

SEVENTY-THIRD SESSION

***In re* COMLAN**

Judgment 1167

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guy Comlan against the World Health Organization (WHO) on 5 March 1991 and corrected on 6 April, the WHO's reply of 1 July, the complainant's rejoinder of 11 November 1991 and the Organization's surrejoinder of 12 February 1992;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal and WHO Staff Rules 565.2, 1230.1.1, 1230.1.3, 1230.8.1 and 1230.8.3;

Having examined the written evidence and decided not to order oral proceedings, 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 Benin, joined the WHO in 1969 as a doctor at grade P.4. He held posts in several African countries before being transferred, in 1985, to a P.6 post as the Organization's Representative in Gabon.

There was a programme on television in Gabon in which viewers were invited to send in written questions to Government ministers about department affairs. On 15 July 1988 the Minister of Public Health and Population Questions appeared on the programme and there were letters from members of the public charging the complainant with unlawful activities such as trading in duty-free goods and speculating on real property. The Minister was taken to task for letting the complainant into Gabon when two other countries where he had served earlier - Cameroon and Niger - had declared him *persona non grata*.

In a letter of 18 July 1988 to the President of Gabon the complainant objected to being exposed to such accusations in public.

By a letter of 12 August 1988 the Minister of Foreign Affairs and Co-operation asked the Director of the WHO's Regional Office for Africa, which is in Brazzaville, to transfer the complainant: citing the charges against him, the Minister said that he was anxious to see Gabon keep on good terms with the Organization.

On 17 August the Regional Director, who was the complainant's supervisor, summoned him to Brazzaville to explain what had been happening. After talks between them the complainant applied for transfer to some other country.

By a telex of 17 November 1988 the Regional Office told him of a decision to transfer him to Bangui, in the Central African Republic, without loss of grade or step, even though his new post was graded only P.5. On 2 December 1988 he answered that he accepted though he had "fallen foul of an evil plot" and his new assignment amounted to an "unfair sanction". On 29 December he took up duty in Bangui.

On 10 April 1989 he submitted to the Director-General an appeal against transfer and on 10 May he followed it up with a letter to the chairman of the Regional Board of Appeal. Citing Rules 1230.1.1 and 1230.1.3, he applied for transfer to a post as WHO Representative at his own or a higher grade and asked to be relieved of serving under officials junior to him in both grade and length of service.

In its report of 28 March 1990 the Board recommended rejecting the appeal as time-barred under Rule 1230.8.3 and therefore irreceivable, and by a letter of 17 July 1990 the Regional Director endorsed the Board's recommendation.

On 25 April the complainant had appealed to the headquarters Board of Appeal against the Regional Board's findings. In its report of 10 December 1990 the headquarters Board again held his appeal to be irreceivable under Rule 1230.8.3. As for the merits, it saw "nothing wrong with" transferring him to Bangui; he had suffered no loss of grade or step and no financial injury. The Board recommended rejecting his appeal and in a letter of 28 January 1991, the impugned decision, the Director-General agreed.

B. The complainant submits that his transfer was a punitive measure calculated to wreck his career. It was the outcome of a plot hatched by the Minister of Public Health of Gabon and the Regional Director because he had got the Government to pay back money it owed the Organization. On his supervisor's own admission the television broadcast of charges against him was "a trap set for him" and he "sprang" it. Government officials let out that his supervisor had been behind the demand from the Minister of Foreign Affairs for his transfer. After their talks in August 1988 the Regional Director forced him to apply for transfer and on 23 September 1988 asked him over the telephone to leave Gabon and go back to his home country. He thereupon sent the Director-General his telex of 26 September objecting to his supervisor's tactics.

Though the television programme cast aspersions on him the WHO did not even try to defend him. His transfer made him subordinate to officials who were younger and less well qualified and had lower grades and seniority. The "emotional torment" his supervisor has subjected him to since August 1988 has caused him moral injury.

He seeks the quashing of the impugned decision, the restoration of his rights, including assignment to a post not lower than his present grade - D.1/P.6, step 1 - and preferably higher, an award of 500 million CFA francs in moral damages, and costs.

C. In its reply the WHO submits that the complaint is irreceivable.

Rule 1230.8.3 says that "A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made ..."; and Rule 1230.8.1 that "An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action". The complainant got notice of the material decision on 17 November 1988. Not until 10 April 1989 did he send the Director-General the telex announcing his intention of filing an appeal. He plainly missed the time limit in Rule 1230.8.3 and the Director-General was right to reject the appeal as irreceivable in his decision of 28 January 1991.

