

THIRTY-NINTH ORDINARY SESSION

In re GHAFFAR

Judgment No. 320

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Abdul Ghaffar on 27 July 1976, the WHO's reply of 17 September, the complainant's rejoinder of 4 November and the WHO's surrejoinder of 24 November 1976;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the WHO Staff Rules, particularly Rules 320.3, 430.2, 440, 450.1, 960, 1010 and 1040, and the WHO Manual, particularly Part II, Article 1, paragraphs 10 and 130, Article 5, paragraphs 50 and 55, and Article 6, paragraph 270;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant was first employed by the WHO from 1 May 1963 to 1 June 1972 as an administrative assistant in Karachi and Mogadishu. He was reappointed on 9 December 1974, as a "senior secretary/administrative assistant", and sent to Dubai and then to Abu Dhabi. He was given a two-year contract, which was made subject to one year's probation in accordance with Staff Rule 320.3. According to his probation report his performance was not satisfactory. The probation period was accordingly extended by four months and his within-grade salary increment was withheld. In a second probation report his performance was again said to be unsatisfactory and he was therefore told that his appointment would not be confirmed. He made an appeal to the Director-General, who told him on 3 June 1976 that it was dismissed. That is the decision he now impugns.

B. The complainant believes that the demands made on him went beyond what might be expected of the incumbent of his post and attributes the adverse reports to his supervisor's desire to give his post to someone else. He believes that the decision not to confirm his appointment was unwarranted and asks the Tribunal to order payment of his salary increment and his retroactive reinstatement.

C. The WHO maintains that the complainant was not asked to do anything outside the scope of his post description. He did not do his work satisfactorily and that is the only reason why, in keeping with the rules in force, his contract was not confirmed. No term of the contract was infringed and the decision, which was based on evaluations by the complainant's supervisors, was taken in the interests of the WHO and within the scope of the Director-General's discretionary authority as executive head of the Organization. There is no truth whatever in the complainant's allegation that his supervisors' reports were inspired by extraneous motives or designed to supplant the complainant with someone else. The WHO therefore asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. The complainant entered the service of the Organization in 1963. By 1972 he had served under five WHO representatives in different countries as senior secretary and from 1965 as administrative assistant. His work was always satisfactory and often commended. On 31 May 1972 through no fault of his own he had to leave his position in Mogadishu because the Government of Somalia insisted on the appointment of a Somalian national. He took with him a testimonial from the Regional Director which referred to his nine years' service with the WHO as "conscientious, hard-working and devoted" and to "his long experience in administrative work". He then took a lower post as clerk-secretary in the office of the UNDP representative in Kuwait, where also his work was commended.

2. In January 1973 Dr. Clement met the complainant in Kuwait when he (Dr. Clement) was on his way to Dubai to open there a new WHO mission. He suggested to the complainant that he should apply for the appointment as his administrative assistant. The complainant did so but the post was given to a Mr. Nabil, then in the Regional Office at Alexandria. Mr. Nabil had had previous experience as an administrative assistant but he failed in Dr. Clement's opinion to measure up to the required standards and was found after a year to be "incapable of acquiring the skills

needed".

3. In September 1974 the position was offered to the complainant who accepted it. His contract, dated 30 September, is for the post of Senior Secretary/Administrative Assistant for a temporary fixed term of two years with a minimum period of probation of one year. The complainant has called the Tribunal's attention to Staff Rule 320.3, which says that "Prior satisfactory service for the Organization in the same type of post may be credited towards completion of probation". The rules leaves it obscure as to what the official's rights are, if any, if prior service is not credited. The Organization disputes that the rule is applicable when the prior service was, as in this case, interrupted by service with another organization. The Tribunal will not decide the case on this point.

4. The complainant took up his duties at the Dubai office on 9 December 1974. He was, he says, shocked to find that there was no one else in the office besides Dr. Clement himself. Dr. Clement and he are both agreed that the office was under staffed. The complement to which the complainant was used (which Dr. Clement later described as the minimum) would include, besides the administrative assistant, a typist and a driver/messenger. The post description includes typing among the complainant's duties but in a way that suggests it would be only incidental. The duties are generally described as "administrative duties with a large degree of independence". Under this there are ten heads of which the fourth is "verbatim recording and transcription of certain meetings, preparation of précis, taking shorthand, typing". The ninth head is "supervising and training driver/messenger". Since there was no such employee the complainant had to do all the work of a driver/messenger, including the maintenance of the car.

5. The complainant worked for approximately eight months in the office at Dubai. There is a conflict of evidence about whether during this period Dr. Clement made any complaint about the quality of the complainant's work: there is nothing in writing. On 3 August 1975 the office was moved to Abu Dhabi. The complainant makes the point that, if Dr. Clement thought he was unfit for the job, the natural time to say so would have been before the move which involved the transportation of the complainant and his family to Abu Dhabi and the finding of accommodation there. Only a week after the move Dr. Clement went on leave for six weeks leaving the complainant in charge of the office; it is therefore surprising to find among his later criticisms of the complainant that he was "not reliable" and that he had "no initiative and no administrative acumen". On 5 October the complainant was given three weeks' leave. The applicable rule provides that leave is not normally granted unless the recipient will be serving for at least six months after the date of his return. This does not suggest that Dr. Clement was then contemplating that the complainant's appointment might be terminated at the end of his probation period.

6. Shortly after the complainant went on leave Dr. Clement came into contact with a Mrs. Buaishah who had just ceased secretarial employment in the office of the WHO representative at Aden. On 12 October he cabled to the Regional Office for authorisation to appoint Mrs. Buaishah while the complainant on leave; and without waiting for authorisation he did in fact appoint her. The Regional Office was not satisfied with Mrs. Buaishah's record in Aden and they replied to Dr. Clement disapproving the appointment and telling him to suggest another candidate if it was absolutely necessary to cover the complainant's absence. On 15 October Dr. Clement cabled again. The cable is not in the dossier but it clearly contained a critical assessment of the assistance he was getting from the complainant. On 17 October the Regional Office replied that under the circumstances they would agree to a temporary assignment for Mrs. Buaishah until 21 October. On 20 October Dr. Clement sent a cable in which he renewed earnestly his request for additional assistance which, he said, was absolutely necessary anyhow; he asked for authorisation to continue Mrs. Buaishah's unemployment until a final arrangement was made. The Regional Office replied refusing to approve additional assistance but saying that they would review the matter later on the basis of "detailed information received from you".

7. It was in these circumstances that Dr. Clement wrote the letter of 21 October 1975 which contains the first criticism in the dossier of the complainant. He wrote that in selecting the complainant he had been completely misled by his appraisal reports. He said that the complainant's performance met in no way the requirements of his post description. He criticised specifically his typing, also his reliability, his initiative and administrative acumen as noted in paragraph 5 above. In words that resembled his judgment on Mr. Nabil, he said that he was convinced that the complainant "will never be able to do better in his present capacity". On these grounds, he requested "continuous immediate additional assistance" as long as the complainant remained and reiterated his belief that Mrs. Buaishah "can fill the bill". By 6 November Dr. Clement had received no answer to this letter and on that day he sent a cable "confirming impossibility operate representation efficiently without 'additional assistance'". On 30 October the Regional Director had received from the WHO representative in Aden a memorandum containing an unfavourable assessment of Mrs. Buaishah's work; he sent this to Dr. Clement with his note on it that Mrs. Buaishah should not be recruited again by WHO. Dr. Clement replied by cable on 23 November that he had in fact

continued to employ Mrs. Buaishah and that her performance was "highly satisfactory", contrary to the information in the memorandum. To this the Regional Director replied firmly that Mrs. Buaishah's employment must cease on 27 November, which in fact it did.

8. Dr. Clement had not made any of the formal evaluations of the complainant's performance as contemplated by Staff Rule 430.2. Staff Rule 440 demands that a performance evaluation report be made before the end of the probationary period. It was on 3 November 1975, while he was still hoping for a favourable decision on his request to retain Mrs. Buaishah, that Dr. Clement, as "first level supervisory", completed his report on the complainant. He attached to it a detailed appraisal in which he itemised the complainant's duties as set out in the post description under forty-eight heads. Under thirteen heads he criticised it as needing improvement or "much improvement". Under seventeen heads he praised it as good or very good or the equivalent and in one case as excellent. Under nine heads he noted that there had not been time for the complainant to discharge the duty. (In general he criticised the administrative work and praise with one important exception) the less exalted functions such as finance and accounts and book-keeping; it was for tact and courtesy on the telephone and with visitors that he got his "excellent". The exception was typing which, he wrote, the complainant dealt with "with reluctance ... except for very short notes and memorandums" and that it needed "time consuming corrections". He thought that he might "improve in his performance as an administrative assistant if given the time to work more as such through being relieved of secretarial, clerical, and messenger duties". His conclusion was that the complainant could not "by himself alone accomplish all what is required - i.e. items of the post description and the volume of work". He made no recommendation.

9. There are striking differences between the appraisal report and Dr. Clement's letter of 21 October. First, the sweeping assertion that the complainant's performance met in no way the requirements of his post description is reduced to the statement that his performance in thirteen out of forty-eight items needed improvement. Second, the general charge of unreliability is not repeated and no material is provided to sustain it. Third, the opinion that the complainant would never be able to do better in his present capacity is replaced by an opinion that his performance might be improved if he was relieved of secretarial and other duties.

10. On 13 November the "second level supervisor", Mr. Westenberger, the Chief of Administration and Finance at the Regional Office, attached his comment. He wrote that it was evident that the complainant's performance was not up to the requirements of the post; that his services were unsatisfactory and that the annual increment should be withheld; and that it was only because of his previous service with WHO that he should be allowed a four-month extension of his probationary period to give him "a last chance to improve his performance and attitude". Within twenty-four hours the Regional Director, who had in 1972 given the complainant such a good testimonial, had concurred.

11. It was hardly to be expected that anything would come of the extended probationary period. Dr. Clement had concluded that the complainant would never be able to do better unless he was relieved of secretarial, clerical and messenger duties and the relief had not been forthcoming. On 22 March 1976 he signed a second performance report in which he simply confirmed what was in his previous report and recommended the complainant's immediate transfer. Mr. Westenberger commented that it was evident that the complainant could not adequately fulfil the duties of his post. On 6 April 1976 the complainant's appointment was terminated.

12. A decision taken by the Director-General, either during or at the end of the probation period, not to confirm the staff member's appointment is one which falls within his discretion and accordingly the Tribunal will interfere with it only on strictly limited grounds. The Tribunal will, however, interfere if essential facts have not been taken into consideration or if conclusions which are clearly false have been drawn from the documents in the dossier. The crucial decision, which the Director-General must have approved, was that taken by the Regional Director on 14 November 1975 on the first appraisal report and on the basis of the two evaluations made by Dr. Clement and Mr. Westenberger. The Regional Director offered no comment of his own but must have drawn the conclusion that these evaluations were sound. A study of the material should have shown him that they were both highly questionable and that, unless he questioned them, he would not get at the essential facts. If he had questioned them, he would inevitably have come to the conclusion that as evaluations they were worth little or nothing, the first because Dr. Clement's judgment was palpably unreliable and the second because it was not an independent evaluation but almost entirely an adoption of Dr. Clement's judgment; on the points at which it went beyond that, it drew clearly false conclusions.

13. The starting point for any criticism of Dr. Clement's judgment is that he is unable to explain the discrepancy

between it and all the complainant's previous appraisal reports except upon the hypothesis that the latter were all wrong. This is highly unlikely. They extended over eleven years and came from seven (if the UNDP representative is included) different representatives. If any of them contained a single word of criticism, it has not found its way into the dossier to be weighed against the many commendations. The next point is the circumstances in which the judgment was reached. It emerged only after ten months and at a time when Dr. Clement's efforts were concentrated on obtaining additional assistance in general and Mrs. Buaishah's assistance in particular. The minimisation of the assistance he was getting from the complainant was an essential step towards the attainment of his objective. Without imputing to him any sinister motive (when, for example, he was considering the detailed appraisal point by point, he was obviously trying to be fair), his evaluation of the complainant's work cannot be regarded as unbiased. Finally, the Regional Director should have asked himself whether Dr. Clement's judgment of his subordinates was in any circumstances sufficiently reliable to be acted upon by itself. The volatility of his judgment is shown by the contrast between his letter of 21 October and the subsequent detailed appraisal; see paragraph 9 above. Further, the Director must surely have noted the contradiction between Dr. Clement's estimate of Mrs. Buaishah as highly satisfactory and the opinion of the WHO representative at Aden who had had much longer experience of her work. Again, did the Director ever reflect that the complainant was not the first but the second administrative assistant who had failed to please Dr. Clement?

14. Assuming however that Dr. Clement's powers of judgment were good and reliable, what was the conclusion to be drawn from his report? The conclusion drawn from it by Mr. Westenberger was that the complainant's performance was not "up to the requirements of the post". This is not what Dr. Clement said. What he said was that the complainant was not up to some of the requirements of the post, mainly those on the administrative side, and that one, and perhaps the only reason for his failure was the volume of the secretarial and "menial" work which he had to do. That this is the right interpretation of the conclusion summarised in paragraph 8 above is partly reinforced by consideration of what Dr. Clement was actually prepared to do. He did not really want to get rid of the complainant but to supplement him with Mrs. Buaishah. Then "he might improve in his performance as an administrative assistant". The essence of what Dr. Clement was saying was that in his view and because of understaffing the complainant's administrative abilities had not as yet been fully and fairly tested.

15. Dr. Clement's opinion that his staff was inadequate is not of course conclusive. Neither is the opinion of the Regional Director, who presumably considered that the staff was adequate. What matters for the purposes of the complainant's contractual obligations is the post description attached to his contract and the conditions which it contemplated. That it contemplated a driver/messenger on the staff is beyond argument. In the Tribunal's judgment it contemplated also that there would be an office typist. Under the post description the complainant's duties were primarily administrative; such duties might be expected from the description of them to occupy at least half his time. Undoubtedly he was to do the typing that was incidental to such duties e.g. preparing notes of meetings. But that he was to do all the routine typing which would be generated by a WHO representative with a half-time administrative assistant is quite a different thing; it would put a stress upon the single mention of "typing" in the post description which would be far more than it could bear. It follows that since the conditions in which the complainant was required to work were not in accordance with his post description, his performance could not for the purposes of an appraisal report be fairly and properly tested.

16. There is another point, not unimportant, on which Mr. Westenberger drew a false conclusion from Dr. Clement's report. Mr. Westenberger's comment ends with an admonition to the complainant "to improve his performance and attitude". The central weakness in the Organization's case is the unlikelihood of the complainant's capabilities, which would determine the quality of his performance, having changed for the worse so rapidly. If, however, it could be said that his attitude had changed, that he was no longer giving of his best, it would be a different matter. Dr. Clement never complained in terms of the complainant's attitude and Mr. Westenberger seizes upon the alleged reluctance to type and gives it a significance out of all proportion. He overlooks the qualification that it did not extend to short notes and memoranda. He ignores Dr. Clement's general observation that the complainant was "always very willing" to perform other related duties as required. Nor was the willingness confined to related duties. It does not seem to have occurred to Mr. Westenberger that there could not be much wrong with the attitude of an administrative assistant who discharged for ten months and without a word of complaint the duties of the driver/messenger whom he was supposed to supervise.

17. To sum up. In reaching the decision that the complainant's performance was unsatisfactory, the Director-General and/or the officials whose conclusions he accepted, relied exclusively on the opinion of Dr. Clement. They disregarded the factors that made this opinion unreliable. They wrongly concluded that in the opinion of Dr. Clement the complainant was completely unsatisfactory; if they based this conclusion on the appraisal report, they

misinterpreted the report; if they based it on the letter of 21 October, they were wrong in preferring that letter to the appraisal report and in disregarding its irreconcilability with the complainant's previous record. They disregarded the fact that the conditions under which the complainant was working were not in accordance with his post description; if they thought that they were, they misinterpreted the post description. Finally, they falsely concluded from Dr. Clement's report that the complainant was an unwilling worker and they exaggerated the significance of his supposed reluctance to type. The Tribunal, having reached these conclusions from the material in the dossier, is authorised and required in accordance with the principle set out in paragraph 12 above to intervene and to set aside the Director-General's decision.

18. The relief sought by the complainant is the restoration of his within-grade increment and the confirmation of his appointment retroactively. As to the first, the decision to withhold the increment was not part of the decision complained of and accordingly, though the Tribunal does not doubt that it was unjust, it is not in its power to order its restoration. As to the second, the Tribunal, when quashing a decision of this character, does not invariably order the reinstatement of the officer concerned since it may present practical difficulties. In the present case, however, the complainant's long and excellent record of service to the WHO, enhanced by his conduct in the trying circumstances of his assignment in Dubai and Abu Dhabi and by the clarity and moderation of his submission to the Tribunal in this case, have shown him to be an officer whom the Organization should be sorry to lose.

As to the award of costs:

19. In principle a Complainant whose complaint is allowed in whole or in part is entitled to costs, to be paid by the defendant organisation. There is no need for the complainant to have put in an express claim for such costs. Nor is it material whether he has been assisted or represented by counsel. However, costs are payable only to the extent warranted by the circumstances of the case, that is to say its nature, importance and complexity and the actual contribution made by the complainant or his counsel to the proceedings.

In the present case it is appropriate to award the complainant on the basis of these rules costs amounting to 1,000 United States dollars.

DECISION:

For the above reasons,

The appeal is allowed and

1. The decision of the Director-General of 3 June 1976 is quashed; and

2. It is ordered:

(a) that the complainant be reinstated in his appointment as Senior Secretary/Administrative Assistant as from 1976,

(b) in respect of the loss of his salary and emoluments from their cessation in 1976 until the date of his reinstatement he shall be paid such compensation as may be just, having regard inter alia to the earnings and emoluments, if any, from any other source, which accrued to him during this period, and

(c) that costs amounting to 1,000 United States dollars be awarded against the Organization.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 November 1977.

M. Letourneur
André Grisel
Devlin

Roland Morellet

