Registry's translation, the French text alone being authoritative.

SEVENTY-EIGHTH SESSION

In re MOORE

Judgment 1405

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gerald Dowsland Moore against the World Health Organization (WHO) on 15 November 1993 and corrected on 28 February 1994, the WHO's reply of 3 June, the complainant's rejoinder of 26 August and the Organization's surrejoinder of 13 October 1994;

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

Having examined the written submissions and decided not to order hearings, 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 joined the WHO in 1986 under a short-term appointment. On 1 November of that year the Organization gave him a two-year appointment as a technical officer at grade P.5 and assigned him to the Action Programme on Essential Drugs (DAP). His duties included frequent missions to African and other countries. His appointment was extended twice until 31 October 1992.

Reports appraising his performance in the periods from November 1986 to October 1987, from November 1987 to March 1989 and from April 1989 to March 1990 said that his work was satisfactory. The reports for the periods from April 1990 to March 1991 and from April 1991 to March 1992 cast no doubt on his technical competence but expressed criticism of his conduct and reservations about his fitness for international public service.

In a letter of 10 December 1991 the Director of Personnel informed him that there had been "persistent reports" from various quarters that he had been disregarding the WHO's policy on drugs and the Staff Regulations and Staff Rules and as a result the Government of Kenya had declared him persona non grata; in accordance with Staff Rule 1120 he was summarily suspended from duty on two charges. One was that he had used his influence and been paid a commission to secure for a private Dutch foundation, the International Dispensary Association (IDA), an important contract for the supply of drug kits to Zambia; the other was that while in the WHO's employ he had done consultancy work for a drug distribution company, Chanpharm.

In a memorandum of 11 December 1991 to the Director of Personnel the complainant denied the charges and asked to have the suspension lifted. He sent the Personnel Division a memorandum on 18 December in further refutation of the charges.

By a letter of 13 January 1992 the Director of Personnel asked him for more information on any services he had rendered to Chanpharm and told him he was retroactively reinstated with pay pending the outcome of investigation. He supplied the information in a memorandum of 14 January to the Director.

By a letter of 3 August 1992 the Director told him that his fixed-term contract would not be renewed when it expired on 31 October 1992 and he was thereby given notice under Staff Rule 1040. By a memorandum of 6 August the complainant gave the secretary of the headquarters Board of Appeal notice of appeal against the decision of 3 August. He lodged his appeal on 14 August.

In its report of 5 July 1993 the Board of Appeal concluded that the decision not to renew his appointment was tainted with a procedural flaw, the reasons for non-renewal were unclear and the complainant's unfitness for international public service was not proven. It therefore recommended that the Director- General reverse his decision. By a letter of 19 August 1993 - the impugned decision - the Director-General told the complainant that he upheld his decision.

B. The complainant has a single plea, that the decision was tainted with a procedural flaw.

What he challenges is not the Organization's discretion to renew his appointment or let it expire on 30 October 1992, but the way the decision not to renew it was reached. He contends that the Organization acted on rumours about him unquestioningly and without letting him have his say, and thereby sought to discipline him. But it failed to do so by the proper procedure because it had not a shred of evidence to support its charges; so it simply waited for his appointment to expire so that it could invoke its discretion not to renew it. That was an abuse of process.

The complainant answers the pleas put forward by the WHO in the internal appeal proceedings.

He denies its allegations about the management of the Essential Drugs Programme funded by the World Bank in Nigeria. Everyone was quite happy with the running of it and it was dropped only because money had run out.

It was at the instigation of his supervisor that another official of the WHO criticised him at a meeting in Nairobi in 1991.

He denies the IDA's accusation that he wanted commission from it for an order of drugs for Zambia. He denies acting against the WHO's interests by helping Chanpharm to improve its essential drugs programme. In his submission the reasons for the charge were that his mission was a threat to the Association's financial interests and some WHO officials were jealous of him.

Kenya never declared him persona non grata; the WHO's Representative in Kenya merely referred to a letter from the Ministry of Health and said that for "reasons of security and good relations" he should not take part in a forthcoming mission to that country. In any case the Government later changed its mind, and he went there and was warmly received.

Lastly, he submits that the WHO acted in breach of the general principle of law - embodied in Rules 1120 and 1130 - that someone must be presumed innocent until proven guilty by due process. The WHO based on Rule 1120 its decision of 10 December 1991 to suspend him from duty but the terms of the Rule were not met since there was neither misconduct - serious or other - nor any likelihood of prejudice to the Organization's interests.

He asks the Tribunal to set aside the WHO's decision not to renew his appointment and order it to reinstate him in the post he held up to 10 December 1991 or a similar one; to pay him, with interest, for the period from the end of his appointment until the date of reinstatement; pay him 900,000 Swiss francs in damages for the suspension and non-renewal of his appointment and for the consequent injury to his reputation, dignity and honour; and pay him 60,000 Swiss francs in damages for the delay in settling his case and 45,000 in costs.

C. In its reply the WHO submits that the inquiry into the complainant's conduct produced ample evidence in support of the charges in the letter of 10 December 1991 and brought to light other serious shortcomings which showed him to be unfit for international public service.

He did try to get 10,000 United States dollars or the equivalent in guilders in commission from the IDA in consideration for a promise to persuade the Zambian Government to award the Association a contract for the supply of drug kits. The charge is based on written statements by two senior officers of the Association. He also solicited a 10 per cent commission from a drug company in Zimbabwe in return for a promise to secure an order from the DAP: the accusation was from sources that two WHO officials regard as trustworthy.

The complainant also did private consultancy work while he was an employee of the WHO. He served a firm by the name of Misereor in recruiting and coordinating the work of other consultants and helped to produce a report on Chanpharm. According to Regulation 1.4 he should have sought leave from the WHO to do so. Furthermore, in the course of the work - which he said was of interest to the WHO - he used his own bank account to cover the consultants' costs.

The complainant failed to observe WHO procedures and rules in handling a trust fund financed by the World Bank. The Bank's objections prompted adverse comment in the report on his performance from April 1990 to March 1991.

He failed to defend WHO policy at a meeting in Nairobi. In one document he stated an opinion he knew to be at variance with such policy without consulting the Organization first.

Kenya did declare him persona non grata. Even a temporary ban of that kind is relevant in rating fitness for international service.

Before the Board of Appeal the complainant admitted that while suspended from duty - from 10 December 1991 to 13 January 1992 - he took a short-term appointment with a private institute, called CEPNI, for practical research in international negotiation. Without leave from the WHO he made use of information he had obtained at a private WHO meeting to write a report for CEPNI. The Institute paid him for the work, which he has tried to conceal, but he did not pay the amount over to the Organization. Such behaviour constituted breach of Regulation 1.4 and serious misconduct under Rules 110.8.1, 110.8.2 and 110.8.3.

Citing the Tribunal's case law, the Organization observes that it has wide discretion over renewal. It drew no clearly mistaken conclusions from the evidence, overlooked no essential facts and committed no misuse of authority. It took the impugned decision in its interests and for sound reasons. It informed the complainant of the reasons and gave him every opportunity to defend himself.

D. In his rejoinder the complainant enlarges on his plea that commercial firms - aided and abetted by WHO officials - were out to discredit him because he was bothering them in Africa and elsewhere. The charge that he asked the IDA for commission is mere hearsay and was not borne out by the investigation. Nor was the allegation that he wanted a cut from a drug firm in Zimbabwe. Contrary to what the WHO makes out, the services he performed for Chanpharm were authorised by the then Director of the DAP and he later gave a full account of them. He used his own bank account only so as to help in recruiting consultants, and there was no breach of his professional obligations in that. The Organization was wrong in alleging that he mismanaged the trust fund financed by the World Bank; he simply had difficulty in squaring the WHO's method of accounting with the Bank's. What he said at the meeting in Nairobi was not contrary to WHO policy. He was never under contract to CEPNI; he merely helped it with a report for a fee of 1,000 Swiss francs which it paid him while he was suspended from the WHO. He kept the job secret because the Organization's behaviour drove him to do so. He reaffirms that the Kenyan Government never declared him persona non grata.

