

NINETY-THIRD SESSION

Judgment No. 2129

The Administrative Tribunal,

Considering the complaints filed by Mrs P. A., Mrs A. A., Mr E. B., Ms F. B., Ms N. B., Mr C. B., Mrs L. Z. B., Mrs A. B., Mr J. B., Ms V. C. L., Ms C. D., Mr M. D., Mr L. D., Mr R. E., Mr G. P. G., Mr B. I.-P., Mrs B. I., Mrs M. I., Mrs G. K., Mr E. K., Mr J. K., Mr L. K., Mr J. D. D. K., Ms T. K., Mrs A. K., Mr W. K., Mr A. L., Mr B. L.-M., Mr L. B. L., Mr P. L., Mr L. M., Mrs J. M., Mr R. M.-N., Mr P. M., Mr G. M., Mr A. M., Mrs A. M., Mrs M. M., Mr E. M., Mr J. M., Ms H. M., Mrs F. M., Mrs H. M., Mr P. M.-M., Mrs H. M., Mr V. M., Mr G. M., Mrs Y. M., Mr R. M., Mr P. M., Mr A. M., Mr J.-C. N., Mr P. N., Mr J. N., Mr J.-P. N., Mr J. N., Mr A. N., Mrs M.-J. N.-B., Mr B. N., Mrs E. N., Mr C. N., Mrs C. N., Mr A. N., Mrs C. O.-B., Mrs M.-L. O.-S., Mr D. O., Mr J.-A. P., Mrs M. P. G., Mrs E. P., Mr J.-A. P., Mrs V. T. A., Ms F. T., Mr G. T., Mr A. T., Mrs E. V., Mrs E. Z. and Mr J. Z. B. against the World Health Organization (WHO) on 23 March 2001 and corrected on 9 July, the WHO's reply of 23 November 2001, the complainants' rejoinder of 27 February 2002, and the Organization's surrejoinder of 10 April 2002;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are all locally recruited General Service staff members in the WHO's African Regional Office (AFRO). Prior to the breakout of civil war in the Republic of the Congo, AFRO was located in Brazzaville, but in June 1997 internationally recruited staff were evacuated and the office provisionally closed. AFRO was temporarily relocated to Harare, Zimbabwe, from 1 September 1997. Most of the complainants were invited to work there on a temporary basis; they remained assigned to their Brazzaville post on travel status in Harare. While on travel status they received their full salary at Brazzaville rates and a per diem, paid monthly. In accordance with WHO Manual paragraph VII.2.40.1 the per diem was paid at 100 per cent of the standard rate for Harare for the first 60 days and then under the provisions of Manual paragraph VII.2.43.1, at 75 per cent thereafter.

On 6 March 1998 Information Circular IC/98/08 was issued informing the Brazzaville staff, inter alia, about "their employment situation in the Organization in view of the temporary relocation of the Regional Office to Harare for a further period of at least two years with effect from 1 February 1998". On 17 July 1998, in response to the extended nature of the "temporary" relocation of AFRO, Information Circular IC/98/22 was issued, informing General Service staff that in accordance with Manual paragraph VII.2.45 the Regional Director had established a "special" per diem rate at "50% of the standard rate normally applicable" which would apply as of 1 August 1998 to all staff already having completed two months of service in Harare. For those staff that had not yet completed two months of service, the standard per diem rate would apply for the first two months. On the same day a question and answer information session was held with the staff. On 20 July 1998 the complainants addressed a letter to the Regional Director asking him to annul the decision announced in Information Circular IC/98/22; he did not accede to their request.

Information Circular IC/99/21 was issued on 17 June 1999, informing staff, inter alia, that as of 1 August 1999 the per diem allowance would be set at a special rate of 1,000 United States dollars per month. On 4 August the complainants filed notifications of intention to appeal to both the Regional and Headquarters Boards of Appeal

against the "reduction of per-diem monthly rate from the normal rate of 75% after two months to 50% effective 1 August 1998, and arbitrary fixing at US\$ 1,000 per month from 1 August 1999". After much debate as to which Board should hear the appeal, it was agreed that the case would be dealt with directly by the Headquarters Board of Appeal.

