

SEVENTY-EIGHTH SESSION

In re ERMAKOV

Judgment 1381

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Voldemar Ermakov against the World Health Organization (WHO) on 3 February 1994 and corrected on 16 March, the WHO's reply of 16 June, the complainant's rejoinder of 25 July, and the Organization's surrejoinder of 5 September 1994;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a Russian born in 1936, first served the WHO under short-term contracts in 1963-64 and 1985. In 1986 he was seconded from the Government of the then Union of Soviet Socialist Republics (USSR) to serve the Organization as a medical officer at grade P.5 in its Regional Office for the Western Pacific at Manila. He got three extensions of appointment, the last until 29 February 1992.

In a report appraising his performance in 1988-89 his first-level supervisor said that he had a "tendency to overlook important administrative considerations" and his second-level supervisor concurred. The complainant described their comments as "defamatory".

In the summer of 1989 the Regional Director gave someone else duties that the complainant had been carrying out as acting chief of Human Resources for Health and put the complainant in charge of the fellowship programme.

His appraisal report for 1989-90 cited "shortcomings" in his performance and contained a recommendation from his supervisor to withhold his within-grade salary increment.

That report set off a flurry of notes for the file and correspondence about the complainant's work from him, his supervisor and members of the Administration, and they came to a head with draft comments from his first-level supervisor on his performance in 1990-91. Having learned that his supervisor was again recommending that his salary increment should be withheld, he took the floor at a meeting of Professional category staff on 7 January 1992 and started talking about performance appraisals. In a note for the record of even date the Regional Director explained that he had stopped him because "the meeting was not the right forum to discuss assessment of a staff member in an isolated case".

To a memorandum which the complainant sent to all staff on 9 January 1992 he appended the text of the "statement on malpractice of performance appraisals" which he said the Regional Director had kept him from making at the staff meeting of 7 January.

In a memorandum dated 9 January a personnel officer told him that his behaviour at the meeting had amounted to serious misconduct; he was suspended without pay pending investigation and given eight days in which to reply under Staff Rule 1130. He did so on 15 January, denying the charges, challenging the lawfulness of the suspension and announcing his intention to appeal.

By a letter of 31 January 1992 the Director of the Support Programme informed him that, even though there were grounds for dismissing him for serious misconduct under Rules 1075.2 and 1110.1.5 and "ample proof" of his unsatisfactory performance and unsuitability for the international civil service, the Regional Director had decided instead on compassionate grounds to let him go upon completion of his appointment under Staff Rule 1040. He was relieved of duty as from 1 February 1992, the last day of his appointment being 29 February, and was granted three months' pay in lieu of notice.

By a letter of 11 February 1992 the complainant told the Director of the Support Programme that owing to his

wife's poor health he accepted termination under 1040.

On 21 May 1992 he lodged an appeal with the regional Board of Appeal against the decision not to extend his contract and against his suspension from active duty.

In its report of 10 December 1992 the Board recommended rejecting his appeal and by a letter of 11 January 1993 the Regional Director endorsed its recommendation.

On 13 February the complainant put his case to the headquarters Board of Appeal. In a report dated 22 October 1993 the headquarters Board recommended upholding the Regional Director's decision but granting him costs.

In a letter of 3 December 1993, which he impugns, the Director-General rejected his appeal but granted him 500 United States dollars in costs.

B. The complainant submits that he was the victim of a plot of "harassment" hatched by the regional Administration to get rid of him. He has two main pleas.

The first is misuse of authority. After his country voted against the election of the Director-General in 1988 he was no longer welcome in the Regional Office. He sets out a score of cases involving technical, administrative and personal matters to show how the Organization mistreated him. His allegations include "blackmail", "intimidation" and "slandorous statements in appraisal reports". He accuses the Regional Director of a "dictatorial" style of management. When, for example, the Regional Director did not like his ideas he branded them "improper" and called him to account for disobeying the rules on channels of communication.

His other main plea is that the WHO drew mistaken conclusions from the facts. The Administration has offered no evidence to show that his performance was unsatisfactory or that he was unfit for international civil service. His efforts to make the fellowship programme more efficient led to charges of unsatisfactory performance; he had only to point out faults in management for the Administration to trump up charges of misconduct.

He seeks reinstatement at grade P.5, step 6, at any duty station other than Manila and an award of 100,000 United States dollars in damages for the moral injury he and his wife sustained. He claims \$5,000 in costs.

C. In its reply the WHO denies any plot to oust the complainant. It offered him guidance to make his work more practical and his manner less "abrasive", but when that failed it let his contract expire in keeping with Rule 1040.

The complainant is estopped from challenging the decision by his acceptance in his letter of 11 February 1992 of the arrangements for his departure. It would disrupt administrative practice to let officials go back on their acceptance of decisions in order to enter fresh claims.

Although not required under 1040 to give reasons for not renewing his appointment, the WHO made it plain that they were his failure to observe the standards laid down for the conduct of international civil servants, his unsuitability for international service and his unsatisfactory performance.

Though international civil servants are expected to speak and behave discreetly the complainant made in public threatening statements and displays of dissent from his supervisors. That alone was enough to warrant suspension and non-renewal.

Under Rule 1070.1 an official who fails to establish satisfactory working relations with other staff members is unsuitable for international service. Even after warnings from the Administration that his language and behaviour were rude and his manner aggressive the complainant failed to show any improvement.

He was free to appeal against anything he considered unlawful in his appraisal reports, but not to make an ill-tempered show of disagreement to put pressure on senior officers.

The WHO submits that should the Tribunal allow his complaint reinstatement would not be a proper remedy. His claim to moral damages for his wife is unsound and the amount he seeks is in any event unreasonable.

D. In his rejoinder the complainant disputes several points of fact in the reply, answers the Organization's arguments and enlarges on his earlier pleas. Only under duress had he submitted to the arrangements, and that did

not preclude appeal; besides, he had already announced his intention to appeal when he answered the charge of misconduct. He presses his claim to damages for the injury that he himself suffered.

E. In its surrejoinder the Organization presses its earlier pleas. Failing any evidence of duress, appeal against a decision the complainant accepted is ill-conceived.

CONSIDERATIONS:

1. On 28 November 1986 the complainant joined the WHO's Regional Office in Manila as a medical officer under a fixed-term appointment for two years on secondment from the Government of the then Soviet Union. He had his appointment extended by two years to 30 November 1990, by three months to 28 February 1991, and finally by one year to 29 February 1992. He is objecting to the Organization's decision not to renew it thereafter.

2. His annual reports noted shortcomings in his performance in 1989 and 1990, and the process of appraisal for 1991 gave rise to incidents which led to the decision not to renew his contract.

3. It is not in dispute that the relationship between the complainant and the Regional Director became strained. On 4 June 1989, upon their return from a mission to the USSR, a trivial incident at Manila airport led to the Regional Director's addressing him in harsh language. The next day the Regional Director relieved him of duties which he had been performing since late in 1988 as acting chief of a unit known as Human Resources for Health, and replaced him with the Director of Health Services Development and Planning (HP), who until then had been his subordinate and who thus became his own first-level supervisor. The complainant did not challenge any of those decisions. He and his supervisors then began exchanging memoranda and notes for the record on routine, sometimes trivial, administrative and personal matters.

4. On 29 November 1991 the complainant submitted to the Director of HP the text of his "self-appraisal" for 1991. The Director of HP thereupon drafted an appraisal which made adverse comments on the complainant's performance and recommended withholding his within-grade salary increase for three months "in view of contract duration". At a discussion with the Director of HP on 6 January 1992 the complainant objected to that appraisal and refused to accept it without a discussion with his second-level supervisor, the Regional Director. Later that day he demanded discussion of the matter so that he might "protect his professional reputation and human dignity from slander".

5. On the morning of the 7th the Director of HP answered that he saw no need for such discussion. The complainant's reply was that if the Director of HP and the Personnel Office failed to discuss the matter with the Regional Director he himself would raise it at the monthly staff meeting scheduled for that afternoon. He was told that the staff meeting was not a proper occasion for raising personal matters. He then tried to see the Regional Director, but failed.

6. The complainant spoke at the staff meeting of 7 January 1992 and when he referred to his appraisal the Regional Director asked him to stop. Having said that he disagreed with that decision but would have to comply, he went on to remark that the way the Regional Director's mandate had been granted was "exactly the way it could be taken" from him. The meeting ended soon after, and as he left he said to the Regional Director: "You will regret this".

7. Two days later, on 9 January, he circulated to all staff a memorandum stating that the Regional Director had "interrupted him in a very rude and arrogant manner, and had prevented him from making an important statement" at the staff meeting. He appended the text of the statement, which was about "malpractice of performance appraisals". The same day the Director of the Support Programme ordered him by memorandum to withdraw the documents, but he refused, and by a memorandum of 10 January the same Director imposed on him a reprimand on that account.

8. In a memorandum of 9 January the Personnel Office of the Regional Office had charged him with "very serious misconduct" for having aired his grievances at the staff meeting, though told not to do so, and spoken "threateningly" to the Regional Director; he was suspended from duty immediately and without pay on the grounds of such misconduct and of previous instances of behaviour deemed unbecoming for an international civil servant.

9. On 10 January security staff, acting on instructions given by the Personnel Office in consequence of the complainant's suspension, prevented him from entering the WHO's premises.

10. The complainant's reply to the charges was in a memorandum of 15 January which he addressed to the Personnel Office but marked for the attention of "all Professional staff" and of which he sent copies to the Director-General, the Regional Director, the Staff Association and others. Citing what he called the "disgraceful incident" at Manila airport and later events, he alleged that there was a plan to terminate his appointment on the strength of incorrect appraisals of his performance; he explained that he had raised his personal problems at the staff meeting because the Regional Director had not been available for discussion, and denied any intention of threatening him.

11. By a letter of 31 January the Director of the Support Programme informed the complainant that his explanations were unacceptable; stated in the third paragraph that there was adequate reason to dismiss him for serious misconduct under Staff Rules 1075 and 1110.1.5, unsatisfactory performance or unsuitability for international civil service under Rule 1070; but added that the Regional Director, considering his personal situation, his having served for over five years, and the fact that his contract would expire on 29 February 1992, had decided "on purely humanitarian grounds" to terminate his appointment under Rule 1040, headed "Completion of temporary appointment". In keeping with that decision he would be paid for the period of suspension and would also get three months' pay in lieu of notice.

12. In his reply of 11 February 1992 to the Director of the Support Programme the complainant said that since his "wife's health [had] deteriorated during the last days" he was "forced to give up fighting for justice" and "accept the proposal" in the third paragraph of the Director's letter of 31 January.

13. The complainant made an appeal against suspension and non-renewal to the regional Board of Appeal, the Regional Director rejected it on the Board's recommendation, and he then appealed to the headquarters Board of Appeal in Geneva. In its report of 22 October 1993 the headquarters Board found enough evidence of his unsuitability for the international civil service to justify the decision not to renew his contract. It recommended that the termination stand and that he be paid reasonable costs. In a letter of 3 December 1993, the impugned decision, the Director-General accepted that recommendation and granted him \$500 in costs.

14. The Organization contends that its decision not to renew his appointment was justified for three reasons: his unsatisfactory performance in 1989 and 1990, his behaviour on 7 January 1992, and his unsuitability for international civil service.

15. As to the first of those three reasons, the report on his performance in 1989 recorded some shortcomings, including a tendency to overlook important administrative considerations. Although he disputed that appraisal in appended comments he made no internal appeal. In the draft appraisal of him for 1990 the Director of HP noted serious deficiencies and recommended withholding his within-grade salary increase and considering both the appraisals in deciding whether to extend his appointment. In November 1990 the complainant wrote a letter to the Director of HP and a memorandum to the Regional Director but he did not challenge the appraisal; instead he said he was "ready to improve" and sought the sympathetic reconsideration of his case on personal grounds; his wife being unable to put up with the climate, he had already applied for early transfer or reassignment, and that would be facilitated by a good appraisal and the extension of his contract. Initially the within-grade increase had been withheld and only a three-month extension granted. The Regional Director and the Director of HP discussed the matter with him in a meeting on 7 January 1991, and the Regional Director then instructed that a fresh appraisal be prepared and that he be given the within-grade increase and a one-year extension. That appraisal rated him satisfactory but noted the need for him to communicate better and adhere more closely to procedure. He accepted the appraisal.

16. Though contending that the Regional Director was hostile and vindictive at that meeting, the complainant admits to writing him a personal letter in April 1991 thanking him for his concern, kindness and objectivity in an important personal matter. The Tribunal is unable to accept his explanation that that was mere politeness and rejects his version of the discussion. For the same reason his allegation of personal prejudice on the part of the Regional Director in the appraisal of his performance fails.

17. In the circumstances it was not unreasonable for the Organization to regard his performance in 1989 and 1990 as not good enough to justify the renewal of his appointment.

18. Secondly, as to his behaviour at the staff meeting on 7 January 1992, the complainant not only knew that he should not be raising personal matters at staff meetings but had been told that very morning not to do so. Although

he complied with the Regional Director's ruling at that time, his subsequent remarks show some defiance, even if they were not intended to threaten; by circulating the text of his statement to the staff he thwarted that ruling; and the language he used in it, and his refusal to withdraw it, only made matters worse. He was thereby guilty of misconduct likely to undermine the authority of his supervisors and to disrupt the functioning of the Organization by embroiling other officials in personal disputes.

19. Thirdly, as to his suitability for the international civil service, the flow of documents between him and his supervisors on matters which could easily have been dealt with by discussion and dialogue shows a deterioration in his relations with others at work, and for that he was at least partly to blame. The many notes for the record also indicate some lack of mutual respect and trust. He got a written reprimand in September 1991 for ignoring normal channels of communication and for threatening to ask the Soviet Government to make an official request to the Organization, but even that did not deter him. His conduct fell below the standards expected of an international civil servant.

20. The conclusion is that on all the grounds set out above the Organization was justified in deciding not to renew the complainant's appointment.

21. Since the complaint fails in any event on the merits, there is no need to entertain the Organization's objections to receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, 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 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner