

The Administrative Tribunal,

Considering the third complaint filed by Mr B. K. against the World Health Organization (WHO) on 25 January 2007 and corrected on 3 March, WHO's reply of 7 June, the complainant's rejoinder of 16 July and the Organization's surrejoinder of 19 October 2007;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Indian national, was born in 1960. As from 1981, he was employed under a series of short-term contracts in the WHO Regional Office for South-East Asia (SEARO). On 8 September 1986 he was appointed to the post of clerk at grade ND.04 on a two-year fixed-term contract, which was subsequently extended. As a result of a reclassification of his post, he was promoted to grade ND.05 as personnel assistant in 2003.

By a letter of 24 September 2004 a Personnel Officer informed him that a local bank had inquired as to the authenticity of a salary certificate, dated 15 April 2004 allegedly issued by the Organization, which had been submitted to it in support of a loan request by one "V. K.". After it had been ascertained that the certificate was neither original nor issued by WHO, she asked the complainant to provide an explanation on the matter. In a letter dated 1 October 2004 the complainant responded that he had not applied for any loan from the bank in question and that he had not requested any salary certificate. He asked that a copy of the certificate and of any other document provided by the bank be sent to him. On 18 and 19 November 2004 he took annual leave to attend a court case. When contacted by telephone by the Administration shortly thereafter, he said that he was unable to report for duty and, by a fax of 23 November, he requested advance annual leave until 29 November. His request was rejected by a letter of 23 November from the Regional Personnel Officer on the grounds that it was not adequately justified and he was advised to report for duty.

By a fax of 8 December 2004 the complainant, who had not returned to work, requested leave without pay until 16 December 2004 "owing to unwarranted difficulties". By letter of the same day the Personnel Officer informed him that his absence from 22 November 2004 was considered unauthorised as he had exhausted the annual leave to which he was entitled and had not conveyed valid reasons for his absence. The complainant was instructed to report for duty immediately, failing which the Organization would take disciplinary measures against him. The letter having been returned undelivered, another letter – repeating the contents of that of 8 December – was sent to him on 14 December. By fax of 20 December 2004 the complainant reiterated his request for leave without pay, which he now wished to be granted until 5 January 2005 "in the extraordinary circumstances".

By a letter of 5 January 2005, the complainant was notified that he was suspended with pay pending clarification of his situation, effective immediately and until 14 January 2005. By another letter of even date, which referred to the previous communications of 23 November, 8 and 14 December 2004, the Regional Personnel Officer requested the complainant to provide an explanation in writing of the reasons for his continued absence from duty since 22 November 2004. She further noted:

"it may be concluded that you have failed to observe the standards of conduct for staff members [...] As a result, you may be found to have committed misconduct as defined in Staff Rule 110.8 [and] could be subject to any of the forms of disciplinary action set out in Staff Rule 1110, including dismissal or summary dismissal.

Before deciding whether you committed misconduct, and what, if any, disciplinary action should be taken, you are invited to provide your written comments on the charges set out above."

The complainant indicated in a letter of 12 January 2005 that he had been absent from work because he was "a

victim of a conspiracy hatched by some unscrupulous persons who tried to misuse [his] identity by furnishing fake and fabricated documents” and that, since the nature of the case was such that, if arrested, he would not be granted bail, “there was no alternative left than to take shelter elsewhere to sort out and ward off the whole matter”.

By letter dated 24 January 2005 the Regional Director informed the complainant that it had been concluded that his absences since 22 November 2004 were unauthorised, that “on the basis of all available evidence” he had committed serious misconduct, and that the sanction of summary dismissal was justified. He was therefore dismissed with effect from 26 January 2005.

On 21 March the complainant filed an appeal with the Regional Board of Appeal against the Regional Director’s decision. In its report of 28 October the Regional Board recommended that the summary dismissal be upheld and that the complainant’s claims for reinstatement and compensation be rejected. By a letter of 8 December 2005 the Regional Director informed the complainant that he had decided to endorse the recommendation of the Regional Board.

On 3 January 2006 the complainant appealed the decision of 8 December 2005 before the Headquarters Board of Appeal, which, in its report of 18 August 2006, concurred with the Regional Board and recommended that the appeal be dismissed. By a letter of 17 October 2006, which constitutes the impugned decision, the Acting Director-General informed the complainant that he had decided to accept the recommendation of the Headquarters Board and to reject all his requests for redress.

B. The complainant first argues that the decision to dismiss him summarily is flawed in that the charge underpinning it was vague and imprecise. This, he submits, breached his right of defence as defined in the Tribunal’s case law. In particular, the letter of 5 January 2005 was not clear as to whether he was charged with unauthorised absence from 22 November 2004 onwards or also with irrelevant instances of earlier absences already “considered and closed at the relevant time”, in breach of the principle of double jeopardy. Besides, the letter of 24 January 2005 referred to inquiries from the police as to his whereabouts and from the bank regarding unpaid loans, while no such matters were mentioned in the letter of 5 January 2005.

Second, the complainant alleges a denial of due process. Insofar as the letter of 24 January 2005 specified neither the provisions he had violated nor the precise penalty – to wit summary dismissal – the Regional Director intended to apply, there was a breach of the procedure to notify intention to terminate an appointment as laid down in WHO Manual paragraph II.9.550.

Third, he contends that the Organization failed to consider the bona fide reasons that he put forward, whereas it “should have given [...] every help to clear his position”.

Fourth, the complainant submits that WHO violated the diplomatic immunity he enjoyed as an international civil servant by allowing police authorities to apprehend him without going through the formalities governing waiver of such immunity.

Lastly, he considers that summary dismissal was a disproportionate sanction in the light of the circumstances.

The complainant asks the Tribunal to set aside the decision of 17 October 2006. He claims 25,000 United States dollars in compensation for the moral injury he suffered and 2,500 dollars in costs.

C. WHO replies that both the letter of 5 January and the decision of 24 January 2005 were clear, precise and in conformity with the relevant provisions of the Staff Rules and Regulations. According to the Organization, although the said letter brought to his attention his past attendance record, it was clear that the complainant was being charged in connection with his unauthorised absences since 22 November 2004. On the contrary, whilst WHO repeatedly warned him that his absences were considered unauthorised, it was the complainant who, by failing to provide a reasonable justification for them, violated Staff Rule 610.

The Organization not only provided the complainant with an opportunity to state his case before taking a decision, as prescribed by Staff Rule 1130; it also put him on notice that he might incur summary dismissal, although the case law does not require it to do so.

WHO also avers that it duly took into account the complainant’s letter of 12 January 2005. However, he chose to keep the reasons for his absences secret and avoided being contacted by the Organization by not disclosing his

whereabouts, thus preventing WHO from assisting him.

It stresses that staff members enjoy only functional immunity, in the interest of the Organization, not immunity from legal process for their personal benefit. As to proportionality, the Organization submits that, in imposing summary dismissal, the gravity of the matter was carefully assessed based on all relevant factors, including the complainant's service record, in accordance with the case law.

D. In his rejoinder the complainant presses his pleas. He adds that WHO's mention of relevant rules in its reply does not remedy its initial failure to specify under what provision he was charged for his absences. In his view, there is an "irrational" shift in the letter of 5 January 2005, from an accusation of absence from duty to an unrelated charge of failure to observe standards of conduct. He emphasises that throughout his period of absence, he was in contact with the Administration but that the latter was biased, as evidenced notably by its failure to bear out that there was no "V. K." among its staff. The fact that his performance appraisal report was not appended to the letter of 5 January 2005, as required by Manual paragraph II.9.540, shows that the Organization did not, at the time, intend to dismiss him summarily. Lastly, the evidence supporting the decision of 24 January 2005 was not made known to him.

E. In its surrejoinder WHO maintains its position. In its view, the lack of reference to a specific rule does not make the charges less precise, and unauthorised absences may form the basis of disciplinary action. Since the complainant was also known to his colleagues as "Vimal", the Administration had no reason to question his identity. As to the documents exchanged with the bank, they were all communicated to him when he finally reported to work. It was WHO's duty to cooperate with police authorities. Moreover, it was under no obligation to append the complainant's performance appraisal to the letter of 5 January, given that the termination of his contract was not the result of unsatisfactory performance. In this respect, the Organization notes that the complainant relies on an outdated version of the Manual. Lastly, the complainant has neither demonstrated any bias on the part of the Organization, nor proven that he was the subject of a "conspiracy".

CONSIDERATIONS

1. The complainant was a staff member of SEARO from 8 September 1986 until 26 January 2005. He was summarily dismissed with effect from that latter date. On 17 October 2006 the Acting Director-General rejected the complainant's internal appeal with respect to his summary dismissal in accordance with the recommendation of the Headquarters Board of Appeal. That is the impugned decision.
2. The complainant was dismissed for unauthorised absence from duty from 22 November 2004. On 18 November 2004 he informed the Administration that he was unable to report for duty on 18 and 19 November as he had to attend a court case. He did not report for duty on the next working day, 22 November. When contacted by the Administration, the complainant said he was unable to report for duty and gave the same reason as before. On 23 November he applied, by fax, for advance annual leave until 29 November. The same day he was informed by letter that, by remaining absent on 22 and 23 November, he had exceeded his annual leave entitlements and that it would not be recommended that his leave request be granted. He was advised to report for duty on receipt of the letter. Instead, on 8 December, he sent a further fax requesting leave without pay until 16 December 2004. He based his request on "unwarranted difficulties" arising from "situations beyond control at this juncture" adding that the reasons "may be clarified" when he resumed duty.
3. By a further letter, dated 8 December 2004, the complainant was informed that his absence from duty was unauthorised and was considered to be "a serious disciplinary issue". He was instructed to report for duty immediately and warned that, if he did not, disciplinary measures would be taken against him. The letter was returned undelivered. A further letter of 14 December, repeating the contents of that of 8 December, could not be delivered by a WHO messenger who reported that the complainant's house was locked and a neighbour had stated that no one had been seen there for almost a week. A further letter, dated 21 December, was returned by the postal authorities with the note that the "addressee ha[d] gone out for [a] long [period]". Attempts to deliver the letter by courier on 22 and 23 December were also unsuccessful. In the meantime, the complainant had contacted the Administration by telephone on 16 December, stating that he intended to extend his leave until 20 December. Having again contacted the Administration on the same day, he was informed that his leave was unauthorised and that he should report for work immediately. When asked, the complainant declined to give a definite date for his return. On 20 December 2004 he sent a fax requesting leave without pay until 5 January 2005 and stating that he

had “not been able to resolve unwarranted problems and it [might] take another 2-3 weeks”.

4. Two letters dated 5 January 2005 were hand-delivered to the complainant. One informed him that he was suspended with pay; the other requested him to explain his unauthorised absence within the next five days. The second letter also informed him that, by reason of his absence, he might be found to have failed to observe the standards of conduct set out in Article I of the Staff Regulations and Staff Rule 110 and, if so, could be subject to disciplinary action, “including dismissal or summary dismissal”. The complainant replied on 12 January, stating that he was absent from duty because he was “a victim of a conspiracy hatched by some unscrupulous persons who tried to misuse [his] identity by furnishing fake and fabricated documents which were tried to be used as genuine”. He further explained that, as the case against him, which had been registered with the local police, was a “non-bailable” offence, he had no alternative but “to take shelter elsewhere to sort out and ward off the whole matter”. He further asserted that the situation was the responsibility of WHO as certain staff members had been in touch with his bank and with police authorities. The bank in question had been given a forged WHO salary certificate in support of a loan request in favour of a person whose name was the same as the complainant’s save for one letter.

5. The Regional Director informed the complainant by letter dated 24 January 2005 that it had been concluded that “[his] absences as of 22 November 2004 were unauthorised, [...] that on the basis of all available evidence, [he had] committed serious misconduct”, and that the sanction of summary dismissal was justified. He was thus dismissed with effect from 26 January 2005. In giving his reasons, the Regional Director noted that the Organization had been “constrained [...] to respond to inquiries from the police with respect to [the complainant’s] whereabouts, as well as from bank authorities regarding unpaid loans”. He further stated that “similar issues relating to a loan application” had led to a finding of misconduct and a written reprimand in 2002.

6. The complainant argues that the charge against him was vague and imprecise; that the procedure set out in Manual paragraph II.9.550 was not followed and, thus, he was denied due process; that wrong conclusions were drawn from the facts and material facts were overlooked; that his immunity was violated; and that the sanction was disproportionate to the offence.

7. The first argument of the complainant may be disposed of briefly. The letter of 5 January 2005 referred to the fact that his attention had been called on numerous occasions to his absences. However, it was specific in requesting “an explanation for [his] continued absence from duty since 22 November 2004” and in informing him that, because of that absence, he might be found to have failed to observe the standards of conduct for staff members and to have committed misconduct. Moreover, the complainant’s letter of 12 January 2005 makes it clear that he understood that he had only to explain his absence from 22 November 2004. Accordingly, the argument that the charge was vague in that it was not clear whether the complainant was charged with earlier absences and, thus, placed in double jeopardy must be rejected.

8. The complainant’s second argument is that, contrary to the requirement of the Organization’s Rules and Regulations, there was no statement in the letter of 5 January 2005 either of the proposed course of action or of the relevant provision under which it would be taken. That argument is wrong. The letter clearly identified summary dismissal under Staff Rule 1110 as a possible course of action. Moreover, the complainant is in error in pointing to the failure to attach his appraisal report to the letter of 5 January: that is required only when it is proposed to terminate an appointment for unsatisfactory performance.

9. In his third argument, the complainant contends that WHO failed to take into account that his absence from duty was “no abandonment of post” but was “a ‘bona fide’ self defense [...] under circumstances known to the Administration”. Additionally, he claims that “[t]he Administration based its stand [...] on [...] a similar case [...] that involved [him]”. Initially, the complainant provided only vague reasons for his absence. The explanation provided on 12 January gave no details of the alleged conspiracy and the explanation given was, in effect, that he was thwarting police inquiries into what he claimed was a case of mistaken identity. The Regional Director did not overlook the explanation provided by the complainant but found that was not a “satisfactory explanation”, a finding that was well open to him. Insofar as the Regional Director referred to previous issues relating to a loan application, that was merely to indicate that the complainant’s past conduct as well as that upon which he relied as justification for his absence from duty had resulted in inquiries that had caused embarrassment to the Organization. Accordingly, the complainant’s third argument must also be rejected.

10. The complainant’s fourth argument that WHO violated his immunity by allowing free access to the police is misconceived. The inquiries set in train by the bank and police authorities related to the complainant’s private

activities, not those conducted by him for or on behalf of the Organization. As is made clear by Staff Regulation 1.9, the privileges and immunities of the Organization “furnish no excuse to staff members for non-performance of their private obligations or failure to observe laws and police regulations”. Moreover, the cooperation extended by the Organization to the bank and police affords no evidence either of bad faith or of bias, as claimed by the complainant.

11. Standing alone, the punishment of summary dismissal, as distinct from dismissal, might be thought to be disproportionate to the misconduct of which the complainant was guilty. However, he was twice warned in writing in 1998 to improve his poor attendance record. In the same year, he was informed that the complaints received “with regard to [...] alleged financial manipulations, fraudulent activities, police and court cases” were causing embarrassment to the Organization and he was cautioned to “extricate [him]self from these situations”. In 2002, he was found guilty of misconduct in relation to banking transactions and issued with a written reprimand. In the light of these matters, the punishment of summary dismissal cannot be regarded as disproportionate.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet