

EIGHTY-FOURTH SESSION

In re Prvulovic

Judgment 1722

The Administrative Tribunal,

Considering the complaint filed by Mr. Tomislav Prvulovic against the World Health Organization (WHO) on 12 September 1996 and corrected on 6 November, the WHO's reply of 13 February 1997, the complainant's rejoinder of 8 March and the Organization's surrejoinder of 9 June 1997;

Considering Articles II, paragraph 5, and VII, 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 Yugoslavia in 1936, joined the staff of the WHO in February 1989 under a fixed-term appointment as a medical officer at grade P.4. In May 1990 the Organization assigned him to Ghana. Having abolished his post there at the Government's request, it terminated his appointment under Staff Rule 1050.1 on 1 March 1992. On 28 November 1992 he returned under another fixed-term appointment for two years as a medical officer at grade P.5. He was assigned to Yangon, in Myanmar.

In a form extending his appointment until 30 November 1996 the Administration gave 62 as the age of his retirement. By a memorandum dated 13 December 1994 a personnel officer told him that, having "validated" previous service in the Organization with the United Nations Joint Staff Pension Fund as from 31 October 1989, he would have to retire at the age of 60, on 31 January 1996, under Staff Rule 1020.1. That rule reads:

"Staff members shall retire on the last day of the month in which they reach the age of 60. However, staff members who have become participants in the United Nations Joint Staff Pension Fund on or after 1 January 1990 shall retire on the last day of the month in which they reach the age of 62."

In a letter of 23 June 1995 replying to a request that the complainant had made for review the Organization's Regional Director for South East Asia confirmed that he must retire at 60. He accordingly retired at 31 January 1996.

By a letter of 13 February 1996 he told the chairman of the regional Board of Appeal that he intended to appeal against "premature retirement". In a reply dated 20 February the chairman said it was not clear what administrative action he was objecting to and drew his attention to the time limit. In a letter of 12 April 1996 he asked the headquarters Board of Appeal to take up his case. The secretary of the Board replied on 30 April 1996 that he had to put the matter to the regional Board first and then get a decision from the Regional Director.

He is impugning the decision in the memorandum of 13 December 1994.

B. The complainant submits that the Administration was wrong to make him retire at 60. He has three main pleas. First, since the WHO brought him back in November 1992 under an entirely new contract he was entitled to retire at 62. Secondly, the impugned memorandum shows a mistake of fact: he never validated prior contributory service with the Fund. Lastly, he alleges "premeditated" victimisation by the Organization.

He claims compensation for the loss of 10 months' pay, from 31 January to 30 November 1996, and for another 14 months' pay, from 1 December 1996 to 31 January 1998.

C. The WHO observes that his complaint is irreceivable for failure to exhaust the available internal

remedies. In any event a challenge to a decision taken one year and nine months before the date of filing is plainly time-barred under Article VII(2) of the Tribunal's Statute.

The Organization answers the complainant's pleas on the merits. Though he returned in November 1992 as a new staff member, that was irrelevant to the age set for retirement in the rules. The WHO acknowledges that, contrary to what it said in the impugned memorandum, he had not validated prior contributory service with the Fund. But what matters is the date at which he joined the Fund and the fact that before returning to the WHO, as he did within one year of separation, he had not collected any benefits.

D. In his rejoinder the complainant enlarges on his earlier pleas and answers the arguments in the reply. He says he did his best to resist the impugned decision and maintains that the mistake of fact that tainted the impugned decision was fatal.

E. In its surrejoinder the WHO presses its pleas and comments on several points in the rejoinder. Though plainly irreceivable, his complaint is also devoid of merit because the Organization correctly applied the material rules.

CONSIDERATIONS

1. The complainant contests a decision of the World Health Organization (WHO) establishing his retirement date, and in consequence the end of his fixed-term appointment, as at the end of the month in which he reached his sixtieth birthday.

2. The Organization maintains that the decision in question is in accordance with the applicable Staff Regulations and that the complaint is irreceivable on two separate grounds. The Tribunal will first examine the alleged irreceivability and will deal with the merits only if the complaint is found to be receivable.

3. The first ground of irreceivability is based on Article VII(1) of the Tribunal's Statute:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

4. The complainant wrote to the regional Board of Appeal on 13 February 1996 in the following terms:

"On the eve of the last day, that as a former WHO staff, I am eligible to submit my appeal on the subject. This is to officially request you to consider herewith that I am starting the appealing procedure with my strongest possible protest against WHO illegal and wrongful procedure in the entire process.

I am ready to submit all necessary evidence/proofs that I was told/instructed/ advised that my retirement will start in January 1998 since I have taken my contract with WHO on 27 November 1992.

I have prepared myself, my family and our entire future on the above basis.

Being 'outcasted' on a ruthless short notice and being given very unfair and ill treatment by WHO authorities, in spite of highest respects and excellent rapport I am enjoying with the [Ministry of Health] entire government, top leaders, colleagues and people of this country, I have suffered a lot, physically and psychologically (I have proofs of my deteriorated health).

I would therefore request your prompt action and sympathetic consideration of my case."

5. The chairman of the Board of Appeal promptly responded to that document on 20 February 1996 as follows:

"Please refer to your communication dated 13 February 1996, received by me on 16 February 1996.

In this connection, it may be mentioned that the Regional Board of Appeal is entitled to deal with appeals from the Staff members within the meaning of Staff Rule 1230.1 which states that 'Subject to the provisions of Rule 1230.8, a staff member may appeal against any administrative action or decision affecting his appointment status on the grounds that the action or decision complained of resulted from one or more of the following factors'. Staff Rules 1230.1 and 1230.8 are extracted and attached herewith.

It is not clear from your letter which administrative action you intend to appeal against, and furthermore, your appeal should be within the time limit stipulated in the above Rules.

We understand that you were separated from the Organization as from 01 February 1996. Hence you cease to be a staff member within the meaning of the said Staff Rule and, in view of this fact, you may find alternative avenues to meet your requirements."

6. The complainant apparently took the somewhat obscure wording of the last paragraphs of this letter to be an invitation to him to launch a further appeal to the headquarters Board of Appeal. He did so by a detailed and comprehensive document dated 12 April 1996 in which he set out in full his complaint against the Organization and attached a large number of relevant documents.

7. By a letter dated 30 April 1996 the secretary of the headquarters Board replied as follows:

"With reference to your letter dated 12 April 1996 addressed to the Headquarters Board of Appeal (HBA), please refer to Staff Rule 1230.8.4 which states that 'A staff member who was assigned to a region at the time of the action complained of shall address his appeal to the regional Board of Appeal of the region concerned'. The HBA is competent to hear appeals from staff members and retired staff members administered by regional offices only against decisions of Regional Directors subsequent to the recommendations of a regional Board of Appeal, which means that we cannot accept your appeal until it has been examined by the appropriate Regional Board and Regional Director has informed you of his decision.

I note that you contacted the Regional Board of Appeal (RBA), SEARO on 13 February 1996. If you have not already done so, you should send a revised declaration of intention to appeal to the RBA/SEARO, including the information requested by Mr. J. Pospisilik, Chairman RBA/SEARO, in his response to you dated 20 February 1996. Your revised declaration should consist of a brief letter indicating your full name, grade and Unit at the time of the administrative action impugned. You should state concisely the nature of the administrative action concerned and give the date on which you were informed of the decision, as requested by Mr. Pospisilik. Your declaration of intention to appeal should also include the grounds of appeal under the sub-section(s) given in Staff Rule 1230.1, and a statement to the effect that in your opinion, all existing administrative channels have been tried.

I would like to draw your attention to Staff Rule 1230.8.3, which gives the time limits applicable to appeals. Please note that your declaration of intention to appeal should be despatched to the Regional Board, SEARO within sixty calendar days of receipt of notification of the administrative action you are appealing against."

8. In the Tribunal's view the letter of 30 April 1996 gives a clear and unambiguous indication to the complainant that his appeal should be addressed to the regional Board of Appeal as well as an indication of the proper manner in which to bring such an appeal. Instead of following this advice and seeking a waiver or extension of time within which to launch his internal appeal, the complainant waited for over four months and then filed the present complaint.

9. The complainant has not exhausted or attempted to exhaust the means of resisting the impugned decisions which were open to him under the applicable Staff Regulations.

10. The second ground of irreceivability is based on Article VII(2) of the Tribunal's Statute:

"To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published."

11. The complainant had been advised by a letter from the WHO dated 5 October 1994 that his fixed-term appointment was to be extended by two years to 30 November 1996. Rightly or wrongly this term was based on the view that the complainant's normal retirement age was 62. The Administration revised this view in a letter dated 13 December 1994 and advised the complainant as follows:

"Please refer to our letter dated 5 October 1994 indicating the extension of your appointment until 30 November 1996.

It has recently come to our attention, however, that you have validated your prior service with the Organization from 31 October 1989, although your recorded entry on duty date is 28 November 1992.

Staff Rule 1020.1 provides that staff members who have become participants in the United Nations Joint Staff Pension Fund prior to 1 January 1990 shall retire on the last day of the month in which they reach the age of 60. As you became, by your validation, a participant in the Fund prior to this date, your normal age of retirement is thus 60 years and you are therefore scheduled to retire from the Organization on 31 January 1996. We have accordingly amended your contract to reflect this new expiry date and we are enclosing herewith a revised Personnel Action which incorporates this change.

We apologize for any inconvenience this may have caused."

12. This is the decision which is clearly identified by its date in the complaint filed by the complainant with

the Tribunal on 12 September 1996.

13. There can be no question that the complainant received the impugned decision on or shortly after the date it bears. He confirms this in his entry under point 3(a)(ii) of the complaint form, where he gives 13 December 1994 as the date when he had notice of the final decision. He subsequently engaged in correspondence with his superiors protesting against it. While not all that correspondence has been produced before the Tribunal it is clear from the complainant's own written pleadings that it concluded, in a manner unsatisfactory to him, by July 1995. The complainant in fact retired from the WHO on 31 January 1996.

14. The complaint is out of time.

DECISION

For the above reasons:

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner