SEVENTY-EIGHTH SESSION

In re WADIE

Judgment 1384

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Youssef George Wadie against the World Health Organization (WHO) on 31 October 1993, the WHO's reply of 24 February 1994, the complainant's rejoinder of 2 May and the Organization's surrejoinder of 27 June 1994;

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, an Egyptian born in 1955, joined the staff of the WHO over ten years ago as a clerk at grade EM.05 in its Regional Office for the Eastern Mediterranean (EMRO) at Alexandria.

In a memorandum of 25 November 1990 the manager in charge of Biomedical and Health Information (MHI) in EMRO informed the Administrative Services Officer (ASO) that on return to work after the weekend he had discovered that the keyboard and the central processing unit, though not the monitor, of a personal computer were missing from his office and other equipment had been tampered with; he recommended calling in the Egyptian police. In a handwritten addendum of 29 November he reported having "belatedly noticed the disappearance in the same robbery" of a laser printer.

The police were called in, carried out an investigation and interviewed several EMRO employees, including the ASO, the storekeeper in charge of computers, two messengers and the complainant.

On 30 December 1990 an official making an inventory of computer stock at EMRO found that a computer monitor in a cardboard box had also gone missing.

The police investigation having led to no charges, the Regional Director appointed Mr. Raga'a Al Arabi, who was then Deputy Attorney-General of Egypt, to make an inquiry. On 15 February 1991, after a tip from an anonymous telephone caller, the police recovered the stolen equipment.

In his report dated 19 February 1991 to the Regional Director Mr. Al Arabi, observing that, in his view, the thief must be an employee of EMRO with "a certain degree of intellectual capacity unlikely to be possessed by any of the messengers", suggested that "the position of [the complainant] regarding the theft of the computer from room No. 4 is not spotless". In a "complementary report" also of 19 February he said: "... a chain of evidence implicates [the complainant], as regards the theft of the computer from room No. 4 and the monitor ... Circumstantial and presumptive evidence strongly suggest that [the complainant] is guilty of this theft". He went on to set out the evidence.

By a letter of 21 March 1991 the Regional Personnel Officer gave the complainant notice under Staff Rule 1130 that he was charged with theft of the computer and monitor and that the Regional Director would be taking disciplinary action against him for "misconduct" within the meaning of Rule 110.8; he had until 31 March to reply to the charges in the complementary report, which was appended.

In a letter of 27 March to the Personnel Officer the complainant denied the charges, asked to see other material documents and said that if EMRO stood by the charges it "would only be fair" to go to the national courts.

In a memorandum of 13 May 1991 the Administration and Finance Officer explained to the Regional Director why he thought Mr. Al Arabi's reports were "subjective" and "it would be incorrect to conclude that [the complainant] is the only suspect".

After getting a copy of that memorandum the Director of the Personnel Division at headquarters advised the Director of the Support Programme in a postscript to a memorandum dated 9 May 1991 to await "further analysis" of the facts. The Director of the Support Programme got that memorandum and postscript on 29 May.

By a letter of 27 May the Regional Personnel Officer had informed the complainant that the Regional Director had decided to dismiss him under Rule 1075.1 for misconduct as from 29 May and to grant him one month's pay in lieu of notice.

On 21 July he appealed to the regional Board of Appeal alleging personal prejudice under Rule 1230.1.1 and incomplete consideration of the facts under 1230.1.2. The regional Board heard his case on 2 and 3 December 1991 and in its report recommended rejection. By a letter of 9 December 1991 the Regional Director rejected his appeal.

On 9 February 1992 he went to the headquarters Board of Appeal in Geneva. In a report of 4 June 1993 the headquarters Board recommended rejecting his allegations of personal prejudice and incomplete consideration of the facts but replacing his dismissal with "termination at the end of the contract existing at the time of the incident" on the grounds that the Organization had lost confidence in him. That, said the Board, seemed more fitting because the grounds for dismissal had rested on mere presumption.

In a letter of 4 August 1993 the Director-General told the complainant that though EMRO had "established [his] guilt beyond any reasonable doubt", he accepted the Board's recommendation and was therefore granting him pay and other entitlements from 29 May to 31 August 1991, the date of expiry of his last contract. That is the impugned decision.

B. The complainant challenges both the dismissal for misconduct and the decision not to renew his contract.

In his submission the case law says that whenever an official denies charges against him the burden of proof shifts to the organisation, which, to discharge it, must identify a set of precise and concurring presumptions. But the evidence referred to in Mr. Al Arabi's complementary report is inconsistent, prejudicial and irrelevant. As for the main report, EMRO's own Administration and Finance Officer declared it inconclusive and subjective. The police investigation revealed insufficient evidence to substantiate charges against anyone. And the headquarters Board of Appeal, struck by the inconsistencies in the evidence, was at a loss to sort out the facts and therefore rejected the charge of misconduct.

The enquiries having failed to establish the complainant's guilt "beyond any reasonable doubt", the Director-General drew a plainly mistaken conclusion from the facts.

Moreover, although a decision not to renew a contract is discretionary it must still be taken in the Organization's interests. Yet according to the complainant's appraisal reports his performance was beyond reproach, and his supervisor had just recommended him for promotion. So for the same reason the non-renewal too was a flawed decision.

He seeks the quashing of the decision of 4 August 1993, reinstatement as from 1 September 1991, moral damages and an award of 10,000 Swiss francs in costs.

C. In its reply the WHO submits that the decision to terminate the complainant's appointment for misconduct rested on "sufficient" proof that he had been "implicated in" the theft. It sees in the testimony of two messengers in EMRO the "set of precise and concurring presumptions" needed to discharge the burden of proof that falls on it. The evidence is that the complainant was on EMRO premises during the weekend when the theft occurred; that he alone had access to the room where the stolen goods were kept; and that he had been seen carrying computer tables and sealed cardboard boxes. Another staff member, who gave evidence in the complainant's favour, might have been trying to "protect" him as they appeared to be "either good friends or related". Since the Administration and Finance Officer submitted his comments "gratuitously" and "in a private capacity" he appears to have had "ulterior motives".

Lastly, there was nothing unlawful in the decision not to renew the complainant's contract: the seriousness of his misconduct had destroyed the Organization's confidence in him.

D. In his rejoinder the complainant corrects what he sees as mistakes of fact in the reply and enlarges on his earlier pleas. He expresses surprise and resentment at the WHO's attempt to discredit the evidence in his favour. Since its

only reason for not renewing his contract is charges of theft that it lacks the evidence to prove he is entitled to reinstatement on the strength of his age and seniority, the quality of his performance and his rightful expectations of promotion.

E. In its surrejoinder the WHO observes that the rejoinder raises no new issues of fact or law. An eminent lawyer having carried out a thorough investigation and written two reports on the case, it has no reason to "doubt" the facts or the conclusions therein.

CONSIDERATIONS:

1. The complainant used to be employed as a clerk at grade EM.05 in Distribution and Sales in the WHO's Regional Office for the Eastern Mediterranean (EMRO) at Alexandria. He is objecting to the Organization's decision not to renew the two-year fixed-term appointment which he held and which expired at 31 August 1991.

2. The working week in EMRO was from Sunday to Thursday and except on Tuesday, when the staff worked three extra hours in the evening, the schedule of work was from 7.30 a.m. to 2.30 p.m. Thefts of several items of computer equipment from EMRO were discovered in November 1990, and the circumstances were as follows.

(a) There were two Wang computers, each with a laser printer, and one Epson computer in the room of the manager of Biomedical and Health Information (MHI). On Sunday 25 November 1990 he reported that that equipment, which had been in proper order when his secretary had left work on Thursday, had been tampered with: one of the Wang computers and the keyboard were missing, only the monitor being left; the laser printer was switched on; and the keyboard of the second Wang computer and the monitor of the Epson computer were unplugged.

(b) Having been on leave from the 26th to the 28th, the MHI wrote a report on Thursday the 29th to the Administrative Services Officer (ASO) in which he said: "we have belatedly noticed the disappearance in the same robbery" of a Wang laser printer.

(c) During stocktaking on 30 December 1990 it was found that a box containing a Wang monitor was missing from the "skylight storage area".

3. Police investigation from 26 November to 31 December 1990 proved inconclusive. Suspicion fell at first on one employee, then on the complainant; the police held him in custody for a day and then released him.

4. The Organization engaged the then Deputy Attorney-General of Egypt, Mr. Raga'a Al Arabi, to conduct a private investigation. After questioning several employees he submitted a report dated 19 February 1991 which contained only a summary of the statements made to him and in which he concluded:

"... there is ground for belief that [the complainant's] position regarding the theft of the computer from Room No. 4 is not spotless ... the theft took place during the period starting from the end of work on 22/11/1990 to the start of 25/11/1990."

The same day he submitted a "complementary" report in which he purported to elaborate on his findings:

"... a chain of evidence implicates [the complainant] as regards the theft of the computer from Room No. 4 and the monitor from [the] skylight store. Circumstantial and presumptive evidence strongly suggest that he is guilty of [the] theft."

5. As a result of those reports the Regional Personnel Officer informed the complainant by a letter dated 21 March 1991 that the Regional Director would be taking disciplinary action against him for misconduct, namely theft of a computer and a monitor, as set out in the complementary report. Only the complementary report was sent to him, and with the names of the witnesses omitted at that. He was warned against contact with anyone who he thought might have contributed to that report. He was required to reply by 31 March 1991. By a letter dated 27 March he requested full access to the original statements and the two reports and he objected that because the identity of the witnesses was concealed he could neither confront them nor comment on their evidence. He was, however, told to keep to the deadline and so, without having been given any further information or documents, he submitted a reply to the points made against him.

6. By a letter dated 27 May 1991 the Regional Personnel Officer informed him that "the Organization is satisfied beyond reasonable doubt" that he had committed the theft of the computer and the monitor and therefore dismissed him as from 29 May with one month's pay in lieu of notice.

7. On appeal the regional Board of Appeal observed in its report of December 1991 that the investigation by Mr. Al Arabi had "led to the conclusion that [the complainant] could be suspected of the theft on circumstantial evidence". The Board held that he had been "given full opportunity to defend himself", that his dismissal had been for misconduct "documented by circumstantial and presumptive evidence" and that the Organization had "lost confidence in him". It therefore recommended rejecting his appeal, and the Regional Director did so.

8. The complainant then appealed to the headquarters Board of Appeal. In its report of 4 June 1993 that Board said it found such "a high degree of contradiction in the statements made at various times" by all who had given evidence, including the complainant, that it was "at a loss to resolve" relevant issues of fact, such as when, and from where, the stolen goods had been removed and how they had been returned. Accordingly the Board disagreed with the finding of misconduct, which it held to be "based on presumptive evidence only" and held that dismissal was "probably not the wisest and fairest decision" and that it "would have been better to await the end of [the complainant's] contract". It recommended that "the dismissal be converted to termination at the end of the contract existing at the time of the incident" i.e. at 31 August 1991, "on the grounds of loss of confidence in [the complainant's] suitability for employment in WHO". In a letter of 4 August 1993 to him the Director-General stated that although guilt had been established beyond reasonable doubt he accepted the recommendation. That is the impugned decision.

9. Though the impugned decision purports to "convert" the complainant's dismissal for misconduct into non-renewal of his fixed-term appointment, as the Tribunal has consistently affirmed - more recently, for example, in Judgment 1317 (in re Amira), under 24 and 28 - an organisation is required to give a reason for such non-renewal, and the WHO has unequivocally stated that termination in this instance was for "serious misconduct, which led to loss of confidence". Yet for the reasons set out below the finding that the complainant was guilty of theft cannot stand.

10. As was said in Judgment 635 (in re Pollicino), the complainant's denial of the alleged misconduct "shifts the burden of proof to the Organization. The Tribunal will not require absolute proof, which is almost impossible to provide on such a matter. It will dismiss the complaint if there is a set of precise and concurring presumptions" of the complainant's guilt.

11. As both Boards of Appeal recognised, the first report by Mr. Al Arabi showed that there was at most mere suspicion that the complainant might have been involved. There was no basis on which the Organization could contend that the charge of theft had been satisfactorily proved. What it did in effect was to reverse the burden of proof by expecting the complainant to show that his conduct was "spotless".

12. Furthermore, the suspicion that did fall on him was only about the computer stolen from room 4 in November 1990, not about the monitor missing from the skylight store in December 1990. The Organization had no grounds for concluding that he was involved in the theft of the monitor.

13. The complementary report cited some evidence that he was present in room 4 for a short time between 2.30 and 3.00 p.m., on Thursday 22 November 1990. But it failed to disclose the evidence that he had legitimate business there; that the two boxes in which he was suspected of having removed the missing equipment were being used to take WHO publications to and from EMRO premises in the discharge of his duties; that an employee who was responsible for making sure that the computers were turned off and cleaned, and who had been in room 4 after 2.30 p.m., had told the police that if the computer had been missing he would have noticed; that an electrician came every Friday morning to do maintenance work; that "garbage collectors roam[ed] freely within the office without supervision"; and that several previous thefts from EMRO premises had not been reported.

14. The same report referred to evidence by one witness that the complainant had gone to the building on Saturday 24 November and said that another witness had confirmed it; yet the complainant denied going to the office on that day. The report also failed to disclose that according to the evidence the complainant had remained in his own office in the basement; that another witness had stated that no-one could have entered room 4 or indeed any room without referring to one of the messengers; and that no witness had even suggested that the complainant had entered room 4. In view of those and many other discrepancies and omissions it is not surprising that the

headquarters Board of Appeal was unable to determine the relevant issues of fact.

15. At all events there were many flaws in the procedure that the Organization followed. It did not allow the complainant to be present when statements were taken from the witnesses or to question them. Thereafter not only was he denied access to their statements but even their identity was concealed from him. He was given only an incomplete and inaccurate summary of the investigation by Mr. Al Arabi. He was denied the right to see Mr. Al Arabi's first report, though it was one of the documents on which the decision to dismiss him was based. No verbatim record of the statements by the witnesses was ever produced. Neither directly nor indirectly was he confronted with his accusers, and he was deprived of the opportunity to press the points in his favour or to explain those that told against him. The conclusion is that he was denied his right to defend himself before an adverse decision was taken. As the Tribunal stated in Judgment 999 (in re Sharma):

"Whoever makes inquiries of the kind that were made in this case must be scrupulous in not taking evidence from one party without the other's knowledge. Whether or not the evidence did work to the complainant's prejudice is irrelevant: it is sufficient that it might have done so, and it is not the likelihood but the risk of prejudice that is fatal."

The Tribunal is satisfied that in this case the complainant's right of defence was seriously prejudiced.

16. The decision not to renew the complainant's contract was based on loss of confidence consequent upon the finding of misconduct. That finding was based on an error of law as to the burden of proof; rules of procedure relating to the right of defence were seriously violated; essential facts were not taken into consideration; and clearly mistaken conclusions were drawn from the facts. So the finding cannot stand, and the plea of loss of confidence which the Organization based thereon must be rejected.

17. The impugned decision must therefore be quashed. The Organization has failed to state a valid reason for non-renewal. The complainant's performance in 1987-88 and 1988-89 was rated good, despite shortcomings due to lack of facilities, and in 1989-90 very good. In a handwritten comment on 29 January 1990 a supervisor described work he had done in 1989 as "an excellent performance indeed" and on 18 March 1990 he was recommended for promotion. The Organization would, but for the wholly mistaken conclusion that he had been involved in the theft, have extended the complainant's fixed-term contract beyond August 1991 as a matter of course. Moreover, the decision not to renew his contract, based as it was on a finding of theft, must have seriously harmed his moral and social standing and his prospects of finding other employment. And the flagrant disregard of his right of defence caused him further moral injury.

18. The damage to the complainant's career and reputation is so grave that nothing short of reinstatement and the grant of a further contract of employment will suffice.

(a) He must be put in the same position as if his contract had never terminated and be reinstated as from the date of termination up to the date of this judgment. Since his performance was good he should be granted any within-grade salary increases he would ordinarily have been entitled to. Although any indemnities or earnings from employment after termination may be deducted from the amounts due, he is entitled to the payment of interest on all arrears of pay at the rate of 8 per cent a year from the dates at which each component sum fell due.

(b) He is to be granted an appointment for a period of two years starting at the date of delivery of this judgment.

(c) He is entitled to an award of damages for moral injury, and the Tribunal sets the amount at 6,000 United States dollars.

(d) He is awarded 4,000 dollars in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 4 August 1993 is quashed.

2. The Organization shall reinstate the complainant on the terms set out in 18(a) above.

3. It shall grant him a contract of appointment for a period of two years starting at the date of delivery of this judgment.

4. It shall pay him 6,000 dollars in damages for moral injury.

5. It shall pay him 4,000 dollars 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 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.