

NINTH ORDINARY SESSION

In re WAKLEY

Judgment No. 53

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the World Health Organization drawn up by Stanley Robert Wakley on 14 February 1961 and the reply of the Organisation dated 6 April 1961;

Considering Articles II and VII of the Statute of the Tribunal, and Articles 130, 280.5 (b), 320.2, 320.3, 830, 960 and 1010 of the Organisation's Staff Rules;

Having heard Mr. Robert Goldscheider, Counsel for complainant and Mr. Frank Gutteridge, agent of the Organisation, in public sitting, on 26 September 1961;

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

A. Complainant was appointed by the Organisation on 13 October 1959 for two years and subject to a period of probation of one year, as a technical assistant in the grade P.1 and assigned as a motor maintenance mechanic to a malaria eradication project at Kpain, in Liberia. Prior to his departure, complainant was briefed by several officials of the Organisation who gave him such information as was available to them concerning living conditions in Liberia. Complainant also made arrangements for the payment of half his emoluments in Geneva in order to discharge debts outstanding in Switzerland.

B. Complainant proceeded to Liberia with his family and entered upon his duties at Kpain on 28 November 1959. Shortly thereafter, a complaint was addressed to the Organisation with respect to complainant's failure to settle a dentist's bill which he had agreed to pay before his departure from Geneva and, following his arrival in Liberia, complainant began to fall into debt there. As complainant's unsatisfactory financial situation became embarrassing to the Organisation, it was suggested on 9 May 1960 that his appointment be terminated forthwith under Staff Rule 960 (non-confirmation of appointment during probationary period). Complainant's supervisor pointed out, however, that sums due by the Organisation to complainant had been paid irregularly and suggested that the question of the termination of appointment should be left open for a certain period in order to give complainant a further opportunity to settle his outstanding debts. It was then proposed therefore that complainant's period of probation be extended for six months and that he should be warned that unless he settled his personal affairs, his appointment would be terminated with one month's notice under Staff Rule 960 on the grounds of unsuitability for international service. On 18 May 1960, complainant was warned to settle his debts and take steps to put his financial affairs on a sound basis.

C. As it had been discovered that a miscalculation in the amount of the installation allowance payable to complainant upon arrival in Kpain had resulted in an overpayment of \$810, complainant was requested, by letter dated 7 June 1960 and received on 15 June 1960, to reimburse the amount overpaid within three months but, in view of his financial difficulties, the Organisation later agreed that the repayment should be spread over some eleven months during which that part of complainant's salary which was to be paid in Liberia would be correspondingly reduced.

D. Between May and August 1960, complainant again failed to settle his debt and the appraisal report on his first year of service, prepared at the end of August 1960, mentioned inter alia that since complainant's arrival at Kpain he had been in constant financial difficulties, had continuously contracted debts and left them outstanding and had thereby damaged the reputation of the Organisation and in particular of the malaria eradication project to which he was assigned. Complainant had been so advised on several occasions and had repeatedly promised to make arrangements for settling his debts but had failed to remedy the situation to any notable extent, whereas claims additional to those he had disclosed had come to light. After considering this appraisal report and complainant's observations thereon, it was recommended that his appointment be terminated under Staff Rule 960 since the report reflected an attitude on the part of complainant which was not compatible with the standards of conduct required by the Organisation. On 18 September 1960 complainant was notified of the termination of his appointment. Complainant's appointment was extended in accordance with Staff Rule 1010 pending consideration of his appeal

against this decision. On 16 November 1960 complainant was notified that his appeal had been dismissed by the Director-General and was given one month's notice. He left the service of the Organisation on 17 December 1960.

E. After complainant's return to Geneva, arrangements were made between him and the Organisation for the discharge of his debts in Liberia and on 8 December 1960, complainant signed a document indicating his agreement to the final settlement of his account with the Organisation.

F. Before the Tribunal, complainant sought the quashing of the Director-General's decision to terminate his appointment and reinstatement as a probationer official for a period of six months. Alternatively, he asked for damages amounting to three years' salary and the provision of a reference. Complainant further sought an order for the repayment of the sum of \$810, being the amount of the before-mentioned overpayment of installation allowance, which he alleged had been wrongfully recovered by the Organisation; for payment of certain travel expenses amounting to Sw.frs. 622.90, which the Organisation had improperly withheld; for payment of Sw.frs. 477.0 for damages by oil to his personal effects while he was en route to Kpain in a motor-car provided by the Organisation, and for moral damages and costs. In support of his claim for the above-mentioned relief complainant submitted that the Director-General when exercising his discretion to terminate complainant's appointment in consequence of his unsatisfactory financial position in Liberia, was guilty of an abuse of power in that he had given insufficient consideration to administrative errors which had contributed to complainant's financial state. Further, the complainant contended that the Organisation was under a contractual obligation, express or implied, to provide such reasonably satisfactory conditions as would enable him properly to perform his duties, that the Organisation had failed to honour its obligations in this respect, and that its failure had had a direct bearing upon his conduct of which it complained.

G. The administrative errors alleged related to (a) faulty briefing as to living conditions, which had caused complainant to take his family to Liberia, although living costs were in fact so high as to make it impossible for complainant properly to maintain his family on the sums payable to him in Liberia, (b) the error in placing complainant in grade P.1, (c) the error in the calculation of complainant's before-mentioned installation allowance, resulting in the overpayment of \$810 which was subsequently improperly recovered by the Organisation, (d) the continual late payment of complainant's salary, (e) the improper refusal of the Organisation to pay to the complainant the before-mentioned sum of Sw.frs. 477.0 in respect of damage to his personal effects and to reimburse complainant in the before-mentioned sum of Sw.frs. 622.90 in respect of travelling expenses.

IN LAW

1. Staff Rule 960 provides that if during a probationary period the staff member's performance or conduct is not satisfactory, if he is found unsuited to international service, or if he fails to qualify medically, the appointment will be terminated at one month's notice and without indemnity. Neither complainant's performance nor his health are in issue. While the Tribunal is competent to review any decision of the Director-General to terminate the appointment of a probationer official, in so far as it may be tainted by an error in law or based upon materially incorrect facts or if essential material elements have been left out of account or if obviously wrong conclusions have been drawn therefrom, the Tribunal will not substitute its own opinion for that of the Director-General as regards the conduct or suitability of an official for international service.

2. While there is no positive obligation for the Organisation to brief an official as to living conditions at his future duty station, where the Organisation undertakes to provide such briefing, it must do so carefully and realistically. Although complainant asserts that, on the basis of the information supplied by the Organisation he was induced to take his family to Kpain, in spite of the fact that the salary payable to him was insufficient to meet necessary living costs in Liberia, and was therefore compelled to incur debts to support his family, it is not established that he was given incorrect information. The onus was upon him, therefore, to decide in the light of the briefing provided by the Organisation and of his personal circumstances and the amount of his remuneration, of which he was well aware, what arrangements he should make, it being neither incumbent upon, nor possible for, the Organisation to advise him in the matter. Consequently, his submission concerning faulty briefing must be set aside.

3. Complainant was appointed in the grade of P.1 and accepted such appointment. Had he considered that the classification of his post did not accurately reflect the type and level of his duties and responsibilities and the qualifications required of him, it was open to him, under Staff Rule 130, to request at any time a re-examination of the classification of the post he occupied, and this he did not do. Consequently his submission in respect of incorrect grading must also be set aside.

4. Complainant challenges before the Tribunal the validity of the decision of 7 June 1960 to recover by way of deduction from his salary an overpayment of \$810 made as a result of the miscalculation of the amount of the installation allowance due to him.

In the absence of relevant provisions in the Staff Rules, the general principle of law according to which the payer is entitled to pursue the recovery against the payee of sums paid in error is applicable to the present case. While monies paid to an official in error cannot be deducted from the salary of the official in accordance with Staff Rule 280.5(b), it is open to the Organisation to require by decision taken in reasonable time reimbursement in whole or in part of the overpayment, account being taken of all the circumstances of the case, including inter alia the bona or mala fides of the official, the nature of the error, the degree of negligence of the Organisation and of the official and the hardship caused to the official by any subsequent recovery in consequence of an error of the Organisation. Decisions taken in respect of recovery are subject to review under the conditions provided for in paragraphs 1 and 2 of Article VII of the Statute of the Tribunal.

5. Though the complainant drew attention in general terms to the hardship in which recovery would involve him, he did not challenge the validity of the decision which had been taken in this regard on 7 June 1960 until 14 February 1961, the date upon which he challenged the decision of the Director-General to terminate his appointment. The challenge in respect of the decision to recover the overpayment was, contrary to the requirements of Article VII, paragraph 2 of the Statute of the Tribunal, made more than 90 days after 15 June 1960, the date upon which that decision was notified, and in consequence complainant's submissions under this head are not receivable. Furthermore, complainant, who as stated above was aware of the decision of 7 June 1960 for recovery, did not, as is provided in Article VII, paragraph 1 of the Statute of the Tribunal, exhaust all such means of resisting it as were open to him under applicable Staff Regulations, and in this second respect too his submissions are also not receivable.

6. Delays in the payment of complainant's salary and allowances did not adversely affect the complainant's over-all financial position for, if account is taken of his indebtedness in Geneva, at all material times the complainant's indebtedness exceeded not only the sums which fell due to him in Liberia but also the total sums to which as a grade P.1 official he was entitled both in Liberia and in Geneva, and it has not been established that his indebtedness was inflated by interest or other charges upon the monies borrowed to meet unavoidable living expenses while awaiting delayed salary payments. Further, it is to be noted that the Organisation, when not proceeding with the termination of his appointment as early as May 1960, took into account the fact that payment of his salary had from time to time been delayed.

7. As defaulting on financial obligations and incurring debts beyond the debtor's capacity to repay within a normal period are incompatible with the standards of conduct required of an international civil servant and is likely to bring the Organisation and its officials into public disrepute, and as the alleged administrative errors relied upon to excuse complainant's conduct of his financial affairs either do not constitute errors or were not material in the circumstances of the case, the Director-General's decision to terminate complainant's probationary appointment in the exercise of the powers vested in him under Staff Rule 960, far from being tainted by an error in law or based upon materially incorrect facts or leaving out of account essential facts or drawing obviously wrong conclusions therefrom, were in the circumstances of this case fully justified.

8. Save as regards costs, neither the claim for travelling expenses nor the claim for damage to personal effects are in issue before the Tribunal since they have been formally withdrawn.

9. Damages to personal effects, in respect of which complainant makes a claim for Sw.fr. 477.0, arose out of and in the course of employment. Whether or not the claim for compensation was allowable under the Organisation's baggage insurance policy, the Organisation was directly liable for compensation. Such compensation was paid to complainant prior to the hearing of the case, but not before complainant had instituted proceedings before the Tribunal. Complainant is therefore entitled to costs in respect of the settlement of this claim. As the Tribunal does not award costs to defendant Organisations, the above-mentioned costs cannot be set off against costs in respect of the mistaken claim for transportation expenses withdrawn by complainant after the submission of the Organisation's reply. Hence the cost of securing settlement of the claim for damage to personal effects, the amount of which shall be taxed by the President of the Tribunal, should be borne by the Organisation.

DECISION

1. The claims for Sw.frs. 477.0 and Sw.frs. 622.90 for damages to complainant's personal effects and for travel expenses respectively having been settled before the hearing by the Tribunal, no decision by the Tribunal on the merits of these items is necessary.

2. The remainder of the claim is dismissed.

3. The costs incurred by the complainant in respect of the item of Sw.frs. 477.0 shall after taxation by the President, be paid to the complainant by the Organisation.

In witness of this judgment, delivered in public sitting on 6 October 1961 by the Right Hon. Lord Forster of Harraby, K.B.E., Q.C., President, Mr. Maxime Letourneur, Vice-President, and Mr. André Grisel, Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

Signatures:

Forster of Harraby

M. Letourneur

André Grisel

Jacques Lemoine