order payment of all allowances from the date of his marriage, 4 January 1978, and of his full costs (5,642 dollars) plus interest at 15 per cent a year on the sums due. He invites instructions as to the disposition of the allowances paid to the child's mother by the WHO and the alimony paid by her father, which are at present accumulating in blocked accounts.

F. The WHO points out in its surrejoinder that before the marriage the child was maintained by the mother and therefore dependent on her. The marriage has not changed that state of affairs: the child was never dependent on the complainant. It is begging the question to contend that his wife's daughter is his de facto dependant because he spends a great deal of money on her and is voluntarily in loco parentis. Municipal law cannot be regarded as material. Which law would apply in this case - Danish, perhaps, or English? The WHO refers to municipal law only to determine such matters of status as marriage, birth and adoption, the administrative and financial consequences of such acts being determined by the WHO's own rules. The requirement of consultation of the Director-General in Staff Rule 1230.9 is not absolute and applies only where the Staff Regulations or Staff Rules have to be interpreted. The Regional Board of Inquiry and Appeal did not find any mistake of law: what it recommended was merely an amicable settlement. Even if there were procedural errors - though there were not - they had no effect on the impugned decision. Lastly, the WHO regards as excessive the amounts claimed to cover the complainant's costs.

CONSIDERATIONS:

1. The complainant, a British national, and his wife are both members of the Organization's staff, the complainant being at the rank of P.5 and the wife being employed in the General Service category at the Organization's office at Copenhagen. The wife was previously married to a Danish national by whom she had children. This case is concerned with one only of the children, hereinafter called "the step-child", a girl now aged 17 who is being educated in England at the complainant's expense at a total cost of between £2,000 and£3,000 per annum. The wife has sole custody of the step-child, the father paying as required by Danish law a small sum of about £300 per annum towards his daughter's upkeep. The wife draws from the Organization in respect of the step-child a dependant's allowance. The amount is not stated in the dossier, but it is presumably a substantial sum appropriate to the cost of the education which the child was receiving in Copenhagen before her mother remarried. This allowance, as also the Danish father's contribution, is at present being paid, at the instance apparently of the complainant, into a blocked account.

2. The complainant and his wife were married in Copenhagen on 4 January 1978. The complainant was then working at Copenhagen in the same office as his wife and they set up (and still have) a joint residence there. On 23 April 1978 the complainant signed a declaration, made under the Danish law, whereby he accepted full responsibility for the support and maintenance of the step-child. Since the marriage the complainant has been transferred, still in the service of the Organization, to Ankara. The wife has remained with the Organization at Copenhagen. She is not, for the purposes of a spouse's allowance, a "dependant" of the complainant since the level of her earnings takes her out of the definition of dependant in Staff Rule 310.5.1. But she continues to draw an allowance for the step-child. The complainant is ready to adopt the step-child but the consent from her father, which appears under Danish law to be necessary, has been refused.

3. Staff Rule 310.5.2 provides that where both parents are staff members, "the children, if determined dependent, shall be recognized as the dependants of that parent holding the higher level post". The allowance obtainable by the complainant for a child of the marriage would be higher than that obtained by his wife. The complainant sought to have the step-child recognised by the Organization as his dependant, but on 23 June 1978 this was refused by the Chief of Personnel.

4. The question is whether the step-child is a child of "both parents" within the meaning of Staff Rule 310.5.2. The status of a step-child is nowhere mentioned in the Staff Rules, but Staff Rule 335 grants the status of dependency to three categories of children. The first consists of children by blood of the staff member claiming the allowance; the step-child is not within that. The second is children legally adopted; the step-child is not within that. The third is a category constituted by a discretionary power given to the Organization to recognise as dependent any child who is "de facto fully dependent upon a staff member for its support". Staff Rule 310.5.2 expressly provides that for its purpose "child" shall include a child in this category.

5. Thus relationship is not the deciding factor: the question is whether a child, who may or may not be a step-child or a niece or a grand-daughter or any sort of relative, is de facto fully dependent. This is a question in the first instance for the Director-General; the word "recognized" in the text gives him a discretion; this is natural since the answer depends not on the facts simpliciter but on an appreciation of the facts. If the Director-General withholds recognition, the Tribunal cannot interfere unless he has erred in law or by reaching a clearly mistaken conclusion on the facts, or in some other way has abused his power.

6. The Director-General's decision, which is the decision appealed against and which was conveyed in his letter of 16 August 1979, was carefully expressed and fully reasoned. He emphasised that the question was whether the step-child was fully dependent on the complainant. The question is not answered by saying that she has in fact since the marriage been given full support by the complainant which he has pledged himself to continue. For the question is not whether she is in fact being fully supported by the complainant but whether she is in fact fully dependent on him, that is, whether in fact he is her sole source of support. The Director-General by implication ignored the father's contribution as de minimis. But he held that, so long as the wife was a staff member in receipt of a child allowance, the step-child was partly dependent on her. If the text of the rule is to be taken as meaning what it apparently says, it is difficult to fault this reading of it. The fact that the allowance obtained by the mother is currently being paid into a blocked account cannot make it unavailable as a source of support.

7. The complainant contends that the Director-General's conclusion is erroneous in that he has adopted a too literal, and therefore an incorrect, interpretation of the rule. The complainant submits in his rejoinder that the rule has been applied "in a narrow and restrictive fashion". In this he is echoing the remarks of the headquarters Board of Appeal (whose advice, as also that of the Regional Board, the Director-General has rejected) which criticised the Administration for applying the rule "in the strictest and narrowest sense" and for not meeting its intent; and expressed its surprise "that a case which seemed to present so many discretionary elements had proceeded so far".

8. In the opinion of the Tribunal these criticisms are misconceived. The only thing that can be said about the intent and spirit of the rule is that it was intended to provide allowances in accordance with its terms. It can usefully be observed that what is to be provided is an allowance and not a reimbursement. In the straightforward case of parent and child the allowance is paid without any proof of expenditure; it is left to the moral sense of the parent to expend the money in the way he thinks best for the benefit of the child. In the case of parent and child dependency needs no proof. In the case of a de facto dependency, expenditure may well be a good way of proving that the dependency exists, but it is not of the essence. Proof, such as the complainant says exists in this case, of an enforceable undertaking to support and maintain the child would be sufficient to establish a dependency. But if a

dependency is not established, there is nothing from which an intent can be inferred to grant an allowance to the person who is de facto paying the bills.

9. This is not however the real point in this particular case. The question is not whether the complainant has established that there is a dependency - in the opinion of the Tribunal he has - but whether there is a full dependency. It was to this question that the Director-General rightly directed his mind and he concluded that the step-child was not fully, i.e. solely, dependent on the complainant; it is impossible to say that this was a clearly mistaken conclusion of fact.

10. Thus all that is left to the complainant is to argue that the word "full" should be disregarded as contrary to the spirit of the rule. One must ask oneself why the word is there. Manifestly it can only be there so as to exclude cases in which the child is dependent on more than one person. There might for example be a staff member who with no children of his own undertook to help to a limited extent with the education of the children of a relative or friend. It is true that to meet such a case the rule could have been phrased to give to the staff member a proportionate part only of the allowance. Or it could have been phrased to give to the Director-General a wide discretion to do justice as he saw it in each case. Or the case could be dealt with, as it is in the text, by excluding from the operation of the rule all cases in which the dependency is not as complete as it normally is between child and parent. Objection can be made to all of these alternatives, to the third that it is too narrow, to the second that it is too wide and to the first that it is not really practicable. But there is no sense in which the spirit can be invoked to decide which of the three was intended: that can be determined only by looking at the language used. If the text, by using the word "full", points quite clearly to the third, it is not open to the Director-General to say that he thinks this alternative to be too narrow and restrictive and that he would prefer to choose one of the others. To do that would not be to give a liberal interpretation to the law (as he does for example, when he treats 90 per cent as satisfying the test of fullness) but to take the law into his own hands.

DECISION:

For the above reasons,

The complaint is dismissed.

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 11 December 1980.

André Grisel
Devlin
H. Armbruster

Bernard Spy

Updated by PFR. Approved by CC. Last update: 7 July 2000.