Besides, the complaint is devoid of merit. The complainant is wrong to blame his transfer on bias on the Regional Director's part. It was unavoidable: when the Government of a host country wants the WHO to recall its Representative the Organization cannot but comply. The decision was in the WHO's interests. The charges of impropriety levelled at its Representative on a television programme broadcast throughout the country were a threat to its good name among the people of Gabon. The Regional Director had no wish to harm him and he adduces no evidence of any "plot" the Director might have been involved in. The Director saw him before taking the decision, and besides, it assigned him to duties of the kind he had almost always had since joining the Organization. The Director also approached the Director-General to make sure he kept his grade on a personal basis.

His transfer was in line with the material rules and was no disciplinary measure. Rule 565.2 says that "A staff member may be reassigned whenever it is in the interest of the Organization to do so. A staff member may at any time request consideration for a reassignment in his own interest". After seeing the Regional Director in August 1988 the complainant himself applied under that rule for transfer from Gabon.

There is nothing in the rules that says a supervisor must be older or have greater seniority than his subordinates.

D. In his rejoinder the complainant observes that according to Rule 1230.8.1 before appeal will lie to a board of appeal against a final decision the administrative remedies must have been exhausted. That was the context in which he sent his telex to the Director-General on 26 September 1988. He was also awaiting his yearly performance report in the hope that it would reflect the findings of an inquiry his supervisor should have made into the charges against him.

He enlarges on his pleas on the merits.

E. In its surrejoinder the WHO submits that the rejoinder raises no new issue and it accordingly presses the case made out in its reply.

CONSIDERATIONS:

1. The complainant, who is a doctor of medicine, joined the WHO in 1969 and has held a career appointment since 1975. In 1985 the Organization appointed him its Representative in Gabon.

In 1988 his relations with the Government of Gabon soured and the Minister of Foreign Affairs demanded his transfer to another country. By a telex of 17 November 1988 the Director-General ordered his transfer to a grade P.5 post in Bangui as study co-ordinator, but at his own grade, P.5/D.1, and step.

In his answer of 2 December, though he protested at what he saw as a plot, he accepted transfer to Bangui, and he took up duty there on 29 December.

Not until 10 April 1989 did he give notice of appeal against the decision of 17 November 1988, and he filed his full appeal on 10 May with the Regional Board of Appeal.

2. WHO Staff Rule 1230.8.3 reads:

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed."

The proceedings before the Regional Board were long, indeed far too long: the Board did not report until 28 March 1990. Its main conclusion was that the appeal was time-barred and therefore irreceivable and its recommendation was to reject it.

The complainant then went to the headquarters Board of Appeal, which reported on 10 December 1990. It came to the same conclusion, the Director-General accepted its recommendation on 28 January 1991, and that is the decision against which the complaint has been filed, within the time limit in Article VII(2) of the Tribunal's Statute.

3. It is not in dispute that the complainant failed to meet the time limit of sixty days in Rule 1230.8.3 for appeal to the Regional Board of Appeal. But he makes out that he correctly followed the internal appeal procedure and that his complaint is therefore receivable under Article VII(1) of the Statute. He relies on the first sentence of Rule 1230.8.1, which says that "No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final". In giving notice of appeal the complainant said that he had been unable to act earlier because he had been subjected to "emotional torment" and especially because he had not got until 3 April 1989 his supervisor's appraisal of his performance.

4. His argument fails.

First, the rule he relies on, 1230.8.1, has to be read in its entirety. The second sentence reads:

"An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

Those conditions were met by the end of December 1988, and the complainant does not cite any step he took that may be treated as an appeal in the period from the date when he got the decision of 17 November 1988 to April 1989. Time limits are mandatory.

Secondly, Rule 1230.8.3, on which the impugned decision rests, does not require the lodging of a full statement of appeal within the time limit. All that is needed for the appeal to be receivable is that the impugned decision be clearly identified and the pleas set out.

As for the complainant's plea that he was subjected to "emotional torment", that is a gratuitous allegation for which he adduces no cogent evidence.

The conclusion is that he failed to comply with the provisions of the Staff Rules and to exhaust the internal means of redress and that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute.DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
P. Pescatore
A.B. Gardner