

## SEVENTY-FIRST SESSION

### *In re* DAHLQVIST

#### Judgment 1108

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nils Dahlqvist against the World Health Organization (WHO) on 10 August 1990 and corrected on 13 August, the WHO's reply of 5 October, the complainant's rejoinder of 28 November, the WHO's surrejoinder of 21 December 1990, the complainant's further brief of 18 March 1991 and the Organization's final submissions of 30 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 1230.8 and 1330 and WHO Manual provision II.12.320;

Having examined the written evidence and decided not to order oral proceedings, 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, a Swedish citizen, was on the staff of the World Health Organization for 25 years before he retired in 1985. On the strength of a telephone conversation he had in June 1989 with the Chief of the External Coordination Office (ECO) while he was in Stockholm he went to Geneva to serve WHO as a consultant at grade P.5 from 17 July to 17 October 1989 at headquarters in Geneva. It was there that on 17 July, the first day of the appointment, he signed a letter of acceptance. The letter indicated that as a local recruit he would be paid no daily subsistence allowance.

In the months that followed he made known his dissatisfaction with his local status both to his supervisor, the chief of ECO, and to the Division of Personnel. In a memorandum of 18 October 1989 to the personnel officer who was in charge of the appointment of consultants his supervisor acknowledged that "a series of mistakes and misunderstandings", mainly in ECO, had led to his being given local status and suggested letting him have instead a short-term contract in the Professional category, backdated to 17 July 1989, so as to improve the terms of his appointment without having to alter his status from local to non-local. The Director of the Division of Personnel rejected that suggestion, however, in a memorandum of 27 October 1989 to the complainant's supervisor: the original offer was, he said, in line with instructions from ECO, the complainant had accepted it and the "different nature" of short-term Professional category and consultant's appointments precluded retroactive conversion.

In a memorandum of 23 November 1989 to the Director of Personnel the complainant requested written notification of the final action on his status within the meaning of Staff Rule 1230.8.1, but on 4 December 1989 the Director of Personnel answered that the letter he had signed on 17 July 1989 had already given him such notification.

In a letter of 8 December 1989 he appealed under Rule 1230 to the Board of Appeal against what he described as "a group of administrative decisions" and claimed non-local status and three months' subsistence allowance. In its report of 28 March 1990 the Board declared his appeal receivable and, because of "faults on both sides", recommended granting him by way of compromise half the difference between the pay he had actually got and what non-local status would have entitled him to. But by a letter of 10 May 1990, the decision impugned, the Director-General informed him of the rejection of his appeal as time-barred under 1230.8.3.

B. The complainant contends that the WHO's practice was to grant local status to nationals of countries other than Switzerland only when their position was quite different from his own. His "principal residence" had been in Sweden since October 1988. Though he did sign an offer that gave him no subsistence allowance an administrative assistant had assured him that the terms of his appointment were in line with practice. So he had just assumed that the Organization had its reasons for giving him local status, and it was not for him anyway but for the Administration to make sure that the offer it made him was factually correct.

Although he and his supervisor pointed out the mistake, the Organization made no attempt to put it right. Instead it

let time go by in the hope that he would be too late to appeal. Not until 4 December 1989 did the Director of Personnel write to him to refuse the written notification he had asked for under Rule 1230.8.1. But the delay was pointless anyway since his monthly pay slips amounted to continuing breach of the rules and so his appeal was not time-barred.

The complainant asks the Tribunal to award him three months' daily subsistence allowance at the Geneva rate and the costs he incurred for travel from Stockholm to Geneva and back.

He further seeks an award of 45,000 United States dollars in damages for injury to employment prospects and for "stress and distress" as well as 2,903 Swiss francs in costs.

C. The WHO replies that the complaint is irreceivable because the complainant failed to exhaust the internal remedies. Under Rule 1230.8.1 appeal will lie only against final action "taken by a duly authorized official" and communicated to the staff member by "written notification". The letter dated 17 July 1989 was such action, and so the sixty days prescribed in 1230.8.3 were already over by the date of the complainant's internal appeal. Though he made out that he was challenging three "decisions", he failed to say when and by whom they had been taken and whether he had had "written notification" of them. In fact what he was really objecting to was an omission, and for that the proper remedy was to be found in 1230.8.2.

The confidential memorandum the Director of Personnel sent to his supervisor, which merely confirmed the terms of his appointment and required no formal notice, did not amount to any "final action". Nor may any of his pay slips be treated as a final decision: 1230.8.1 says that such a decision must be taken by a "duly authorized official". If the subsistence allowance is to be regarded as a recurring benefit, his appeal was receivable only with respect to payment of the allowance from 30 September - sixty days before the filing of notice of appeal - to 17 October 1989 - the last day of his appointment: no claim will lie for payments due before the start of the period covered by the appeal.

Subsidiarily, the WHO contends that the complaint is devoid of merit because there was no breach of the terms of the complainant's employment. Even if he would ordinarily have been treated as internationally recruited under WHO policies or rules, the Organization was free to stipulate otherwise in its offer. In any case he had had years of experience of staff management, so there was no question of his being lured into accepting the offer by any misrepresentation that he would have non-local status. Indeed his failure to apply for reimbursement of travel expenses upon arrival in Geneva shows that he did not even expect it.

In the circumstances it was reasonable not to grant him the subsistence allowance. He had been living in Geneva for 25 years and was unlikely to incur as high expenses as anyone less familiar with the city might have done. He was well-paid, his rent was low, and he had a pension anyway.

D. In his rejoinder the complainant seeks to refute the WHO's reply. He objects to its comments on such issues of fact as his place of residence and talks he had with people in the Division of Personnel.

He enlarges on his earlier pleas on receivability, pointing out that the Board at any rate clearly thought his appeal receivable. Treating a pay slip as the written notification required by 1230.8.1 does not mean that the staff member who signed it must necessarily be the same "duly authorized official" as the one who decided what his status was to be.

As to the merits he contends that the Organization was bound by Manual provision II.12.320, which says that consultants shall be paid the subsistence allowance for the country to which they are assigned: *patere legem quam ipse fecisti*. It is irrelevant that he used to live in Geneva, that his rent was high or low and that he had a pension. It was while he was in Sweden, before he travelled to take up the appointment, that he and his future supervisor reached agreement over the telephone that he should be offered the appointment, and to deny him non-local status was in breach of good faith. He presses his claims.

E. In its surrejoinder the Organization reaffirms that the complaint is irreceivable and, besides, unfounded. The complainant accepted an offer without querying his status, and over the next two months all he did was leave a message for a personnel officer. The Organization develops its plea concerning pay slips. It points out the difference between a pay slip which merely confirmed the earlier individual decision notified in the letter of acceptance and the pay slips referred to in the case law on continuing breach, which constitute the initial

application of general decisions.

F. In further submissions authorised by the Tribunal the parties discuss issues of fact raised in their earlier briefs.

#### CONSIDERATIONS:

1. In its reply the Organization submits, first, that the complaint is irreceivable because the complainant's internal appeal was lodged out of time and, secondly, that in any event the complaint is devoid of merit.
2. On 17 July 1989 the complainant received a written offer of appointment as a consultant which included the words "No per diem since [the complainant] is locally recruited". He signed the letter of acceptance the same day and took up duty the following day. The letter of acceptance too bore the words "No per diem since [the complainant] is locally recruited."
3. The complainant made known his dissatisfaction and on 18 October 1989 the Chief of ECO wrote to the Director of Personnel to try to sort the matter out. But in his reply of 27 October the Director wrote:  
  
"... Personnel has acted strictly in accordance with the instructions received from ECO on form WHO.217.4 ... This form ... was cleared through PCO and indicated clearly that Mr. Dahlqvist was to be recruited locally, i.e. no per diem, no recruitment travel, but would receive a daily pay rate of US\$ 130.  
  
The Offer of Appointment was issued to Mr. Dahlqvist who signed and accepted it - on this basis - on 17 July 1989. In signing this contract, Mr. Dahlqvist agreed to the conditions stated therein.  
  
In my opinion, any objection to the conditions of the contract should have been raised at that time - before acceptance of the Offer of Appointment ... It is not appropriate, at this stage, to revise retroactively a contractual arrangement which was previously acceptable to both parties."
4. The position stated by the Director is correct in law. If the complainant laid claim to payment of the per diem allowance he should have said so before signing the offer of appointment; the Organization would then have had the opportunity of maintaining or amending the terms of its offer. The complainant might have been entitled to claim the allowance if he had not signed a contract that expressly excluded it; but as it was he was bound by the terms of appointment to which he put his signature. He had, after all, spent 25 years in the service of the WHO, during which, moreover, he had gained experience of personnel matters, until he retired in 1985. It is therefore not open to him to plead unawareness of the consequences of his acceptance.
5. Besides, although Manual provision II.12.320, as stated under D above, says that consultants shall be paid the subsistence allowance applicable to the country of the duty station, Staff Rule 1330 empowers the Director-General to "appoint consultants without regard to the provisions of the other sections of the Rules". So the Director-General's offer of an appointment as a consultant without the per diem allowance was quite lawful anyway.
6. In the circumstances the issue of the place of the complainant's residence at the time of his appointment is immaterial.
7. Since the complaint fails anyway for the reasons set out above, there is no need to take up the Organization's other pleas.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux

Mohamed Suffian  
P. Pescatore  
A.B. Gardner

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