

## EIGHTIETH SESSION

### ***In re* THUILLIER**

#### **Judgment 1484**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pascal Thuillier against the World Health Organization (WHO) on 17 August 1994 and corrected on 18 October 1994, the WHO's reply of 30 January 1995, the complainant's rejoinder of 6 June and the Organization's surrejoinder of 12 September 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Frenchman born in 1961, joined the staff of the WHO on 5 April 1988 at its International Agency for Research on Cancer, at Lyons, as a laboratory technician at grade G.3. He held a short-term appointment which the Organization regularly extended until 30 September 1989. On 1 October he got a fixed-term appointment for two years.

In the first two reports appraising his performance, which covered the periods from 1 October 1989 to 30 September 1990 and from 1 October 1990 to 30 September 1991, Dr. Brigitte Pignatelli, his first-level supervisor, and Dr. Helmut Bartsch, his second-level supervisor, described his work as satisfactory. On 23 May 1991 the Organization extended his contract by two years to 30 September 1993.

His third appraisal report, on his performance from 1 October 1991 to 30 September 1992, said that "after some difficulties early in 1992" he had "changed his behaviour at work" and should "maintain his present attitude if his work is to remain satisfactory".

His fourth report, covering the twelve months from 1 October 1992 to 30 September 1993, showed a decline in performance. In appended comments which he saw on 25 June 1993 Dr. Pignatelli criticised him for spending time on futile work, making a big order for supplies without telling her beforehand, despite instructions to cut down, and baulking at some of his tasks. She said that he had sent members of the unit a memorandum complaining that he had not been named as one of the authors of a paper. He had overestimated his contribution to positive testing of one mutagen and the discovery of another. Her recommendation was to withhold his within-grade step increment for six months.

On 2 July 1993 Dr. Bartsch asked to have his appointment extended by only six months, to 31 March 1994. He was so informed the same day. Feelings rose in July with a to-ing and fro-ing of memoranda between the complainant, his supervisors and the Administration. His supervisors' main objections were that he was not making proper use of analytical tools and his work was unreliable. In a memorandum dated 7 July Dr. Pignatelli took him to task over the order. By a memorandum of 5 August the Division of Administration and Finance said in answer to an enquiry from him of 9 July that the purpose of the six-month extension was to give him time to do better.

In a memorandum of 27 August Dr. Bartsch recommended ending his appointment forthwith. By a letter of 30 August the Director of Administration and Finance told him that, the Director of the Agency having agreed, he was summarily suspended from duty but would stay on the payroll until 31 December 1993, when his appointment would end for unsatisfactory performance.

On 27 September 1993 he lodged an appeal against dismissal with the headquarters Board of Appeal. In its report of 12 April 1994 the Board recommended rejection. By a letter of 17 May 1994, the challenged decision, the Director-General told him that he had endorsed the Board's recommendation.

B. The complainant submits that he was dismissed because Dr. Pignatelli had vowed to get rid of him. Relations between them soured after they had disagreed over his discovery of a "highly mutagenic molecule" and "positive testing of a mutagen" in August 1991. On the publication of the findings he tried in vain to win acknowledgment.

Why, he asks, did Dr. Pignatelli take so long to express criticism of his performance and the accuracy of his results? Though it was "tactless" of him to bruit his grievance about his contribution to research, Dr. Pignatelli used his behaviour as a pretext for "exaggerating her charges" against him. The order he allegedly got wrong was someone else's fault. The WHO's unquestioning and unqualified support of Dr. Pignatelli amounts to misuse of authority.

He has two further pleas.

The first is that the WHO offended against Staff Rule 1070 on unsatisfactory performance. Had his performance suddenly become "unsatisfactory" the WHO should have let him show his mettle under another supervisor. He did not get the "reasonable time" that Rule 1070.2 prescribes in which to bring his performance up to par. He had to stop work before his six-month contract had even begun.

His other plea is that the WHO was bound under the law of contract to fulfil its promise to put him on trial for six months.

He seeks the quashing of the decision of 17 May 1994 to dismiss him and reinstatement under a two-year appointment as from the date of judgment, together with payment of any sums withheld by virtue of the impugned decision. In subsidiary claims he asks that he carry out his final six-month appointment under another supervisor. Whichever claim may succeed, he wants the equivalent of six months' salary in damages for "physical and moral injury" and 8,000 Swiss francs in costs.

C. In its reply the WHO submits that the complainant did not properly discharge his main duty, which was to analyse biological samples and make accurate reports on the results. Early in 1993 it lost confidence in his analyses. His errors were costly and undermined the Agency's reputation. The mistake over the order, which he did make himself, would have meant further waste of money had it not been caught in time. The WHO accuses him of being careless in storing laboratory samples and loth to carry out certain tasks.

He got a "written warning" under Rule 1070.2 and it spoke of his supervisors' appraisals in the third performance report and Dr. Pignatelli's comments appended to the fourth. The purpose of the six-month extension of his contract was to give him reasonable time to show improvement. When his work had collapsed and keeping him on put the Agency's good name at risk, the Organization was not bound to keep him in his post until the extension expired. Nor did it owe him another assignment, since the reason why his work was below standard was not that his duties were beyond him.

Dr. Pignatelli harboured no prejudice against him for finding the "new mutagen". The real reason for dismissing him was the decline in his performance, and it dated from early in 1992. He adduces no proof of misuse of authority.

D. In his rejoinder the complainant presses his plea that Dr. Pignatelli was prejudiced against him. No-one ever told him that his performance was wanting. The third appraisal report, which was vaguely worded, was no proper written warning.

E. In its surrejoinder the WHO restates its pleas, stressing that the decision to terminate the complainant's appointment was taken not by Dr. Pignatelli but by the Director of the Agency. It denies his charge of bias.

#### CONSIDERATIONS:

The application for an expert inquiry and hearings

1. In the complaint form the complainant says he does not want hearings, but in his rejoinder he applies for an expert inquiry and the hearing of witnesses in response to the objections about the quality of his performance and the criticisms of him by the Organization and, in particular, his first-level supervisor. In the light of what is said below the evidence he wants to produce is not germane to the outcome of the case, and there is therefore no call to

allow it.

The gist of the case

2. The complainant, a Frenchman who was born on 28 May 1961, joined the International Agency for Research on Cancer at Lyons, an agency of the WHO, on 5 April 1988 as a laboratory technician at grade G.3. He held at first a short-term appointment for six months, which the Agency extended several times. From 1 October 1989 to 30 September 1991 he held a two- year appointment, which was renewed for a further two years from 1 October 1991 to 30 September 1993.

3. On 2 July 1993 he had his appointment extended by six months from 1 October 1993 to 31 March 1994. But by a letter of 30 August 1993 the Agency informed him that his appointment would end at 31 December 1993 and that he was summarily relieved of duty; despite warnings in his last annual report his work had become so poor that it could no longer be relied on for "scientific accuracy".

4. On 1 July 1993 his first-level supervisor had sent a memorandum criticising him to the Director of the Administration and Finance Division through her own supervisor. He was sent a copy. On 2 July 1993 his second-level supervisor approved his annual report. A memorandum of 5 August 1993 told him that his appointment had been extended by six months to give him reasonable time to do better and that, if he did not, his appointment would be terminated at the end of the six months, as indeed his second-level supervisor had warned in his annual report. On the recommendation of the headquarters Board of Appeal the Director-General confirmed on 17 May 1994 the decision to dismiss him.

5. The complainant's case is that the Organization failed to meet the formal and material requirements for early termination: it gave him neither enough warning before notifying its decision to him, nor a proper chance to improve, and besides, its criticisms were largely unwarranted.

6. The Organization denies the complainant's allegations. It contends that it did give him proper notice and did so many times both orally and in writing, and more particularly in the annual report of 2 July 1993; so the termination was lawful.

The material rules

7. WHO Staff Rule 1070 reads:

"1070 UNSATISFACTORY PERFORMANCE OR UNSUITABILITY FOR INTERNATIONAL SERVICE

1070.1 A staff member's appointment may be terminated if his performance is unsatisfactory or if he proves unsuited to his work or to international service. It shall be considered unsatisfactory performance if the staff member does not or cannot perform the functions of the post to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working.

1070.2 Prior to termination action, a staff member shall be given a written warning and a reasonable time to improve. If there is reason to believe that the unsatisfactory performance results from assignment to duties and responsibilities beyond the capacity of the staff member, consideration shall be given to reassignment to a post more suited to his abilities.

1070.3 A staff member whose appointment is terminated under this Rule shall be entitled to a notice period equivalent to that specified in Rule 1050.3.

1070.4 A staff member whose appointment is terminated under this Rule may, at the discretion of the Director-General, be paid an indemnity not exceeding one-half of the amount to which he would have been entitled if terminated under Rule 1050."

The foregoing rules mean that an appointment may not be terminated before the date of expiry on the grounds of unsatisfactory performance or unsuitability unless the staff member has had a written warning and been allowed enough time in which to improve.

8. Besides, according to general precepts of administrative law and the law of the international civil service an organization may not unilaterally take action that affects a staff member's status before letting him have his say: Judgment 1082 (in re Liégeois) affirmed that rule in 18:

"By virtue of their contractual relationship and the trust that therefore prevails between them, an organisation owes its employee a duty to declare its intention of dismissing him and to let him plead his case."

The same principle was set out in Judgments 1212 (in re Schickel-Zuber) under 2 to 4 and 1395 (in re Walter) under 6.

9. In this case it is plain that, although the complainant was informed of the objections to his work and behaviour he was never given any warning that was recognisable as such of the Organization's intention of ending his appointment before expiry. The Organization makes out that the annual report of 2 July 1993 afforded him ample warning. That is not so. Though the shortcomings reported therein prompted the Organization to extend his contract by only six months, instead of two years as before, to give him time in which to do better, he had no reason then to suppose that his appointment would be cut short. The decision he impugns shows a serious formal flaw and cannot stand. That being so, there is no need to rule on his other pleas.

10. The complainant is entitled to damages for the wrongful termination. His appointment was to have expired at 31 March 1994 and relations between the parties made any extension beyond that date unlikely anyway. So the amount that the Tribunal awards in material and moral damages is equivalent to the pay he would have received had his appointment expired at 31 March 1994.

#### DECISION:

For the above reasons,

1. The Director-General's decision of 17 May 1994 is set aside.
2. The Organization shall pay the complainant the equivalent of the amounts that he would have been paid had his appointment expired at 31 March 1994.
3. It shall pay him 2,500 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas  
Mella Carroll  
Egli  
A.B. Gardner