

EIGHTY-SIXTH SESSION

Judgment 1828

The Administrative Tribunal,

Considering the complaint filed by Ms. K. A. K. against the World Health Organization (WHO) on 21 January 1998, the WHO's reply of 24 April, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 19 October 1998;

Considering Article II, paragraph 5, 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 a citizen of the United States who was born in 1964. She joined the WHO's staff in July 1996 under a short-term contract for one month as a technical officer at grade P.3 with the Global Tuberculosis Programme (GTB). Having returned to the United States, she received the offer of another short-term contract, to run from 2 September 1996 to 31 July 1997, again as a technical officer with the Programme.

She left Boston, in the United States, on 28 August 1996 on the first leg of her journey to her duty station, which was Geneva. On 4 September she put in a travel claim for 446 United States dollars by way of reimbursable expenses for excess baggage and certified the amount to be "true and correct". By a memorandum of 4 September the Director of GTB asked the head of Associates, Short-term Professional Staff and Consultants (ASC) to authorise refund of the cost of 273 kilograms of excess baggage for her and submitted a copy of her excess baggage ticket. On 11 September the head of ASC recommended allowing her 20 kilograms under Manual provision II.11.460. By a memorandum dated 20 September 1996 the chief of Finance told the Director of GTB that because of discrepancies in the baggage ticket she might, he feared, have been "wrongly charged" and he asked for copies of her credit card statement or payment authorisation slip. In a memorandum of 14 October she reported that the credit card company "appears" to have charged her 219 United States dollars, and she attributed the error "to a discrepancy on either the receipt provided to me or on [the company's] bill".

In a memorandum to her of 18 October the head of Claims Examination (CLX) said that her reply of 14 October was "not adequate" and he gave her eight days in which to submit proper supporting documents and explain the difference between what she had paid and what she had claimed. On 22 October she attached travel documents and a statement from her credit card company to a memorandum saying that she had paid a total of \$219, including \$73 for her pet cat, which she was taking with her. She said that under the stress of departure she had failed to check the receipt; she was not familiar enough with the metric system to realize that the weight entered on it was too large; either she had been "given the wrong handwritten receipt, or the ticket agent incorrectly marked the ticket".

By a letter of 29 October the Director of the Division of Personnel charged her with "wilful falsification of documents with the intention of defrauding the Organization" and asked her to comment in writing within eight days; he also suspended her from duty without pay as at 30 October pending review of her comments and the results of further investigation. She submitted an explanatory affidavit on 7 November under cover of a letter asking the Director of Personnel to lift the suspension. By a letter of 15 November the Director told her that the suspension held good.

In a letter dated 18 December 1996 the Director set out the findings of the investigation. He told her, among other things, that the statements backing her claim were not "true and correct", that the top copy of the baggage ticket showed a cost of \$146, that the duplicate copy alone had been changed to a total cost of \$446; that she had charged only \$146 to her credit card; and that the figure for "rate per kg or piece" had been changed from "73.00" to "273.00 kg". He concluded that she had tampered with her copy of the ticket and used it with intent to defraud. Since such action amounted to misconduct, the Assistant Director-General had decided to dismiss her under Rule 1075.1 with payment of one month's salary in lieu of notice.

She appealed to the headquarters Board of Appeal on 14 February 1997. In a report of 18 August 1997 the Board recommended letting her resign as at 30 October 1996 provided she dropped any legal action against the

Organization in consideration for withdrawal of the decision of 18 December to terminate her appointment. By a letter of 23 October 1997, which she is impugning, the Director-General upheld the decision of 18 December 1996 terminating her appointment.

B. The complainant submits that she was wrongfully dismissed and her good name besmirched. She has three main pleas.

First, she pleads misapplication of the Staff Regulations and Rules. She charges the Board with breach of Staff Rule 1075.1 in failing to find evidence of wilful deception. Instead it applied a "standard of negligence". She denies that there was a set of "precise and concurring presumptions" that might shift the burden of proof to her and rule out the possibility of error. As the case law says, dismissal is far too drastic a punishment for the staff member not to have the benefit of the doubt. In any event the punishment was out of proportion to the alleged offence, the more so as the amount at stake was but a fraction of the thousands of dollars she had spent to ship her belongings to Switzerland. By failing to tell her why it was suspending her from duty the Administration was in breach of Rule 1120. Besides, suspension was unwarranted.

Secondly, she pleads neglect of the material facts. There were many to which the Board and the Director-General failed to pay proper heed: her lack of motive for fraud, her unfamiliarity with her new employer's administrative procedures, turmoil at the airport, muddle over whether she might take the cat with her, inconsistencies in the baggage ticket, her untarnished reputation, her apology to the Administration for causing it inconvenience and her willingness to cooperate. Such facts leave open the possibility of "mere error or negligence".

Lastly, she blames her dismissal on personal prejudice. Since her supervisors differed with her over matters like "gender" she attributes the harsh treatment to considerations that had nothing to do with work.

She wants the Tribunal to quash the impugned decision and order the WHO to (1) write her a letter declaring her "innocent of any wrongdoing" and a victim of "improper" dismissal; (2) pay her the salary and benefits she would have had if she had been able to serve out her contract and (3) grant her a total of \$40,000 in moral damages under four heads, including the breakdown of her marriage (\$10,000) and her bankruptcy (a further \$10,000). She claims \$25,000 in costs, interest at a rate to be set by the Tribunal on the sums due, and the award of "all other and further costs" as the Tribunal may order.

C. The WHO replies that her complaint is devoid of merit. It observes that she alone was responsible for the accuracy of a claim she had submitted as "true and correct". Hers was not a case of clerical error or mere negligence: there was a set of precise and concurring presumptions that she had tampered with her copy of the excess baggage ticket and used it to back an inflated claim. That her copy of the ticket had been altered was plain from the top copy, which the Organization produces.

It denies committing any procedural mistakes. At every stage in the proceedings it let her have her say. Suspension was a proper exercise of discretion.

As to proportionality, there was no inference of "mere error": this was a case of intent to defraud. There is, it submits, no threshold below which fraud may be overlooked, certainly not during the early days of an official's contract. It took full account of the effect of dismissal on her career. But the seriousness of the offence and the need to safeguard its own interests outweighed such subjective considerations. Besides, she had only to resign if she so wished after getting notice of dismissal.

As to personal prejudice, there was no evidence of any against her and the officers she singles out had no part in the impugned decision.

The Organization sees no grounds for her claims to redress. Her marital and financial troubles are irrelevant.

D. In her rejoinder the complainant enlarges on her earlier pleas and rebuts the arguments in the WHO's reply. The Organization was, she says, in breach of due process by failing to let her know that it had the top copy of the baggage ticket: it had a duty to inform her of any evidence it got from the airline company. Owing to the existence of a "cap" on the amount payable to her under the rules for excess baggage it would not have been possible for her to defraud the Organization. She presses her claims, including those to damages for her divorce and financial plight, the "effective cause" of which was the WHO's wrongful treatment of her.

E. In its surrejoinder the WHO confines comment to the main arguments in her rejoinder. It denies breach of due process: disclosure of the top copy of the ticket did not amount to a new element, but merely confirmed that the document had been tampered with. As to the existence of a cap on refund of the cost of excess baggage, the Organization points out that the material question is not whether such cap - had there been one - might impede fraud, but whether there was intent to defraud. And, it concludes, there was.

CONSIDERATIONS

1. The World Health Organization recruited the complainant in the summer of 1996 as a technical officer at grade P.3 under its Global Tuberculosis Programme (GTB) at headquarters in Geneva. At the outset she had a contract for one month. She then got a new one from 2 September 1996 to 31 July 1997. To take up duty under the new contract she travelled on flights from Boston to Frankfurt and then to Geneva on 28 August 1996 by the German airline, Lufthansa.
2. On 4 September 1996 she submitted to the Organization a claim to refund of \$446 to cover the cost of excess baggage and with it an excess baggage ticket in which the "rate per [kilogram] or piece" had been altered from "73.00" to "273.00" and the cost from "USD146" to "USD446".
3. A memorandum of 20 September 1996 from the chief of Finance to the Director of GTB asked the complainant to submit her credit card statement showing the payment she had made for the excess baggage. She replied in a memorandum of 14 October to the Director but in a memorandum of 18 October the WHO told her that her reply was "not adequate". On the 21st Lufthansa confirmed that the total amount charged to her for excess baggage had been \$146, not \$446. On the 22nd she submitted a letter from her credit card company confirming one payment of \$73 for the transportation of her pet cat on the same flights and another of \$146 for the excess baggage.
4. By a letter of 29 October the Director of the Division of Personnel told her that she was suspended from duty as from 30 October under Staff Rule 1120; charged her with "wilful falsification of documents with the intention of defrauding the Organization"; and set her, in accordance with Rule 1130, a time limit for reply, which was eight days. She replied in an affidavit dated 7 November. By a letter of 18 December 1996 the Director informed her that the Administration's conclusion was that she had wilfully falsified the copy of the excess baggage ticket that she had submitted in support of her claim and that she was dismissed for misconduct under Rule 1075.1.
5. On 14 February 1997 she appealed to the headquarters Board of Appeal and it reported on 18 August 1997. It held that, though she must go, her "personal circumstances ... were such that the effects of this dismissal on her future professional life were likely to be out of proportion with the misconduct in question". It recommended offering her "the possibility of resigning as from 30 October 1996" provided that she would "undertake no further legal action".
6. The Director-General did not accept the Board's recommendation but in a letter to her of 23 October 1997 confirmed her dismissal. That is the decision she is impugning.
7. The Tribunal disallows the complainant's application for hearings, being satisfied that they are not necessary for ruling on the case: it has full written evidence and extensive submissions from both parties.
8. The complainant has three main pleas: that the WHO failed to apply the Staff Regulations and Rules correctly; that there was incomplete consideration of the facts; and that her dismissal was attributable to the personal prejudice against her of "a supervisor or responsible official".

The alleged disregard of the rules

9. The complainant contends that the Board did not explicitly and clearly state that the dismissal rested on "a finding of fraud, that is, wilful deception"; that thereby the Board, and so the Director-General, incorrectly applied Rule 1075; and that indeed the Board "may have applied a standard of negligence, which would be clearly wrong". She takes the Board to task for identifying as "one of the set of precise and concurring presumptions" inconsistency in the evidence, particularly the way in which the credit card payment slips had been presented to her, and she maintains that her statements are "entirely coherent" and "credible". She objects to the Board's drawing another such presumption from the fact that she "did not dispute that the excess baggage ticket had been changed" and that "no one [else] had any motive to falsify the amount". She argues that that "ignores the possibility ... of an error, which is rendered likely by the great haste in which the credit card payment was processed more than once". She

believes that the Board drew yet another presumption from her failure to "produce any evidence to indicate that she had not falsified the document" supporting her claim. She says that that is to shift the burden of proof to her to disprove her alleged guilt. All she did was submit "an inaccurate excess baggage ticket and an inaccurate travel claim under circumstances (which are not contested) in which she had no reasonable opportunity of verifying the information, was uninformed and in unfamiliar circumstances, and was rushed at every stage. This sole remaining element of the purported set of 'precise and concurring presumptions' is more consistent with negligence than with fraud". In endorsing the Board's recommendation the Director-General incorrectly applied both Rule 1075, by laying the burden of disproving fraud upon her, and Rule 1110.1, in that dismissal was a disproportionately severe sanction for the alleged offence, especially when the inference of mere error was so strong, when the amount at stake was so small, and when the personal consequences for her were so grave. Lastly, she contends that the WHO failed, in breach of Rule 1120, to give her at the time of suspension from duty a written statement of the reasons for it; it omitted to tell her how her continuing presence might harm the Organization's interests; and in fact it was wrong to order suspension because it could not reasonably make out that her presence was likely to harm its interests.

10. The complainant cannot succeed in her contention that the Board failed to make an explicit and clear finding of fraud. In paragraph 3 of its report it recorded the fact that "her contract had been terminated under Staff Rule 1075.1 on the grounds of intention to defraud WHO". It then summed up her own and the Organization's arguments. In paragraph 8 it declared that "the issue was not just the false invoice, but rather the false travel claim", which she had certified to be "true and correct". It pointed out inconsistencies in her case. And it "agreed that WHO could not continue to employ [the complainant] following an incident of this kind", and that dismissal was the only course of action open to the Administration. The drift of the whole report is explicit and clear: the Board found the complainant guilty on the charge of basing a false claim on a falsified document with intent to defraud.

11. She must fail too in her argument that the burden was wrongly shifted to her to disprove guilt. That is not at all what the Board meant or did. It is common ground that the excess baggage ticket was falsified. The complainant had that ticket in her possession from the moment when it was handed to her at the airport in Boston until she handed it over to her secretary in the WHO in Geneva. She raises two possibilities: one is that an official of Lufthansa in Boston was the culprit, the other that there was a mere error. But it was only the bottom copy of the baggage ticket which was altered, the top copy being left as it had originally been, and the amount shown as paid on the top copy was correct. The Board refused to accept that anyone other than the complainant had any motive for falsifying the amount. It is plain what the Board meant in referring to her failure to adduce evidence to suggest that she had not falsified the ticket: the Organization had made out a *prima facie* case, and she had failed to adduce any evidence tending to rebut it. She produced a falsified document in support of a claim and certified the statement of fact in that claim to be true. The inference is that she was responsible for the accuracy of the document, and she failed to satisfy the Board that it was by any error that she had certified the claim.

12. No more successful is her plea that the Organization misapplied Rule 1110.1, which sets out the sanctions applicable according to the gravity of the offence. The Tribunal does not accept her submission that dismissal is a sanction disproportionate to the making of a fraudulent claim on the strength of a falsified document. Even though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing her for the misconduct she had committed. It is quite untrue that the Organization refused to take her own circumstances into account. Though the Director-General rejected the Board's recommendation for letting her resign instead, the Tribunal is satisfied on the evidence that he had considered her circumstances but had concluded that they could not prevail.

13. Another unsustainable plea is breach of Rule 1120 in that the WHO gave her no written statement of the reasons for suspension from duty and, more particularly, of the reasons why her continuing presence might harm its interests. On receiving the letter of 29 October 1996 from the Director of the Division of Personnel she learned that she was charged with wilful falsification of documents with intent to defraud the Organization and suspended from duty under Rule 1120. The suspension was a proper exercise of the Director-General's discretion. The reference to the rule implied plainly enough that the Organization took the view that her presence in the office was likely to harm its interests: there was no need for it to say so explicitly then or later.

The alleged neglect of material facts

14. In support of her second plea the complainant pleads that the Board and hence the Director-General erred in disregarding circumstances that suggested she had been guilty of error or negligence. She alludes to such circumstances as anxiety about missing the Lufthansa flight from Boston and about the fate of her cat. She points out that the travel claim form was the first one she had ever had to fill up at the WHO and that she got no information or help but had to rely for the purpose on her secretary and the Division of Personnel. Again, there was an "unmistakeable inconsistency on the face of the ... baggage ticket", which put "the rate per [kilogram] or piece" at 273 kilograms and the total at \$446: a mistake, surely, "not an incredibly naive attempt to defraud". Other facts overlooked were the singularity of the incident, her character references, the absence of motive, her awareness of a ceiling on her entitlement, her prompt acknowledgement of error and rectification of her claim, the absence of actual payment, her sworn statement that she had not altered the figures, and the possibility of "mere error or negligence". She submits that the decision fails to make clear the "exact misconduct finding" against her: though the charge was that she had "intentionally modified the excess baggage receipt with the intent to defraud WHO", there was, she maintains, no evidence to support it.

15. There is no evidence to suggest that the Organization failed to take any material fact into consideration. The complainant had the opportunity of putting her case fully and, as was said in 10 above, the Board summed it up fully in its report. She is quite mistaken in assuming that because not every single argument she offered was specifically mentioned it was overlooked. Again the Tribunal is satisfied that the Organization heeded her explanations, even though the Board and ultimately the Director-General rejected them as not credible.

The charge of personal prejudice

16. In support of her third plea the complainant argued before the Board that she could only infer from the refusal to listen to her case, from the "exceedingly harsh" treatment of her and from the disproportionate penalty that a supervisor or some WHO official was acting out of personal prejudice against her. Though the Board found no evidence of such prejudice in the handling of her case she now blames the Deputy Director of GTB and her first-level supervisor. She submits that of themselves the facts demonstrate those officials' prejudice against her: *res ipsa loquitur*.

17. The two supervisors whom the complainant names had no part in the decision to dismiss her. Not only has she given their names very late in the day, but she has not yet produced a jot of evidence to suggest that either of them was behind her dismissal.

The alleged procedural flaw

18. In her rejoinder the complainant pleads a procedural flaw that was prejudicial to her right of defence. She is referring to the fact that only by the letter of 18 December 1996 from the Director of the Division of Personnel dismissing her was she told of the existence of the top page of the baggage ticket sent by Lufthansa to the Organization and allowed to see a photocopy of it.

19. Yet by a letter of 29 October 1996 the Director had already told her that Lufthansa had "confirmed that the amount charged was \$146, as per copy of our enquiry and reply from Lufthansa attached". So the existence of the top page added no new element but served merely to confirm that the ticket had been altered.

20. In any event the Board went into the whole issue in great detail. As it observed in point 5 of its report, "She said that had she been given an opportunity to comment on the top form of the baggage ticket, she would have said that the changes were 'not at all understandable', but that in any case this ticket represented only a small part of her real expenses".

21. The Tribunal is satisfied that there was due process. The complainant and her counsel had ample opportunity of commenting on the item of evidence at the hearings before the Board.

22. The conclusion is that the complainant's pleas cannot be sustained and that the decision she impugns must stand. That being so, her claims to relief fail in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner