

TWELFTH ORDINARY SESSION

In re KISSAUN

Judgment No. 69

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the World Health Organization drawn up by Mr. Kissaun (Alphonse, Maria, Gerard), doctor of medicine, on 26 October 1962, the reply of the Organization dated 14 December 1962, the additional memorandum by the complainant dated 6 February 1963, the reply of the Organization to that memorandum dated 5 March 1963, and the complainant's additional observations dated 28 March 1963 in respect of which the Organization did not exercise its right of reply.

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Articles 430.2, 430.3, 430.4, 440 and 960 of the Staff Rules of the WHO;

After examining the documents in the dossier, the hearing of one of the witnesses and of an expert having been disallowed and the complainant consequently not having availed himself of the Tribunal's authorisation of the hearing of the second witness, and oral proceedings being therefore without object;

IN FACT:

A. Complainant was appointed by the WHO on 14 May 1961 for a period of two years, including a probationary period of twelve months, as a Medical Officer in the grade P.4, and assigned as team leader of a venereal diseases and treponematoses project in Liberia under the authority of the Organization's Regional Office for Africa, in Brazzaville, and of the North Western Area Representative, stationed in Dakar.

B. Shortly after complainant had assumed his duties in Liberia, difficulties arose in connection with the payment of the rental of the lodging with which he had been provided. Up until 1961, lodging had been provided free of charge by the Liberian Government to technical assistance personnel serving in Liberia, whose allowances were consequently reduced. From then onward, as the result of an arrangement concluded between the Resident Technical Assistance Representative in Monrovia with the Government of Liberia, lodging was provided against payment of a nominal rent and the allowances reverted to their normal rate. Complainant, who contested the authority of the Resident Representative, as an official of the United Nations, to impose the new arrangement upon WHO officials, made difficulties in complying with it, wrote a number of letters in this connection, one of which, addressed to the Resident Representative, was considered by the latter to be discourteous, had several conversations on the matter with his supervisors either when they visited Liberia or when he visited Brazzaville, and finally submitted to the arrangement only on the express instructions of his supervisors.

C. By a letter of 27 April 1962, Dr. Cambournac, Regional Director of the Organization, terminated Dr. Kissaun's appointment. The letter was accompanied by a period evaluation report drawn up on the same date by Dr. Akwei, Dr. Kissaun's immediate supervisor, and endorsed also on the same date by Dr. Norman-Williams, Director of Health Services of the Brazzaville Regional Office. The periodic evaluation report, while acknowledging Dr. Kissaun's professional criticised his character. Dr. Kissaun appealed to the Director-General of the Organization against this decision. During the appeal proceedings, Dr. Cambournac, Dr. Norman-Williams and Dr. Akwei submitted reports on which Dr. Kissaun was not invited to comment. On 9 August 1962 the Director-General confirmed the decision to terminate the appointment.

D. By the present complaint, Dr. Kissaun prays the Administrative Tribunal to quash the Director-General's decision and to recommend his reinstatement. He charges the Regional Director with having violated the Staff Rules, taken his decision with undue haste and based that decision on incorrect or non-proven facts. He complains that he was not made aware of all the documents placed before the Director-General and challenges the competence of the Regional Director to terminate the contract of an official whom he did not appoint. The Organization prays that the complaint be dismissed.

IN LAW

1. The contract of the complainant was terminated less than one year after his appointment, that is to say during the initial probationary period. Article 960 of the Staff Rules provides that if, during the initial probationary period, a staff member's performance or conduct is not satisfactory, if he is found unsuited to international service, or if he fails to qualify medically, the appointment is terminated with one month's notice and without any indemnity. In deciding to terminate the appointment of an official on probation the Director-General is exercising his discretion. Therefore, while the Tribunal is competent to review this decision in as far as, on the one hand, it may have been taken by a person without authority, or in an irregular form, or if there may have been a failure to comply with recognised procedure, or, on the other hand, if it may be tainted by an error of law or based upon materially incorrect facts, or if essential material elements have been left out of account or if obviously wrong conclusions have been drawn from the evidence in the dossier, the Tribunal will not substitute its own opinion for that of the Director-General as regards the conduct or suitability of the official concerned for international service, neither the complainant's performance nor his health being at issue in this particular case.

2. In the present instance there has been failure to comply with recognised procedure in regard to the decision complained of inasmuch as there has been an infringement of the right to be heard. By virtue of this right, before a decision to his detriment is taken, every official should have the opportunity of acquainting himself with the elements taken as the basis for this decision and of explaining himself with regard to them. It follows, in particular, that he cannot be the subject of a termination decision as long as he has not received the evaluation reports concerning him and has not been allowed the opportunity to dispute their contents. The principle stated, which applies even in the absence of express texts, is, moreover, embodied in the provisions of the Staff Rules of the Organization concerning periodic evaluation. According to these provisions, not only must the reports be discussed with the official concerned who must sign them and who may contest their correctness (Articles 430.2 and 430.3), but these reports shall be the basis for decisions concerning the staff member's status and the confirmation of his appointment at the end of his probationary period (Articles 430.4 and 440).

Thus understood, the right to be heard has been doubly ignored in the present case. First, the Regional Director terminated the appointment of the complainant without previously submitting to him a periodic evaluation report or affording him the opportunity of justifying himself. Then, in connection with the appeal proceedings before the Director-General, Dr. Cambournac, Dr. Norman-Williams and Dr. Akwei produced reports of the existence of which the complainant only became aware during the proceedings before the Tribunal and with regard to which he accordingly had no opportunity to state his case in time. Since these reports were placed in the dossier and could influence the Director-General's decision, they should have been brought to the knowledge of the complainant and he should have been afforded the opportunity of submitting his observations.

3. Contrary to the Organization's submission, the infringement of the right to be heard, which the Tribunal has found to have taken place, entails the quashing of the decision complained of. It is incorrect to maintain that, though the complainant was deprived of the possibility of a hearing by the Regional Director, he was, nevertheless, given the possibility of stating his case to the Director-General and that the failure to comply with recognised procedure in respect of the first decision was thus subsequently rectified. In reality, far from having been able normally to defend his interests before the Director-General, the complainant, as has been stated above, was not invited to comment on the documents which were submitted without his knowledge. Moreover, even if the appeals procedure was properly complied with, the previous infringement of the right to be heard was not thereby corrected, since the officer who took the first decision had based himself to a considerable extent on evaluation which the higher authority apparently accepted without checking them all personally. The appeals procedure would at the most have had a reparative effect if the Director-General had made an ab initio investigation of the case, duly heard the complainant and substituted entirely his own grounds for decision for those of the Regional Director.

4. Infringement of the right to be heard being sufficient to entail the quashing of the decision complained of, the Tribunal does not have to consider whether any other reason would also have justified this conclusion. The Tribunal therefore will not examine whether the Regional Director was competent to terminate the appointment of the complainant, whether he acted with undue haste, or whether he based himself on the relevant facts. Far rather it is incumbent upon the Organization to reopen the case, to enable the complainant to exercise all his rights and to consider whether he should be reinstated. The recognised procedure having failed to be complied with during the first stage, it would be normal for the competent officer at that stage to be called upon to take a decision before

anyone else. However, if circumstances render this method of proceeding impossible or ineffective, as a result, for example, of changes which may have occurred in the staff of the Organization, it will rest with the Director-General alone to decide, after as full an investigation as possible.

5. The quashing of the decision impugned not being impossible or not seeming inappropriate, the Tribunal could not base itself on Article VIII of its Statute in order to grant an indemnity to the complainant from submitting a request for an indemnity to the Organization, whether he is reinstated or not. In any case, he could, at the most, only claim to any effective purpose compensation for the prejudice effectively suffered from the time of the coming into force of the decision complained of up until the date of notification of the decision to be taken, or, eventually, if this day is sooner, until the day when his appointment would normally have ended.

DECIDES:

1. The decision, dated 9 August 1962, not to confirm the appointment of the complainant at the end of the probationary period, is quashed.
2. The remainder of the conclusions of the complaint are dismissed.

In witness of this judgment, delivered in public sitting on 11 September 1964 by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

Signatures:

M. Letourneur
André Grisel
H. Armbruster
Jacques Lemoine