His main plea is that the Organization was guilty of abuse of process and his subsidiary ones are that it reached clearly wrong conclusions, overlooked essential facts and misused its authority and that its decision was flawed by being based on hearsay.

E. In its surrejoinder the WHO rejects the complainant's innuendoes about the IDA and WHO officials. The IDA is a non-profit-making association and many international organisations acknowledge the high quality of its services. The WHO officials were merely doing their duty in pointing out what the complainant was up to.

The Organization denies waiting for the complainant's appointment to expire with the intent of not renewing it. Only after objective and honest inquiry into the charges and the reports on his performance did it conclude, in August 1992, that he was no longer fit for international public service. It did so in exercise of its discretion. That decision was neither preconceived nor arbitrary, nor did it show any abuse of authority by the Director-General. It was taken in the Organization's best interests and was not a hidden disciplinary measure.

It is untrue that the complainant assisted the CEPNI during suspension: the meeting at which he got the information he used in the report took place 44 days after his reinstatement.

The complainant knew full well the reasons for non- renewal. He was informed of all the charges against him and allowed to answer.

CONSIDERATIONS:

1. On 1 November 1986 the WHO appointed the complainant to a post of technical officer under its Action Programme on Essential Drugs at headquarters. He then had a two-year appointment. The Organization extended it by two years from 1 November 1988 and again from 1 November 1990. On 3 August 1992 it told him that his contract would expire on 31 October 1992 and would not be renewed. He appealed. Though the headquarters Board of Appeal recommended reversing the decision in its report of 5 July 1993, the Director-General upheld it and rejected the appeal in a letter of 19 August 1993. That is the decision impugned, and the complaint is receivable.

2. The facts of the dispute, which are set out under A above, may be complex, but the complainant's reasoning is straightforward. His main plea is abuse of process. In his view the Organization disregarded the proper safeguards

and adduced not a shred of evidence to support the charges against him, which were mere hearsay and malicious innuendo. Instead it took disciplinary action in the form of non-renewal.

3. The Tribunal is satisfied on the evidence that the WHO's reasons for not renewing his appointment might have warranted disciplinary proceedings and that some of them prompted its decision to suspend him from duty from 10 December 1991 to 13 January 1992. Though in no way bound to take disciplinary action against him, it was of course free to take into account any evidence of behaviour that led it to believe - as it does - that he was unfit for international service.

4. On that score precedent acknowledges an organisation's wide discretion in renewing a fixed-term appointment and its right to refuse renewal for reasons that include misconduct and unsatisfactory performance: see for example Judgments 1052 (in re James), 1262 (in re Scherer Saavedra) and 1271 (in re Sánchez-Peral).

5. Even if it discounts some of the serious charges against the complainant, which he sees as idle rumour, the Tribunal is satisfied that the adverse comments that were duly entered in his annual reports afforded full justification for non-renewal. There is evidence of his failing more than once to follow the WHO's procedures and rules and actually making statements in public that were at odds with the Organization's policy. After reinstatement in January 1992 he attended a meeting held by a private research institute, reported to it about a meeting of the advisory management board of the action programme he had worked on, and took payment for doing so, and all without telling the Organization. It is true, and the WHO acknowledges, that those undisputed facts came to its knowledge after the date of the impugned decision and so afford no grounds for it in law. But they do preclude his reinstatement and, had they come to light at the time, as they ought, they would have given ample grounds for non-renewal.

6. Since disciplinary proceedings are irrelevant to non-renewal of a fixed-term appointment the complainant may not properly allege hidden disciplinary action. Disciplinary proceedings, and the safeguards they afford, are relevant in the event of misconduct warranting disciplinary action while an official is under contract, and one possible sanction is termination of the appointment, whatever its duration may be. Disciplinary proceedings do not apply in the event of due expiry of a fixed-term appointment, when the issue is whether in the light of past performance the contract should be renewed. An organisation must be allowed full freedom to decide the issue without having to go through the disciplinary procedure. So there is no question of abuse of process.

7. Under the circumstances the complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner

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