In its report dated 6 November 2000, the Headquarters Board of Appeal considered that insofar as the appeal concerned the decision contained in Information Circular IC/98/22 to set the per diem at 50 per cent of the standard rate, the appeal was irreceivable as the complainants had not pursued the issue after the decision was implemented on 1 August 1998. On the decision contained in Information Circular IC/99/21 setting the per diem at a flat rate of 1,000 dollars, it noted that under WHO Manual paragraph VII.2.45 the Regional Director has the discretionary authority to establish a different rate. Consequently, the Board recommended rejecting the appeal. In a letter of 12 December 2000 the Director-General informed the complainants that she had accepted the findings and recommendation of the Board and that she was rejecting their appeal. That is the impugned decision.

B. The complainants first contest the Board's finding that their appeal against the decision contained in Information Circular IC/98/22 was not filed in time. The Tribunal's case law has long held that pay slips are individual decisions that may be challenged; thus the per diem rate was challengeable where any pay slip reflected the rate as being 50 per cent of the standard rate. But they had waited to do so because they had been trying to negotiate a reasonable solution to their situation; it was not until Information Circular IC/99/21 was issued that it became clear that such a solution would not be found.

Furthermore, the decisions to reduce the per diem rate represent a breach of their acquired rights and the Tribunal has held in Judgment 1514 that "international officials may allege breach of an acquired right when there is impairment of an essential and fundamental term of conditions of employment; and that is so even where impairment is gradual and due to an accretion of final decisions which are no longer open to challenge". They assert that their appeal against Information Circular IC/98/22 was part of "such an accretion of final decisions" which culminated in the issuance of Information Circular IC/99/21. Any flaws relating to that circular would also be attributable to Information Circular IC/98/22 as both would have resulted from the same erroneous considerations.

On the merits they submit that there is a long line of precedents establishing limitations on an organisation's discretionary authority to adjust staff pay. First and foremost, the chosen methodology for adjusting pay must ensure results that are "stable, foreseeable and clearly understood". But the Organization's use of "ad hoc" terminology, its failure to provide clear reasons, and its failure to publish the per diem rates as required by the Staff Rules are in breach of the Tribunal's standard of transparency and principles of international civil service law.

The reduction in the per diem rate has also breached the principle of equal treatment. In the absence of any express regulations or rules addressing the situation, general principles of law must come into play: the Administration must treat its staff "fairly". When the complainants began arriving in Harare as early as September 1997 it was believed that it would be two years before the Office in Brazzaville could reopen. Thus they expected that the per diem rate would stay at 75 per cent of the standard rate, at least through the end of January 2000. They assert that there were some General Service staff members that continued to receive a per diem rate of 75 per cent until their "definitive" transfer to Harare in June 1999; this not only breached the principle of equal treatment, but that of equal pay for work of equal value as well. The Administration should have been estopped from any changes in the terms of their appointments in Harare without having obtained the complainants' agreement.

Lastly, the complainants argue that the reduction of the per diem rate was the result of a mistake of fact, an omission of critical facts, or erroneous conclusions. Contrary to what the Administration seems to believe, they were not living "luxuriously" in Harare: not only was there an "ever increasing cost of living" there but many of them had the burden of sustaining a "primary household" in Brazzaville as well as in Harare.

The complainants request the Tribunal to order the production of various documents. They claim the retroactive reinstatement of the travel per diem at 75 per cent of the standard rate, payment of the difference between what they have already received and what they would have received had the per diem rate not been reduced, plus interest at 10 per cent per annum. They also want moral damages of 25,000 dollars per complainant, legal fees and other costs in the amount of 20,000 dollars, and any other relief that the Tribunal deems necessary, just and proper.

C. The WHO replies that, insofar as the complaint impugns the decision announced in Information

Circular IC/98/22 it is irreceivable: the complainants did not pursue an internal appeal against that decision in a timely manner and they are barred from doing so now. In fact, at no time did any complainant lodge an appeal against either the decision announced in the circular or against any individual per diem payment at 50 per cent of the standard rate. Furthermore, it notes that some of the complainants' names before the Tribunal differ slightly from those submitted with the appeal to the Headquarters Board of Appeal; the claims of any party to the complaint who was not a party to the appeal would also be irreceivable.

The Organization notes that, had it been possible to predict at the outset that AFRO would remain in Harare more than four years, it would have acted early on "to re-visit" the complainants' employment situation. One option that the Administration considered was to end the complainants' travel status, abolish their posts in Brazzaville, and transfer them to Harare; however, the WHO consulted with the staff on this option and it was met with firm opposition. Consequently, taking into account the extended nature of AFRO's relocation to Harare, the WHO decided to maintain the complainants' travel status, but reduced the per diem rate in accordance with Manual paragraph VII.2.45.

On the merits the Organization argues that there has been no breach of an acquired right: not only is there no absolute right to a per diem of a particular amount, but the decision to reduce it did not impair an essential and fundamental term of their employment conditions. The purpose of a per diem payment is to defray a staff member's reasonable expenses while he or she is "temporarily" working away from the official duty station; it is governed by Staff Rule 830.2 and Manual paragraphs VII.2.40, VII.2.43 and VII.2.45. It was under the discretionary authority granted to the Regional Director in Manual paragraph VII.2.45 that he first reduced the per diem to 50 per cent of the standard rate after the complainants had been on travel status for nearly one year, and it was under the same paragraph that one year later he decided to reduce the per diem to a flat rate of 1,000 dollars per month. His decision took into account the exceptionally long nature of the travel status and "the consequential change in the nature and level of the complainants' expenditures". The flat rate of 1,000 dollars was sufficient to cover normal living expenses. Also, the complainants continued to be paid salaries based on the Brazzaville salary scale, which was higher than that of Harare.

The WHO notes that the complainants have relied on the Tribunal's case law in regards to the requirement that any methodology to be applied in adjusting salaries must ensure results that are "stable, foreseeable and clearly understood"; however, this reliance is misplaced. The Organization has not adjusted the complainants' salaries: a per diem payment is not a component of remuneration and the Staff Rules do not require that the per diem rates must be published. The decision to reduce the rate of per diem was taken after extensive and repeated consultations with affected staff, and it was taken within the proper exercise of discretionary authority. There has been no breach of equal treatment: all locally-recruited Brazzaville General Service staff on travel status in Harare have been treated exactly alike. Each complainant has been paid a per diem at the same rate.

It contests the complainants' assertion that the Organization should have been estopped from changing the per diem rate. There was never any "understanding" that the complainants would continue to receive 75 per cent of the standard per diem rate while they were in Harare. The Administration made no such representation to this effect, nor did they inform the staff that they would be staying in Harare for at least two years. On the contrary, whether the complainants would remain on travel status or otherwise was the subject of ongoing discussions between staff and senior officials both in AFRO and at WHO headquarters.

The Organization asserts that there were no mistakes, omissions of fact, or erroneous conclusions drawn in the decision to reduce the per diem rate. A per diem payment is designed to help staff members to cover their "reasonable expenses" while on travel status. It is not meant to cover the expenses of accompanying family members, thus many of the expenditure amounts put forth by the complainants cannot be used as evidence that the rate was insufficient.

D. In their rejoinder the complainants maintain that the entire complaint is receivable: they did not appeal within 60 days of the issuance of Information Circular IC/98/22 because they were involved in ongoing negotiations. They ask the Tribunal to recognize any complainants that were not a party to the appeal as intervenors in this complaint.

They submit that the Manual paragraph which allows the Regional Director to reduce the per diem rate is inherently "flawed": it sets no standards or procedures for him to follow. His decision was flawed by abuse of discretion and error and the Organization has offered no proof to the contrary. It is true that they opposed any discussions proposing that they become subject to local employment conditions in Harare: they never intended to work there, so

it was correct that they should have remained subject to their original work contracts. It was not their fault that they were not carrying out their work in Brazzaville so they should not be penalized in this respect.

They assert that the per diem payment does indeed represent a fundamental condition of their employment: they had no other choice but to work in Harare or elect to become unemployed. Thus it was an integral part of the terms of their employment in Harare. Moreover, the decision implementing the flat rate was taken unilaterally and the Administration never attempted to clarify its reasoning behind it or the procedures used in taking it.

They refute the WHO's statement that it made no representations to them regarding the duration of their employment in Harare. The Organization issued Information Circular IC/98/08 on 6 March 1998 which stated that the Regional Office would continue to be temporarily located in Harare for a "further period of at least two years with effect from 1 February 1998". Thus their expectation of staying in Harare throughout that period was legitimate.

E. The Organization maintains that insofar as the complaint challenges the decision to reduce the per diem to 50 per cent of the standard rate, it was not challenged within the statutory time limits and is therefore irreceivable. Moreover, by the time it was challenged the decision was no longer in force. The time limits for challenging a decision are not altered by the fact that the complainants were trying to negotiate with the Administration. It reiterates that it appears that some complainants were not part of the internal appeal and it objects to treating them as intervenors without more specific information.

The WHO submits that there is no "inherent flaw" in the Manual paragraph used as the basis for the impugned decision. The decision to reduce the per diem rate was a proper exercise of the Regional Director's discretionary authority. It has shown that it was taken for objective reasons and that staff were consulted in advance.

The complainants have cited an Information Circular as evidence that they were entitled to expect a per diem payment at a particular rate, but they have confused this with the real subject matter of that circular: the length of time AFRO would be located in Harare. It was not, as the complainants assert, a "representation" that their travel status would continue unchanged.

CONSIDERATIONS

1. Seventy-seven General Service staff members of the WHO recruited locally by the WHO's Regional Office for Africa in Brazzaville contest the decision taken by the Organization's Director-General on 12 December 2000 rejecting their appeal against the decisions of 1998 and 1999 reducing the rate of the travel per diem granted to them as a result of the relocation of the Regional Office to Harare and of their stay in that city.

2. Following the outbreak of hostilities in June 1997 in the Republic of Congo, a decision was taken to close temporarily the Regional Office in Brazzaville and to relocate it to Harare in September 1997. On 1 February 1998 it was forecast that the Office would remain there for two years, but in view of the ongoing unrest in Brazzaville that period was subsequently extended. Most of the complainants had been invited to move to Harare; they continued to receive their salary as if they were still assigned to Brazzaville. Since they were considered to be on travel status in Harare, they were entitled to a travel per diem. For the first 60 days the per diem was set at 100 per cent of the rate for Harare; it was then reduced from the third month onwards to 75 per cent of that rate, in accordance with paragraph VII.2.43.1 of the WHO Manual.

On 17 July 1998 the locally-recruited Brazzaville General Service staff serving in Harare were informed by Information Circular IC/98/22 that it had been decided, after prolonged discussion on the subject, that they would remain on travel status until further notice and that they would continue to receive a travel per diem, but that in view of the extended nature of the situation the Regional Director had decided, in accordance with Manual paragraph VII.2.45, to establish a "special" per diem rate at 50 per cent of the rate normally applicable, which may be subject to further review. On 20 July 1998 a letter was sent by the General Service staff on travel status in Harare to the Regional Director, asking him to annul the Information Circular, but this request was not granted and the reduced rate of 50 per cent was applied with effect from 1 August 1998.

3. On 17 June 1999 Information Circular IC/99/21 announced to the staff that the Director-General had decided, in principle, on the abolition of the General Service posts in Brazzaville. The circular also indicated that measures

would be taken concerning professional staff (who could neither be considered on travel status nor receive any special allowance), non-local staff and staff recruited locally in Zimbabwe. General Service staff recruited locally in Brazzaville would continue to be considered on travel status and would receive "an ad hoc allowance" of 1,000 United States dollars per month with effect from 1 August 1999.

4. On 4 August 1999 the complainants sent notifications of intention to appeal to the Regional and Headquarters Boards of Appeal challenging both the decision to abolish the Brazzaville General Service posts (which ultimately was not implemented) and the "reduction of per-diem monthly rate from the normal rate of 75% after two months to 50% effective 1 August 1998, and arbitrary fixing at US\$1,000 per month from 1 August 1999". After an extensive debate as to whether this appeal should be heard by the Regional Board of Appeal or by the Headquarters Board of Appeal, the latter agreed to hear it and the Organization, which had argued that the case should be dealt with locally in the first instance, is not raising that argument before the Tribunal and expressly acknowledges that this issue no longer arises.

5. In its report of 6 November 2000, the Headquarters Board of Appeal considered that the complainants' pleas concerning Information Circular IC/98/22 were time-barred and therefore irreceivable; the pleas challenging the validity of Information Circular IC/99/21 were admissible but should be dismissed as unfounded. The Director-General endorsed the Board's recommendation and accordingly dismissed the appeal by a decision of 12 December 2000, which has duly been referred to the Tribunal.

6. Regarding the admissibility of their appeal, the complainants assert that the Director-General wrongly rejected their arguments against the adjustment of the travel per diem announced in Information Circular IC/98/22. On the contrary, the WHO contends that the complainants ought to have challenged that circular within 60 days of its publication, which they failed to do, or alternatively to have challenged, within the same period, the first individual application of the circular to them.

7. A steady line of precedent, such as that cited in Judgment 1786 under 5, confirms that when impugning an individual decision that concerns the staff member directly, the latter may challenge the lawfulness of any general measure. That ruling does not allow direct challenge to general decisions to which effect should ordinarily be given by individual decision. In such cases, staff members must impugn the individual application to them of the general decision and, if need be, may for that purpose challenge the lawfulness of the general one without any risk of being told that such challenge is time-barred.

8. In this case, the complainants could have challenged the individual application of Information Circular IC/98/22 to each of them as long as that circular remained in force. However, the memorandum of 4 August 1999, in which they gave notice of their intention to appeal, indicates that it only concerned the legality of Information Circular IC/99/21 of 17 June 1999, even though the complainants wrongly interpreted that circular as having set the travel per diem rate at 50 per cent between 1 August 1998 and 31 July 1999. Both the Director-General and the Headquarters Board of Appeal had reason to believe that the debate as to the legality of Information Circular IC/98/22 was closed and that the individuals concerned, who did not expressly challenge the individual application of that circular to them in due time, can no longer impugn it. The fact that the individuals concerned thought that they might succeed in negotiating an amicable solution and for that reason chose not to appeal does not justify lifting the time bar that applied.

9. With regard to the claims concerning the application of Information Circular IC/99/21, the Organization does not dispute the admissibility of the complaint, which must be considered to be aimed at the individual measures taken from 1 August 1999 onwards concerning the payment of a monthly allowance of 1,000 dollars to the complainants. The WHO merely points out that the list of seventy-seven complainants before the Tribunal contains some differences in relation to the list of appellants for the internal appeals, but as it stands this allegation is not sufficiently precise to be taken into account.

10. On the merits, the complainants submit five pleas: the decision to modify the travel per diem rate was arbitrary and did not satisfy the criteria of stability, foreseeability and transparency established by the Tribunal's case law in order to limit the discretion of organisations in adjusting in staff pay; the decision contravened the principle of equal treatment; it was contrary to the undertakings given by the Administration, from which the complainants were entitled to expect fair treatment; it was based on errors of fact and on critical factual omissions; and it breached the acquired rights of the staff members concerned.

11. Before ruling on the merits of these arguments, the Tribunal must examine the provisions on which the disputed circular is based. Paragraph VII.2.20 of the WHO Manual states that a travel per diem is normally granted to staff members on travel status. According to Article 830.2 of the Staff Rules, the rate of this per diem is established by the Director-General. The amount of the per diem is considered to represent a lump sum paid in lieu of reimbursement of a portion of the actual expenses occasioned by travel status. Paragraphs VII.2.40 and VII.2.43 of the Manual stipulate, respectively, that the rate for the first 60 days of travel is set at 100 per cent of the standard rate, and that with effect from the sixty-first day a local currency amount is paid, which, according to the Organization, represents 75 per cent of the standard rate - a figure that is not disputed by the complainants. Lastly, paragraph VII.2.45 of the Manual provides that:

"If necessary, special per diem rates, which may be higher or lower than the standard rate, may be established ... for regional activities, by the regional director concerned..."

12. According to the WHO, this provision gives the Regional Director a discretionary power to set a reduced per diem rate in order to take into account certain objective factors. The complainants argue that this interpretation amounts to conferring a totally arbitrary power on the Administration, given that the applicable provisions do not set any limits on the scope of the Administration's power to reduce the per diem.

13. It is on this issue that the complainants develop their argument that, according to the Tribunal's case law (see Judgment 1821, for example), adjustments to international civil servants' salaries must satisfy objective criteria of stability, foreseeability and transparency. The Tribunal considers that this line of precedent - concerning the determination of staff salaries, which is necessarily governed by very strict rules - is not entirely applicable to the determination of allowances granted for a specific purpose, such as that of covering expenses incurred by staff members on travel status. Even if it claims to be acting in the exercise of its discretion, and although the legal framework surrounding its action remains vague or non-existent, the Administration must base its decisions on objective considerations and avoid breaching any of the guarantees protecting the independence of international civil servants. It is therefore necessary to establish whether, in view of paragraph VII.2.45 of the Manual, which empowers the Regional Director to set special per diem rates higher or lower than the standard rate, the Administration based its decision on objective criteria.

14. As noted by the Headquarters Board of Appeal in its strongly reasoned recommendation, if the complainants continued to receive their salaries at Brazzaville rates, and since the travel per diem is merely intended to cover the essential expenses of a staff member on duty travel, including lodging and food, a high rate of travel per diem cannot be justified where duty travel, which by nature implies that the staff member will continue to work primarily at his or her original duty station, lasts for two years or more. Admittedly, it would have been preferable to have precise texts setting out the circumstances in which a travel per diem can be replaced by a flat-rate allowance. However, given the exceptional situation faced at the time of the relevant facts by the locally-recruited Brazzaville staff, who were still considered to be on travel status in Harare, the solution adopted by the defendant is not unreasonable. Consequently, the argument that the Administration exceeded its legal authority by setting an ad hoc allowance of 1,000 dollars per month for the complainants cannot succeed, since the amount that was applied, though lower than the reduced 50 per cent per diem rate, shows no obvious error of assessment in the light of the figures submitted by the parties.

15. However, the WHO should not have violated any general principle of law, and particularly the principle of equal treatment. On this issue, the complainants submit that a number of General Service staff members continued to receive a daily per diem at 75 per cent of the normal rate after leaving Brazzaville. The Organization contests this argument and has asked for further details, which the complainants have not submitted in their rejoinder. In any case, the written submissions clearly indicate that all staff members recruited locally in Brazzaville receive a salary based on the rates for that city and were treated equally as regards their right to a travel per diem. There was no discrimination on this matter.

16. The complainants argue that they were deceived by the Organization, which made promises to them and concealed from them the true duration of their stay in Harare and the plans to reduce their travel per diem. However, no undertaking was given by the WHO and none of its statements suggests that the complainants were victims of unfair treatment or misrepresentation as to their situation, which admittedly was made very difficult for them and their families by the situation in the Republic of Congo.

17. In support of their contention that the impugned decision is flawed by a misappraisal of facts, the complainants

have submitted a number of estimates of expenses normally incurred in Harare, which are contested by the WHO. Although the parties differ in their respective evaluations of education, rent, transport, security and telephone costs, and of the exchange rates actually applied, there is no evidence of any misappraisal of facts on the part of the authority that set the travel per diem rate at 1,000 dollars per month.

18. The plea based on a breach of acquired rights must likewise fail: relying on the case law developed in particular in Judgments 986, 1118 and 1514, the complainants assert that their fundamental conditions of employment were affected by a decision which greatly reduced their purchasing power. However, they overlook the fact that their basic salary was not affected, and it is perfectly obvious that the reduction of an allowance intended to cover travel expenses does not alter their fundamental conditions of employment.

19. Since the complainants' pleas fail, their claims must be rejected in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet