

NINETY-SECOND SESSION

In re Donoghoe

Judgment No. 2107

The Administrative Tribunal,

Considering the complaint filed by Mr Martin C. Donoghoe against the World Health Organization (WHO) on 14 September 2000 and corrected on 21 December 2000, the WHO's reply of 3 April 2001, the complainant's rejoinder of 15 June, and the Organization's surrejoinder of 28 September 2001;

Considering Articles II, paragraph 5, and VII 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 is of British nationality and was born in 1958. He joined the WHO's staff on 17 October 1994 under a short-term contract for 2.5 months as a technical officer at grade P.3. He subsequently had a series of short-term contracts of varying durations, with four breaks in service ranging between seven and sixteen days. He worked in the Programme on Substance Abuse which in December 1998 became the Substance Abuse Department. From September 1997 his job title became that of scientist and he held grade P.4.

A new Programme Manager was appointed in October 1998 and became the complainant's first-level supervisor. In a meeting with the complainant on 1 April 1999 she voiced concerns about remarks that had been made in public and which could be construed as an attempt to undermine the reputation of the department. The complainant emphasised his commitment to the work of the Department. A personnel officer was present at the meeting as a neutral observer and produced a "note for the record" dated 9 April, which was subsequently placed on the complainant's personnel file.

In a memorandum of 16 April 1999 his supervisor told the complainant that "the funding situation" of the Department was "very uncertain", and that since the priorities of the Department were evolving in ways which required different qualifications than those he possessed, it appeared that she would not be in a position to renew his contract when it expired on 16 July. She confirmed that information in a memorandum of 5 July. The complainant subsequently appealed to the Headquarters Board of Appeal against his status as a "long-term short-term" employee of the WHO and the non-renewal of his contract. He claimed, *inter alia*, that he should be considered as a fixed-term staff member and that he was the victim of psychological harassment.

The Board reported on 20 March 2000 recommending that the decision not to renew the complainant's contract should stand. It nonetheless concluded that he had not been given proper notice of non-renewal inasmuch as the language in the memorandum of 16 April 1999 was "conditional" and the Organization only transmitted a clear decision to him on 5 July 1999. Because of that, it recommended that he should be paid a sum equivalent to the amount he would have earned if his contract had been extended for six months. The Board also recommended that an ad hoc grievance panel be set up to investigate fully his allegations of harassment.

In a letter of 20 June 2000, the impugned decision, the Director-General told the complainant that the Working Group on Harassment would review his allegations of harassment and provide her with a report on the matter. While she concurred with the Board's view that he should not be offered a further contract she pointed out that he had been given prior notification of non-renewal, even though by the terms of his contract no notice was required; she did not, therefore, accept the Board's recommendation to pay him compensation. The complainant wrote to the Director-General on 21 July 2000 protesting against that decision. In order to allow for the consultations with the Working Group to take place, he indicated that he was prepared to wait until 15 August before lodging a complaint with the Tribunal.

The Working Group held meetings over a six-week period, met with the complainant on 18 September 2000, and subsequently produced a report. Similar allegations of harassment were made by another official in the SAB Department, which are at issue in Judgment 2106 (*in re* Ball), also delivered this day. Pending a report from the Grievance Panel constituted to hear that case the Director-General chose to defer taking a final decision on the present complainant's case.

B. The complainant is contesting his "involuntary" separation from service on several grounds. He contends that the Organization failed to treat him with dignity and respect, did not correctly apply the WHO Staff Rules and Regulations and offended against the principle of equal treatment by discriminating against him.

He alleges personal prejudice on the part of his supervisor and says he suffered "multiple instances" of psychological harassment which the Organization did nothing to prevent, thereby failing in its duty of care towards him.

He takes issue with what he terms the Organization's "practice of maintaining long-serving staff ... on short-term contracts". His nominal designation as a "short-term professional" during his nearly five years of service amounted to "irregular legal fiction". He was in an unfair situation, performing the same "core functions" as fixed-term officials without having the attendant benefits and emoluments. This resulted in unjust enrichment for the WHO and offended against the principle of equal remuneration laid down in international instruments. He claims that he was a *de facto* fixed-term staff member.

The Administration in his view failed to give him adequate notice that his contract would not be renewed. Because of the lack of clearly stated reasons his contract could be deemed renewed by implication. It was only on 5 July 1999 that the Organization notified him of the non-renewal. The two reasons given by his supervisor for ending his contract were false. There was adequate funding for his functions and his work was simply taken over by three or four different colleagues. The decision not to renew his contract was tainted by the "prejudice and malice" of his supervisor, which amounted to abuse of authority. In addition, he claims that she caused his non-selection to a post he had applied for in another organisation. He says he also suffered moral injury as a result of the "defamatory" nature of the "note for the record" of 9 April 1999.

Among his main claims for relief he seeks: the quashing of the impugned decision; reinstatement from 16 July 1999 with payment of all salary and emoluments that he would have been entitled to from that date; a ruling that he was in fact and in law a fixed-term staff member, and had been since the completion of his first eleven and a half months of service, and back payment of emoluments due on that basis; moral damages because of harassment by his supervisor; an *ex gratia* payment as compensation for his non-selection to the post in question following the actions of his supervisor; interest on all sums awarded to him; a written apology from his supervisor admitting the "defamatory nature" of the "note for the record" of 9 April 1999; any other relief deemed necessary by the Tribunal; and costs.

He wants the Organization to produce all documents or correspondence that would shed light on the subject matter of his grievances.

C. In its reply the Organization asserts that as the Director-General has not yet taken a final decision as to whether the complainant's allegation of harassment is well-founded, that aspect of his complaint is irreceivable. It takes note of his request for what it terms "voluminous documentation", but considers that no further submissions are necessary.

It points out that the complainant accepted the contracts offered to him and was bound by their terms. Each one made it clear that he was being offered a short-term appointment. By alleging that he was a fixed-term staff member after his first 11.5 months of service he is seeking retroactive revision of almost 3.5 years of his career at the WHO. Yet, the stability of legal relationships requires that contractual terms are inviolate; his contracts cannot be reconstructed retroactively. Although the complainant also calls into question the WHO's treatment of all short-term staff, his pleas are of a general nature and lie outside the scope of an individual complaint to the Tribunal.

Unlike fixed-term staff members the complainant was recruited without having to participate in a competitive selection procedure. Much of the complainant's work was project-specific. Asking to be regarded as a fixed-term official is equivalent to asking to be appointed to a post. According to the case law, the Tribunal recognises an organisation's freedom to determine its own requirements and the discretionary nature of the decisions it takes.

There is no basis for the claim that the WHO was in breach of the principle of equal pay for work of equal value, and the concept of unjust enrichment is not applicable to the facts at hand.

The Staff Rules do not stipulate that the holder of a short-term contract has to be given advance notice of non-renewal; the complainant did nonetheless receive reasonable notice. The memorandum of 16 April confirmed what he had been told in earlier meetings, and the reasons given to him by his supervisor were accurate. His request for reinstatement is unsustainable; although the WHO was not obliged to do so, it offered him a contract in the Department of Assessment, Classification and Epidemiology (ACE) but he chose not to accept it. There is no evidence to support his allegation that his supervisor obstructed his efforts to find work outside the WHO; his allegations are speculative and there is no basis for his claim to an *ex gratia* payment. Furthermore, the "note for the record" that the complainant refers to was withdrawn from the files in July 1999.

D. In his rejoinder the complainant points out that in his letter to the Director-General of 21 July 2000 he said he was awaiting the outcome of the investigation into the issue of harassment and hoped he would be notified of it in all due haste. He interprets the Working Group's failure to report on the investigation as a constructive denial of his request for relief, and argues that it renders his claim of harassment receivable. As at the date of filing his rejoinder the findings of the Working Group "remained pending", his injuries remained unredressed and the delay was encroaching on his ability to present his case fully to the Tribunal.

He states that in asserting his right to be a fixed-term staff member he was not trying to evade the Organization's formal selection process. His entitlement to reinstatement is, he contends, undeniably sustainable. It was reasonable for him to refuse the offer of employment in the ACE Department: it was a verbal offer "made late in the afternoon" on his final day of work. He had met with the Team Leader of ACE a week previously and was told that future work in the Department was uncertain and could be outside his field of expertise.

E. With its surrejoinder the Organization produces the text of a statement written by the Team Leader of ACE indicating that discussions had been under way since May 1999 with a view to the complainant taking up employment for four months in that Department. The WHO says that the complainant only rejected the offer on 16 July 1999 and concludes that he therefore freely decided to leave the Organization's employ.

It says that the Director-General wants to reach a final decision on the harassment issue as expeditiously as possible, but first wishes to obtain the report from the Grievance Panel investigating the other harassment case (referred to under A above).

CONSIDERATIONS

1. The complainant was employed by the WHO from 17 October 1994 on successive short-term contracts in the Programme on Substance Abuse, which in December 1998 became the Substance Abuse Department (SAB). From 17 January 1999 he held a short-term contract that was due to expire on 16 July 1999. The Director of the SAB, his first-level supervisor, informed him in a memorandum of 16 April 1999 that she would not be in a position to renew his contract. This information was confirmed by another memorandum dated 5 July 1999.

2. Shortly before the end of his contract, the complainant was offered a short-term appointment until November 1999 in a different department. He refused the offer and stated his reasons for doing so; namely, that the offer had been made too late, that it was for too short a period, that there had been no formal confirmation and he had already made other arrangements.

3. The complainant appealed to the Headquarters Board of Appeal against the non-renewal of his contract. He took issue with his status as a short-term staff member and the status of short-term staff in general, principally arguing that:

(i) he should be considered as a fixed-term staff member; and

(ii) his contract should have been renewed.

The Board refused to take up the complainant's arguments relating to the status of short-term staff in general on the grounds that its role was to examine appeals brought by staff against specific administrative decisions affecting

their employment status and to ensure that these decisions were in accordance with the WHO Staff Rules and Regulations. It considered that it was "not a proper vehicle for seeking to change the existing rules or the policy of the Organization".

4. The complainant claimed that the refusal to renew his contract was tainted by the prejudice and malice of his supervisor and that he had been the victim of unfair treatment and discrimination and had been subjected to psychological harassment. He also claimed that the notice he was given was "vague and inadequate".

5. In its report of 20 March 2000 the Board recommended that the Organization should carry out a full investigation into the allegations of harassment and mobbing and take further action upon completion of the investigation. It recommended that the decision not to renew the complainant's contract should stand. Noting that his final contract had been for a period of six months, it recommended paying him a sum equivalent to six months' salary, as compensation for the lack of reasonable and adequate notice and the ensuing stress. It also recommended paying him a sum for costs.

6. The Director-General, by a letter dated 20 June 2000, informed the complainant that she had decided to ask the Working Group on Harassment to review his allegations of harassment, and provide her with a report on the matter and a recommendation. She concurred with the recommendation that the decision not to renew the complainant's contract should stand. She did not accept that he was entitled to notice: by the terms of his contract, none was required. In any event he was given prior notification and was offered a new contract, but had declined the offer. For these reasons she did not endorse the recommendation to pay him the equivalent of six months' salary. That is the decision impugned.

7. The complainant puts forward six pleas:

- His first is that the Organization infringed its own policy aimed at protecting staff from psychological harassment, particularly by managers or supervisors, and he cites instances.

- Secondly, he argues that the Organization's practice of maintaining long-serving staff on short-term contracts is illegal and he is entitled to be treated as a staff member on a fixed-term contract.

- Thirdly, the decision not to renew his contract was tainted by the prejudice and malice of his supervisor.

- Fourthly, the Organization failed to give him adequate notice and did not give clearly stated reasons for its decision not to renew his contract; therefore, it could be deemed renewed by implication.

- Fifthly, the Organization caused him severe moral injury as a result of the "defamatory" nature of the "note for the record" dated 9 April 1999.

- His sixth plea concerns the failure of the Organization to allow the Ombudsperson, the Joint Medical Service physician and the then Executive Director of Administration to give evidence in the proceedings before the Headquarters Board of Appeal. All three requested that they be excused on the grounds of confidentiality, and the Board, with the assent of the Administration, did not accede to his request to have these witnesses testify. He was thus denied due process.

8. As for the allegations of harassment the Organization argues that the Director-General has not yet taken a final decision thereon and that therefore the complainant's claim of harassment is irreceivable.

9. The Tribunal holds that since only final decisions can be challenged before the Tribunal, the absence of a final decision on the harassment claim renders it irreceivable. The matter was referred to the Working Group on Harassment. When the group has completed its work the Director-General will be in a position to give a final decision which would be appealable to the Tribunal.

10. The complainant's claim that he should be considered as a fixed-term staff member cannot be sustained. The complainant was recruited as a short-term staff member, without having to go through a competition process; he accepted several contract renewals. It was within the discretionary authority of the Director-General to decide during the years that the complainant was with the Organization whether to renew each short-term contract or offer him a fixed-term contract. There is no basis on which the complainant can claim to be treated retroactively as if he had a fixed-term contract. He was at all times a short-term staff member.

11. Concerning the complainant's claim that he received inadequate notice, the Tribunal is satisfied that the memorandum of 16 April 1999 did give him notice. The complainant's supervisor wrote:

"... we have extremely limited monies available with which we can pay staff salaries. As the priorities of the Department are evolving in ways that require qualifications which you do not presently have, it appears at this time that I will not be in a position to renew your [short-term professional] contract in July 1999 when your current contract expires. I regret this situation but feel that I must take the steps that are necessary to ensure the continued viability of the Substance Abuse Department".

The complainant was given more than three months' notice that his contract would not be renewed. In the opinion of the Tribunal, that constituted adequate notice.

12. The memorandum of 16 April gave specific reasons which were repeated in the memorandum of 5 July 1999 so the complainant cannot succeed on the ground that the decision is unreasoned. Moreover, the availability of funding and the relevance of the complainant's qualifications to the future needs of the department are matters properly within the appreciation of management.

This finding is without prejudice to the complainant's right to argue in the harassment inquiry that the actual reason for non-renewal was due to harassment.

13. The claim relating to the note for the record of 9 April 1999 was not put forward in the internal appeal and is irreceivable on that ground; the note was in fact removed from the files on 2 July 1999.

14. The plea concerning the non-attendance of witnesses whom the complainant contends could have proven the harassment allegation, is not relevant to this complaint as the part of the complaint related to harassment is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet