SEVENTY-SEVENTH SESSION

In re BALIGA

Judgment 1342

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kalyanpur Yeshavantha Baliga against the World Health Organization (WHO) on 20 September 1993, the WHO's reply of 18 November, the complainant's rejoinder of 29 December 1993 and the Organization's surrejoinder of 24 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 1040, 1050 and 1230 and WHO Manual paragraphs II.9.255 and II.9.260;

Having examined the written evidence and disallowed the complainant's application for hearings;

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

A. The complainant, a citizen of India who was born in 1934, first joined the staff of the WHO in 1971. He served in Kenya on a grade P.5 post for a sanitary engineer until 1975 and in a similar post in Ghana until 1981. At his own request he was then put on leave without pay. In 1983 he was transferred to the Community Water Supply and Sanitation (CWS) programme in Uganda on a post graded P.4 and was later promoted to grade P.5 when the post was reclassified.

By a letter of 5 February 1988 the WHO's Regional Office for Africa, in Brazzaville, informed him that the funding of his post and his appointment would be terminated at 30 June 1988. It nevertheless informed him by a telegram of 7 June that it was extending his contract until 30 September 1988, and by a letter of 11 July, which he got on 1 August, it confirmed the notice of termination at that date.

On 12 November 1988 he lodged an appeal under Staff Rule 1230 with the regional Board of Appeal on grounds of personal prejudice on the part of his supervisors and other officials, incomplete consideration of the facts and failure to apply the Staff Rules correctly. On 20 July 1990 the Board recommended rejecting his appeal as devoid of merit. The Regional Director endorsed the recommendation and so informed him in a letter of 12 March 1991.

On 27 May 1991 he appealed against the Regional Director's decision to the headquarters Board of Appeal which held in its report of 13 April 1993 that the termination of his appointment was "flawed by the play of personal prejudice" and recommended reinstatement. But by a letter of 1 June 1993, the impugned decision, the Director-General rejected the Board's recommendation. He also declared the complainant to be in part to blame for delay in the appeal proceedings.

B. The complainant contends that the reason for the termination of his appointment was prejudice on the part of his supervisors and other officials. He alleges that he was indeed the victim of prejudice from the time he took up duty in Uganda. The first of his two supervisors, having sought in vain to get another staff member appointed in his place, waged a campaign to discredit him and even went so far as to accuse him of complicity in crime.

He displeased his second supervisor by pointing out errors of judgment and aroused the resentment of WHO officials by making constructive criticism at a Regional Office meeting. Several government officials too were prejudiced against him. The upshot was the abolition of his post.

The Organization has made out that it was the Government of Uganda that took final decisions on budgeting and that his post was abolished for lack of funds. That is quite untrue: the WHO's Representative agreed to funding of the programme for 1988-89 at least and at no time had the Government said that it wanted his post done away with. Indeed it had asked to have his appointment extended. Against its wishes his supervisor and the Regional Director pretended there were budgetary constraints so as to have his post struck from the programme. By disregarding the Government's wishes the Organization overlooked essential facts.

That it was the WHO that wanted him to go is borne out by its citing as grounds for termination Staff Rule 1040,

which is about the completion of temporary appointments and refers to a decision "not to reappoint". The Organization failed to observe the criteria in Rule 1050 - the provision it ought to have relied on - by appointing another applicant, and not one senior to him, to a post in Africa that he had applied for. In making that appointment the Regional Director improperly sought to earn political goodwill by choosing the citizen of an African country.

The Organization has argued that Rule 1050 does not apply to his case because it covers only posts of indefinite duration. Yet nowhere is there any definition of such posts. Besides, the personnel action form referred to completion of "appointment", not to "temporary appointment", and made no mention of Rule 1040.

Lastly, he says that he was not at all to blame for the delay in the appeal proceedings. Had there been word of earlier hearings at headquarters he would have been only too glad.

He seeks the quashing of the impugned decision and reinstatement in a suitable post.

C. The Organization denies that personal prejudice was the reason for ending the complainant's appointment.

As the Tribunal has held, prejudice usually has to be established by inference. Though the complainant cites as evidence of prejudice his supervisor's alleged attempt to have him replaced, the supervisor merely recommended, on the Government's proposal, appointing someone else pending his reassignment and clearance. And although his supervisor may have been too hasty to condemn him, the dislike did not go so far as to amount to personal prejudice; his performance reports were good and he was promoted to grade P.5. Had the dislike amounted to prejudice his supervisor would have recommended replacing him altogether with the other staff member rather than taking on the other as a "stop-gap".

There is not a jot of evidence to suggest hostility on the part of his second supervisor, who considerately extended his appointment and asked the Regional Office to find him alternative assignments. The evidence does show that opinions in government circles were divided about him, but again that does not bear out his charge of prejudice.

The Organization maintains that the final decision on the funding of the complainant's post came from the Government. Although it discusses funding with governments it cannot impose a programme that a country does not want.

Environmental health programmes were scaled down in Uganda after 1988. The complainant's post was to be redefined and transferred to the Health Manpower Development (HMD) programme. The credit allocated for 1988-89 - $248,100 - was heavily reduced - to $88,000 - in 1990-91 and ultimately removed altogether. If the complainant's post had been abolished for the sole purpose of getting rid of him the Government would have asked for the services of another sanitary engineer after his departure. It did not.

Contrary to what the complainant asserts, he is not covered by the criteria in Rule 1050. Paragraph 1 of that rule states that "the temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished", and the reduction-in-force procedure in 1050.2 applies only to indefinite appointments. The complainant's post was one of limited duration as defined in WHO Manual paragraph II.9.260. So it was under Rule 1040 that his appointment terminated, on the expiry of his temporary contract.

By the time the Tribunal delivers judgment the complainant will be only a few months short of the age of retirement. So even if his complaint were allowed his reinstatement would not be a suitable remedy. Moreover any award of damages should take account of his earnings and pension payments since leaving the Organization.

D. In his rejoinder the complainant submits that the transfer of his post as scheduled for 1990-91 would not have affected the continuance of his assignment since he had already worked for the Health Manpower Development programme. The allocation of $248,100 for 1988-89 was ample to fund his post until the end of the biennium; yet the WHO maintained that funding was exhausted by the date of his termination. He concludes that the budget was "manipulated" to show a deficit and additional funds were approved later.

The post he held was one of indefinite duration. Manual paragraph II.9.255 states that "posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them". Since his post was abolished the WHO should have applied the reduction-in-force procedure in Rule 1050. Manual paragraph II.9.260 is immaterial since it was not in force at the time of his termination.

That he is near the age of retirement is irrelevant since the Director-General may at discretion grant exceptions.

The WHO is improperly seeking to belittle its liability by suggesting that his pension and earnings be counted in any award of damages.

E. In its surrejoinder the WHO denies changing the funding of the complainant's post in the budget for 1988-89. It properly applied the Staff Rules. Although Manual paragraph II.9.260 came in after the complainant's termination, it confirms the position the Organization has always taken: a post on a country project is not one of indefinite duration within the meaning of 1050.2. Extension of appointment beyond the age of retirement being discretionary, the Director-General may not be ordered to exercise his discretion in the complainant's favour. To take account of earnings and pension in reckoning damages is usual and only reasonable.

CONSIDERATIONS:

1. The complainant joined the staff of the WHO as a sanitary engineer in 1971. He was appointed in 1983, still as a sanitary engineer, to a project in Uganda for the supply and sanitation of community water, known as CWS, which was administered by the WHO's Regional Office for Africa (AFRO), in Brazzaville. He was granted a fixed-term contract for two years from October 1983. He had it extended, by two years, to October 1987 and then in turn to 31 March, 30 June and 30 September 1988. What he is objecting to in his complaint is the decision not to extend it thereafter.

2. By a letter of 5 February 1988 AFRO informed him that funding for his post and contract would expire on 30 June 1988. Although on 7 June he had his contract extended to 30 September he was given notice by a letter of 11 July that he got on 1 August that it would not be extended again but would expire at that date.

3. On 12 November 1988 he appealed to the Regional Board of Appeal against the non-renewal alleging personal prejudice on the part of his supervisor - the WHO's then Representative - of his predecessor and of other officials, contrary to Staff Rule 1230.1.1, incomplete consideration of facts by the Representative and other officials contrary to Rule 1230.1.2, failure to grant him sufficient notice and denial of "priority retention" upon abolition of post, contrary to Rule 1050.2.

4. Only after he had made two complaints to the headquarters Board of Appeal in Geneva of inaction on the part of the Regional Board did the Regional Board hear his appeal, on 4 July 1990. It met for half an hour and then, on 20 July 1990, issued a cursory report recommending rejection. The complainant did not become aware of its report until 24 May 1991, when he received a letter dated 12 March 1991 from the Regional Director accepting the Board's recommendation.

5. On 27 May 1991 he put his case to the headquarters Board pressing his claims on two main grounds, personal prejudice and denial of priority retention. In a comprehensive report of 13 April 1993 the headquarters Board found that officials of the Ugandan Government, AFRO and his supervisors had all agreed that he was a competent and experienced sanitary engineer and had appreciated his services; yet, while giving satisfactory reports on his performance, his supervisors had discredited him in correspondence. The Board found that although the Administration had cited the Ugandan Government's prerogative as the reason for termination the Government did want the services of a sanitary engineer. The evidence gave the Board reason to suspect that it was the WHO that had wanted to discharge him. The Board concluded that, though there was no "proof" of personal prejudice, it was the likeliest cause of the decision not to extend his contract, and it recommended reinstating him. The Director-General did not agree, however, and by a letter of 1 June 1993 informed the complainant of the rejection of his appeal.

6. This case raises two main questions: whether personal prejudice was the cause of the impugned decision, and whether the post he held was one of "indefinite duration" that was abolished and the "reduction-in-force procedure" was therefore applicable.

The complainant's charge of personal prejudice

7. The Organization submits that it was the Government's prerogative to change the budget of the project and so determine whether or not a post under the project should be extended or not; that the Government did not include the complainant's post when submitting its "country programme" for 1988-89; that the allocation of 248,100 United States dollars for the CWS project for that biennium did not include funds for the complainant's post but made

provision only for short-term consultancy services; that only that provision made possible the extension of the complainant's contract up to 30 June 1988; and that the extension up to 30 September 1988 was secured by means of a transfer of funds from another programme; and that the complainant's contract could not therefore be further extended.

8. The Organization gave the complainant satisfactory performance appraisals, and all but one of the government officials directly concerned with his work had made it clear to the Representative between September 1987 and March 1988 that both his post and his services were needed. Indeed a letter written on 26 October 1987 by the Representative to a senior Ugandan official unequivocally records that the question of his continued employment in Uganda had been discussed in the review of the budget for 1988-89 and it had been agreed that his services would be needed for at least one more year.

9. Even after notice of termination had been served on the complainant in February 1988, the Government and the Organization were agreed upon the continuing need both for the post and for the incumbent in 1988 and even beyond. The Representative accordingly wrote to the Regional Director on 14 April 1988 proposing to transfer funds to CWS from a programme for public information and education for health (IEH) to fund the complainant's post, as the Ministry of Health had asked, for the remaining six months of 1988. He suggested that a post for a "public health engineer/teacher" would be more appropriate and that if funds were available in 1989 such a post should be created under another programme, Health Manpower Development (HMD), on the understanding that the engineer could also render service to the Ministry of Health. There is no evidence to suggest that the Government's views changed at any time thereafter.

10. In reply to the Organization's contention that funds were not available the complainant asserts that the allocation of $248,100 for 1988-89 did cover his post and was not much different from the allocations for previous years, and that after he had left short-term consultants were recruited for the remainder of the biennium. The Organization does not deny any of his assertions, and it seems likely that the consultants did perform the same functions as those the Ministry expected of him.

11. The programme budget for 1990-91 produced by the Organization is in line with what the Representative had proposed in April 1988. It shows an increase of $63,700 for HMD and a reduction of $160,100 in the allocation for CWS, which is explained as follows:

"... the post of Public Health Engineer ... is not required in the same form. A new post description of Public Health Engineer under HMD Programme is to be decided by Ministry of Health."

12. The conclusion is that the Government wanted not only a post for a sanitary engineer to continue in 1988-89 but also to have the complainant's services in such post even after 30 September 1988, and that funds were or could have been made available without difficulty for the purpose. The Organization has not advanced any other reason for non-renewal. Assuming that the complainant had already been too long in Uganda, the Representative incorrectly told AFRO in May and again in December 1987 that the Government did not want the post or the complainant's services, and the Regional Director refused to extend his contract after 30 September 1988 on the wholly untenable grounds that the Government did not wish to extend the post and that funds were not available. As was held in Judgment 495 (in re Olivares Silva), under 23:

"In such a case it is enough for the complainant to show that it is more probable than not that a bias against him was a factor in the [decision-maker's] mind when he was considering whether or not the contract should be terminated."

The refusal to extend the complainant's contract on patently untenable grounds makes it "more probable than not" that the decision was actuated by personal prejudice against him. It therefore cannot stand.

The abolition of post

13. Rule 1050.2 prescribes a reduction-in-force procedure when a post of "indefinite duration" is abolished. The WHO contends that the complainant held a fixed-term appointment on a post of limited duration, and it cites Manual paragraph II.9.260, which, as revised on 20 September 1989, reads:

"Reduction-in-force provisions do not apply to posts of limited duration ... [which] automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is

specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include: ...

260.3 country project posts, irrespective of the source of funds."

But that provision is inapplicable because it was introduced only after the termination of the complainant's appointment. Since the rules do not explain the terms "limited" and "indefinite" duration the definition in Judgment 515 (in re Vargas) holds good:

"A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration."

14. Here the project was not one of limited duration. First, the WHO has not produced any document which established the complainant's post or prescribed its duration. Moreover, even assuming that it might have begun as a post of limited duration, the several extensions of it show that it had become one of indefinite duration and the complainant was therefore entitled on the abolition of it to have the reduction-in-force procedure applied. A similar case is the one the Tribunal ruled on in Judgment 891 (in re Morris): see under 7.

15. Upon the abolition of the post which the complainant held compliance with the reduction-in-force procedure was a condition precedent to the termination of his contract. Not being the outcome of a valid procedure, the notice of termination he was given was invalid, and he was entitled to reinstatement for the same reasons as those that are explained in another judgment delivered this day: No. 1371 (in re Ortiz). Having been born on 24 October 1934, however, he is now only a few months short of the normal age of retirement, which is sixty; moreover, he is already being paid a retirement pension. So it is too late to order reinstatement or compliance with the reduction-in-force procedure. The Tribunal will therefore award him instead full compensation equivalent to the salary, allowances and any other benefits that would have been due to him under a contract from 1 October 1988 up to the date at which he attains the normal age of retirement, less any occupational earnings and indemnity he may have received in the meantime.

16. Although the Organization contends that he should give credit for pension payments as well, he points out that his total life-long pension entitlements remain the same, whatever the age of retirement, because the amount in a participant's pension account is fixed and any benefit received on retirement before the age of sixty is offset by subsequent and corresponding reduction. The Tribunal accepts that plea and therefore will not order him to account for pension payments.

17. Since the termination of his appointment was tainted with personal prejudice he has also suffered moral injury and the Tribunal awards him $4,000 in damages on that account. Since he has not asked for costs no award is made under that head.

DECISION:

For the above reasons,

1. The Director-General's decision of 1 June 1993 is quashed.

2. The Organization shall pay the complainant in full the salary, allowances and any other benefits due to him under contract in accordance with what is set out in 15 above.

3. It shall pay him $4,000 in damages for moral injury.

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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