

EIGHTY-THIRD SESSION

In re Carballo

Judgment 1633

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Manuel Carballo against the World Health Organization (WHO) on 26 February 1996, the WHO's reply of 30 September 1996, the complainant's rejoinder of 3 January 1997 and the Organization's surrejoinder of 26 March 1997;

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

Having examined the written submissions and decided not to order hearings, 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, who was born in 1941 and is British, joined the staff of the WHO in 1973 as a consultant. The Organization granted him fixed-term appointments from 1978 until 1993, the last two being each for five years. At the material time he held a grade P.6 post in the Division for the Mobilization of Resources.

By a letter of 25 October 1993 the Director of the Division of Personnel told him that if the Organization failed in its efforts to find funds for a suitable post for him it would not renew his contract; in the meantime, to comply with the requirement of three months' notice it was extending his contract to 31 January 1994.

By a letter of 31 January 1994 the Director proposed putting him on unpaid leave for three months pending further efforts by the Organization to find him a post. The Director said that if by the end of that period no post had been found his contract would end. As things turned out, however, he had his unpaid leave extended until 31 October 1994. At that date the WHO did not tell him of the outcome of its search for a post or that it was ending his appointment.

Since 1 February 1994 the complainant has held short-term appointments, some of them half-time. By letters of 8 November, of 12, 17 and 20 December 1994 and of 28 January 1995, the complainant or, while he was in Sarajevo, his wife asked about his status and about what the Organization would be deciding on his case. By a letter of 15 February 1995 his wife asked the Director-General to take "corrective action".

On 21 April 1995 he filed an internal appeal against the implied decision to reject his claim of 15 February. In its report of 6 November 1995 the Board of Appeal recommended granting him a contract for at least two years as from 1 November 1994; reassigning him to a post commensurate with his qualifications, experience and grade; paying him salary, allowances and other entitlements from 1 November 1994; and paying him 15,000 Swiss francs in damages and 2,000 francs in costs. The Director-General did not tell the complainant of his decision and did not forward to him a copy of the report within the time limit of sixty days set in Staff Rule 1230.3.1. The complainant is therefore challenging the implied decision to reject his appeal.

By a letter of 14 March 1996 the Director-General forwarded the Board's report to the complainant. He agreed to give him a two-year appointment, to pay him his salary, allowances and other entitlements, and to pay him the full amount in damages and 500 francs in costs.

Since 1 July 1995 the complainant has been employed under short-term contracts, half-time for the WHO's Division of Family Health and half-time for the International Organization for Migration (IOM).

B. The complainant contends that his appointment was never terminated. He was on unpaid leave, and therefore still a member of the staff, and he never got the required notice of three months. He submits that the post he held was one of "indefinite duration" as defined in the case law and that the WHO ought therefore to have carried out the prescribed "reduction-in-force" procedure before putting an end to his

appointment. His conclusion is that his contract was tacitly renewed and that the Organization failed in its duty to pay him salary, allowances and other entitlements.

He accuses the WHO of dilatory tactics which aggravated the injury he sustained. It failed to discharge its obligation to reply within a reasonable time to his internal appeal. Its handling of his case was seriously harmful to his professional reputation and career. It has had many opportunities in the last three years of assigning him to a post he was fully qualified for, but the Director-General has consistently refused.

He seeks the renewal of his fixed-term appointment for five years from 1 November 1994; his reassignment to a post commensurate with his qualifications, experience and grade; the payment of his salary, allowances and other entitlements from 1 November 1994; and awards of damages for the injury to his professional reputation and career and for the Organization's failure to take a decision on his internal appeal within a reasonable time, and of 6,000 Swiss francs in costs.

C. In its reply the WHO submits that the only matters still at issue are the duration of the complainant's new appointment, his reassignment to a particular post and the amounts of damages and costs.

As to the renewal of his appointment, it points out that in a letter dated 4 March 1995 he asked for not less than two years. So he was willing to accept such a period. The WHO explains that in any event it did not have the funds to finance a longer contract. The Staff Regulations and Staff Rules and the terms of the complainant's appointment make it plain that the renewal of a fixed-term appointment is subject to the availability of funds. According to the case law a decision to renew a contract, and the duration of such contract, are at the Director-General's discretion.

As to his claim to reassignment to a particular post the WHO was unable to act on the Board's recommendation since there was no such post and it had no funds to create one.

Lastly, as to the sums he claims, it says that it acted in good faith and was not at fault. Though it ought to have told him about his status before his unpaid leave ran out, the sum of 15,000 Swiss francs it has already paid him affords him fair redress for the injury.

D. In his rejoinder the complainant submits that for want of any decision by the Organization his contract was, in keeping with precedent, tacitly renewed for five years. His letter of 4 March 1995 drew no answer and therefore cannot afford grounds for the decision to renew his contract for two years. With the funds at its disposal the Organization had many opportunities of finding him a suitable post.

He alters his claims. Since his claim to payment of salary from 1 November 1994 has been met since the filing of his complaint, he seeks the payment of interest on the sums made over to him with unaccountable delay. Since the defendant has paid him 15,000 Swiss francs, he waives his claims to damages. He presses his other claims.

E. In its surrejoinder the Organization observes that the renewal of an appointment is not a right but at the Director-General's discretion. So is the duration of it a matter that depends, not on that of any previous appointment, but on the Organization's needs and the money at its disposal. It was unable to reassign the complainant to a suitable post. It objects to his claim to the payment of interest since, although it regrets the delay in some payments, it never showed him malice and has already paid him 15,000 Swiss francs in damages.

CONSIDERATIONS

1. The complainant joined the WHO in 1973 and was employed under a series of fixed-term appointments from 1978. In the period from 1 January 1984 to 31 December 1993 he held two consecutive five-year appointments.

2. By a letter of 25 October 1993 the Director of the Division of Personnel told him that there were no funds to finance the extension of his contract beyond 31 December 1993, the date scheduled for the abolition of his post. The Organization granted him, however, an extension to 31 January 1994 in order to comply with the requirement of three months' notice of non-renewal.

3. After discussion the Organization offered instead, in a letter of 31 January 1994, to put him on leave without pay for three months, from 1 February to 30 April 1994, and to pay his and its own pension and health insurance contributions for that period. He accepted its offer.

4. By a memorandum dated 5 April 1994 the Director of Personnel informed him of the extension of his unpaid leave by six months to 31 October 1994. He -- or his wife on his behalf -- wrote the WHO letters on 8 November and on 12, 17 and 20 December 1994 about his employment status. There was no reply. He wrote again on 28 January 1995 asking the Organization to let him know at once what action it intended to take to fulfil its obligations. In a letter of 15 February 1995 his wife asked the Director-General in accordance with Staff Rule 1230.8.1 to take "corrective action". The Director-General failed to answer within the time limit of sixty days in Rule 1230.8.3. On 4 March the complainant wrote a letter from Sarajevo to the Director of Personnel saying that he "would expect an extension of not less than two years as from 1 November 1994" at the same grade and with the "appropriate step increases". In that letter the complainant was commenting on a draft agreement between the WHO and the International Organization for Migration (IOM) about the sharing of his employment. Such sharing did come about and began on 1 July 1995. In his letter the complainant said that several important issues needed to be clarified and settled such as the use of half of his time by the WHO, the "honouring, in full", of the obligations of the Organization since 1 November 1994 and his contractual status. He made a related point about post descriptions in the WHO requiring medical or public-health training.

5. The letter of 4 March not having been answered, his wife, who was in Geneva, wrote on 18 March 1995 expressing his "grave concern" and asking for a precise and prompt reply to all the points in his letter of the 4th. Having still received no reply, he gave notice on 21 April of appeal to the headquarters Board of Appeal. His claims in his brief dated 24 April included renewal of his fixed-term appointment for five years as from 1 November 1994. The Board's report to the Director-General, dated 6 November, was submitted on 9 November 1995. The Director-General having failed to inform the complainant of his decision within sixty calendar days thereafter, i.e. by 8 January 1996, as Rule 1230.3.1 required, the complainant lodged this complaint on 26 February 1996 against the implied rejection of his appeal.

6. The Director-General took a decision dated 14 March 1996 on the Board's recommendations. He accepted the recommendation it had made for extending the complainant's fixed-term contract by two years from 1 November 1994 "in line with the proposal made by the Administration and with the statement made by the Appellant in March 1995". He also accepted its recommendation for the payment of 15,000 Swiss francs to the complainant in damages for the injury to his professional standing and career. The Director-General did not, however, accept its recommendation that the complainant be reassigned to a post commensurate with his qualifications, experience and grade.

7. The Organization says that the central question is whether the complainant is entitled to have his appointment extended by five years rather than the two. It seeks to justify the two by citing the letter the complainant wrote to it on 4 March 1995.

8. The Organization may not rely on the complainant's apparent willingness in March 1995 to accept a two-year extension of his contract: since it did not reply to his letter of 4 March it did not accept his offer. In April 1995 he sought an extension by five years, thereby withdrawing any offer to settle for two.

9. When his unpaid leave expired at 31 October 1994, the Organization took no decision for sixteen months as to whether or not to extend his appointment, which was therefore automatically extended. The question is not whether the Organization might have taken a decision before the expiry of his contract at the end of October 1994 to extend it by only two years, but what the consequence is of its failure to take a decision at the time. The answer to that question is that the automatic extension of his contract from 1 November 1994 was by whatever period would have been normal. As the Director of Personnel told him, the normal practice would have been to offer him another five years if funding was assured. It was up to the Organization to consider before the expiry of his contract whether the funding was. Since it failed to do so at the time, he must be granted an extension by the period normal for his case, i.e. five years. It follows that the Director-General's decision of 14 March 1996 -- after the filing of this complaint -- to extend his contract by two years cannot stand. The complainant's rights flow from the failure to take a decision before 31 October 1994.

10. As was said in 4 above, the complainant has been with the IOM since 1 July 1995 under the agreement

for the sharing of his services with the WHO. By a letter of 1 July 1996 that Organization asked the WHO to extend the agreement by twelve months from 1 April 1996, i.e. to 31 March 1997. It got no written reply. What did happen was that the Director of Personnel wrote the complainant a letter on 26 July 1996 giving him notice that his appointment with the WHO would expire at 31 October 1996. In a letter of that very date the IOM asked the WHO to extend the loan of his services by not less than six months starting on 1 November 1996 and offered to refund the costs in full to the WHO.

11. The complainant says in his rejoinder that to date he has not learnt of any reply from the WHO to the IOM's offer and that he has been paid no salary since 31 October 1996, although he is actually working for the IOM.

12. He has made claims for relief under different heads. He has withdrawn his claim to damages for injury to his professional standing and career and for the failure to take a decision within a reasonable time. What are left are his claims to assignment to a post commensurate with his qualifications, experience and grade, to interest on late payment of his salary, allowances and other entitlements, and to costs.

13. Since the IOM want to keep him on, the question of his entitlement to a suitable post at the WHO would arise only if the agreement with the IOM came to an end before the expiry of his five-year contract.

14. He is entitled to the payment of interest on arrears under the principle of equal treatment so as to keep parity between staff members who receive payment at the due dates and those who get it late: see Judgment 1403 (*in re Tejera Hernandez*).

15. He seeks costs and the Tribunal awards him 5,000 Swiss francs under that head.

DECISION

For the above reasons,

1. The Director-General's implied decision to reject the complainant's claims is set aside.
2. The Organization shall grant him a fixed-term appointment for five years as from 1 November 1994.
3. If the agreement between the WHO and the International Organization for Migration on the sharing of the complainant's employment ends before 31 October 1999 the Organization shall reinstate him for the remainder of the period of five years in a post suited to his qualifications, experience and grade.
4. It shall pay him as from 1 November 1996 the salary, allowances and other entitlements due, including contributions to the United Nations Joint Staff Pension Fund and to the Staff Health Insurance Plan.
5. It shall pay him interest at the rate of 8 per cent a year on the sums due by way of salary, allowances and other entitlements since 1 November 1996 as from the due dates.
6. It shall pay him 5,000 Swiss francs in costs.

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

Delivered in public in Geneva on 10 July 1997.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner