

SIXTY-FIFTH SESSION

Judgment 916

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. C. G. N. against the World Health Organization (WHO) on 5 June 1987 and corrected on 4 November, the WHO's reply of 29 February 1988, the complainant's rejoinder of 4 June and the WHO's surrejoinder of 26 August 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 420.4, 530.2, 540.1, 1060, 1070.2 and 1210.1 and .2 and WHO Manual provisions II.5.60 and 80;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Angola, was born in 1934. He was transferred on 3 March 1985 from the United Nations to the WHO's Regional Office for Africa, in Brazzaville. His appointment was for two years, he was on probation in the first year, and he was put on a P.3 post as an officer in the Finance Section (FIN). The first report appraising his performance covered the period from March 1985 to February 1986. Finding his work below standard, his first-level supervisor, the Budget and Finance Officer (BFO), recommended under Rule 1060 ("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.") against confirming his appointment. He made comments on 30 January 1986. Agreeing that his work was poor, the Director of the Support Programme recommended on 13 March extending his probation to 28 February 1987 under Rules 420.4 and 540.1 and withholding his within-grade step increment. The recommendations were approved on 18 March.

In his second probation report his supervisors again declared his work unsatisfactory and recommended against confirmation, and the Regional Director accepted that recommendation in accordance with 1060. A letter of 20 January 1987 from the Regional Office set the date of his termination at 28 February. On 13 February he lodged an appeal under Rule 1210.1: "A staff member may appeal against a decision taken under Rule 1060 not to confirm his appointment because of unsatisfactory performance ...". By a letter of 20 March 1987, the decision impugned, the Director-General informed him of the rejection of his appeal but said that the date of his termination was extended to 31 March under Rule 1210.2. The date was later changed again to 22 April because he was ill, and that is when he left the Organization.

B. The complainant submits that the BFO was prejudiced against him because he was the first black African to become a finance officer and from a desire to push forward other staff although he was better qualified than anyone else in his section. He cites several incidents in support of that allegation. He alleges incomplete consideration and misrepresentation of the material facts. He believes that he was made the scapegoat for the slackness of others. There was misuse of authority in that on 7 July 1986 his supervisor gave him new duties he could not possibly get through, for the improper purpose of getting rid of him on trumped-up charges of unsatisfactory performance. There was misapplication of Rule 1070.2, which says that before being terminated for unsatisfactory performance "a staff member shall be given a written warning and reasonable time to improve". He got no such warning before the second report, and by then he had no time to defend himself, let alone try to do better. In any event the charges against him are groundless. The appraisal being wrong and unfair, the termination was flawed. He asks the Tribunal to declare unlawful the assignment of him to the other duties and the second report; to quash the impugned decision; to reinstate him in a suitable post or award him damages in lieu; to grant him compensation for loss of pay from termination up to reinstatement; to award him 250,000 United States dollars in damages "for the injury caused by the unlawful decision"; and to order any other relief the Tribunal thinks fit.

C. In its reply the WHO goes over the material rules on probation and non-confirmation of appointment - Rules 420.4, 530.2, 540.1 and 1060 and Manual provisions II.5.60 and 80 - and submits that it correctly applied them to the facts of the complainant's case, which it also recounts. It describes the qualifications and qualities it expects, and is entitled to expect, in a finance officer, in particular care not to embarrass the Organization or bring it into disrepute. It was lack of that quality that caused dissatisfaction with the complainant's performance. As early as

August 1985 he had to be reminded in a minute of his duty to keep closer watch over the cashier's office, and a minute of 30 August from the BFO pointed out a blunder he had made in dealings with a Congolese bank and demanded of him greater effort and accuracy. There was another incident in November 1985 over a mistaken deduction from the salary of the WHO's Representative in Zaire. Each time the complainant admitted his own shortcomings. In the extended probation period his work was, if anything, even worse: he was slow, careless, incompetent and a shirker.

He neither enlarges on his charges of personal prejudice nor offers any evidence in support of them. Besides, giving him the benefit of an extension of probation belies them. The material provision is Rule 1060: it is quite plain from its wording that 1070 does not apply to probationary appointments, and the only relevance of it is that it states inability to perform the duties of the post as a criterion of unsatisfactory performance. The criterion reflects WHO practice and was applied in deciding not to confirm the complainant's appointment. Besides, a probationer does not need a warning or time to improve: that is the whole purpose of probation. The Tribunal may not replace the Director-General's appraisal of an official with its own, and there was no flaw in the exercise of the Director-General's discretion in this case.

D. In his rejoinder the complainant answers the Organization's pleas and develops his own. He contends in particular that it misconstrues Rule 1070.2. It is, in his view, not true to say that someone on probation needs neither written warning of an intention to terminate nor time in which to improve: that would be contrary to Rule 530. He alleges an anomaly in his probation in that he should have kept the same duties, not been given new ones. He asks the Tribunal to order disclosure of correspondence he says has a bearing on the nature of his duties and is essential to proper appraisal of his performance. He discusses in detail the incidents mentioned by the WHO and provides explanations. He states his willingness to provide proof of the personal prejudice against him.

E. In its surrejoinder the WHO submits that the complainant raises no new issue of fact or of law in his observations about Rule 1070.2, which the Organization maintains has no bearing on probationary appointments. It is only reasonable that someone who is on trial for employment in the WHO should be tested in all the duties pertaining to his post. The complainant's supervisors warned him orally and in writing as early as August 1985 that his work was not up to standard. Rule 530 was fully complied with. Besides, someone who has his probation extended knows full well that he has not yet been found satisfactory, and he therefore needs no written warning. In his explanations of the various incidents the complainant does not even deny his negligence and shortcomings but seeks only to belittle them. He offers no shred of evidence of prejudice against him.

CONSIDERATIONS:

1. The issue in this case is whether the decision not to confirm the complainant's probationary appointment was lawful.

On 3 March 1985 he was appointed as an officer in the Finance Section (FIN) of the WHO's Regional Office for Africa, in Brazzaville. He was appointed for two years and in the first year was on probation.

The first probation report, appraising his performance from March 1985 to February 1986, was unfavourable. His appointment was not confirmed and the probation was extended by a year.

The second probation report was also unfavourable and his appointment was terminated in accordance with Rule 1060, headed "Non-confirmation of appointment", which 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."

The complainant filed an internal appeal, but by a letter of 20 March 1987 the Director-General informed him that it had been rejected.

2. Staff Rule 1060 allows wide discretion in taking decisions under it. The Tribunal may not therefore set aside such a decision unless the decision was taken without authority, or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

Such considerations hold good for the review of all discretionary decisions, but the Tribunal will exercise special caution in reviewing a decision to dismiss a probationer. Otherwise probation would not serve its purpose as a trial

period.

In the case of dismissal of a probationer the Administration should be allowed the widest measure of discretion and the decision will be quashed only if the mistake or illegality was especially serious or glaring.

3. The complainant's arguments are that his first-level supervisor, the Budget and Finance Officer (BFO), was prejudiced against him; that there was misuse of authority in his supervisor's decision of 7 July 1986 to give him new duties he could not possibly get through; that Rule 1070.2 applied and was not complied with in that he was not given written warning before the second probation report and reasonable time to improve; and that the charges against him are in any event groundless.

4. During the first year of the complainant's probation, one day in mid-1985, janitors found the cashier's room open after working hours. In a confidential memorandum of 14 August the Director of the Support Programme, who was his second-level supervisor, accused the complainant of "serious neglect" of his duty, as the cashier's immediate supervisor, to keep an eye on his work and on the funds and all important papers in his charge.

5. A fortnight later, on 30 August, the BFO sent him another confidential memorandum pointing out that because of a serious mistake he had made the WHO's account with a Congolese bank showed an overdraft of 750 million CFA francs - the equivalent of some 1.7 million United States dollars - which was damaging to the WHO's "image as a reliable and well-

functioning international organisation". The BFO went on:

"... your effort and priority setting do not correspond to the grade of the post you are holding. Urgent matters have been lying with you, and vouchers are also being delayed. Further, the acting BFO during my home leave has reported that his work in Budget was hampered because he also had to be involved in Finance although you were present. Finally, should be mentioned the case of the unlocked door to the cashier's office.

More effort, attention and accuracy must be shown by you to fulfil the requirements of the post you are holding."

In a letter he addressed to the BFO on 27 September 1985 the complainant admitted his mistakes, observing that the bank overdraft had been due to a "technical oversight".

6. Again, in November 1985 a deduction was wrongly made from the salary of the WHO's Representative in Zaire: although a letter of explanation from the Representative had been forwarded to the complainant for action on 9 September 1985 he did nothing about it until 21 October. The Representative wrote a strongly-worded protest to the BFO in Brazzaville.

On 8 November the complainant wrote explaining the reason for the mistaken deduction and saying he fully agreed that he "must attend to incoming correspondence in a more expeditious way".

7. In accordance with Rule 540 a probation report was drafted on 17 January 1986 on the complainant's performance in the first twelve months of his employment. The BFO found his work below standard and recommended against confirming his appointment under Rule 1060. The BFO wrote in the report that there was room for improvement in his technical competence, accuracy and initiative. On several occasions, he observed, "if a voucher, a document, incoming correspondence was missing, it could be found on Mr. N.'s desk, where it had been lying unattended for some time". His general performance had been "below the level expected of an incumbent to the FIN post". Incidents had occurred that had been "expensive to the Organization or damaged the unit's and Organization's image". He had "not been able to take up all the duties" mentioned in his post description. He was regularly late in the morning and did not set a good example to his subordinates.

The complainant disagreed with the report and gave his reasons in a five-page text.

On 13 March 1986 his second-level supervisor endorsed the report, but recommended extending the probation period by 12 months. It was so decided.

8. From 7 July 1986 onwards the complainant was required by his first-level supervisor to clear the suspense account, and the supervisor explained in the probation report on the second twelve-month period that the reason for giving him that work was doubt as to whether he could perform the duties of his post.

In the second report the BFO acknowledged that his performance was "satisfactory" when he was given "few tasks of limited complexity and responsibility", but he was "less effective" in supervising "an important unit with many activities and problems". On 6 December the complainant submitted a six-page text objecting to that report.

On 9 December the Director of the Support Programme added his own comments: "Mr. N. thinks he is doing brilliantly in the Finance Section. His supervisor thinks he is doing very little, and that poorly; and he told Mr. N. so a year ago via the route of extending the probationary period. There is no room for compromise. Mr. N. has to leave the Finance Branch. He writes very well and has three languages. Unless he can be placed elsewhere in the Organization, his appointment cannot be confirmed".

On 8 January 1987 that recommendation was approved.

9. In these circumstances the complaint is devoid of merit. The WHO did not act without authority or in breach of any rule of form or procedure, nor was its decision based on any mistake of fact or law; nor did it overlook any essential fact nor abuse its authority; nor draw mistaken conclusions from the facts. The Administration made a proper exercise of its discretionary authority and the Tribunal will not substitute its own discretion for the Administration's.

10. Indeed the Organization treated the complainant fairly in that it extended the period of probation by a year to give him a further opportunity to improve.

11. Lastly, the complainant contends that it was Rule 1070.2, not 1060, that should have been applied. He is mistaken. It is 1060 that covers non-confirmation of a probationary appointment like the complainant's, whereas 1070 applies where the performance of a confirmed official is unsatisfactory. Besides, it is clear on the evidence that he was given ample written warning before the second report was made and reasonable time in which to prove himself. The conclusion of his supervisors was that he had failed to do so, and the decision must stand.

DECISION:

For the above reasons, there being no need to order the disclosure of further evidence,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gros Espiell
A.B. Gardner