

EIGHTY-THIRD SESSION

In re Bombo N'Djimbi

Judgment 1647

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Daniel Bombo N'Djimbi against the World Health Organization (WHO) on 5 April 1996 and corrected on 25 June, the WHO's reply of 15 October, the complainant's rejoinder of 17 December 1996 and the Organization's surrejoinder of 7 April 1997;

Considering Articles II, paragraph 5, and VII 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 was born in 1936 and is a citizen of the country that at the material time was called Zaire. He joined the WHO in July 1981 under a short-term appointment at its Regional Office for Africa in Brazzaville. He took early retirement on 31 July 1995.

On 1 March 1982 he was put on a post, No. 3.2764, as a clerk-typist at grade BZ.5. On 1 June 1982 he was promoted to BZ.6. From 1 July 1986 until 30 June 1987 he served as an acting administrative assistant at grade BZ.9 on post 3.0069. His supervisors asked for the upgrading of post 3.2764 to BZ.9. The Organization upgraded it as from 1 December 1987 but only to BZ.7, and accordingly promoted the complainant, who was still on it.

In 1988 and in 1990 he made unsuccessful applications for the regrading of the same post to BZ.9. By a memorandum of 19 March 1992 a personnel officer of the Regional Office told him that at his supervisor's request the Regional Director had approved the upgrading of his post to BZ.8 and that he was promoted to that grade as from 1 March 1992. On 4 March 1993 he appealed to the regional Board of Appeal claiming the upgrading of his post to BZ.9 for the period from 1987 to 1990 and to BZ.10 from 1990. In a report dated 27 May 1994 the regional Board recommended not upgrading his post but, on the grounds that he had still been acting as administrative assistant from August until November 1987, granting him the difference in pay between BZ.6 and BZ.9 for those four months. The Board further observed that of the reports which he had been claiming on his performance the one for the period from June 1987 to May 1988 was missing and that "gave the impression that the competent unit had not been keeping his personnel records up to date". By a letter dated 28 June 1994 the Regional Director told him that he was rejecting the Board's recommendation for granting him the difference in pay. On 21 July 1994 the complainant appealed to the headquarters Board of Appeal. In a report dated 8 November 1995 that Board recommended rejecting his appeal. By a letter dated 7 December 1995, the decision impugned, the Director General told the complainant that he did so.

B. Citing the regional Board's report, the complainant contends that there was "incomplete consideration of the facts" within the meaning of Staff Rule 1230.1.2: the Board had had before it no report on his performance from June 1987 to May 1988. Headquarters were therefore wrong to reject his appeal. He was told of no decision that he should stop acting as administrative assistant and he therefore acted as such up to 31 July 1995, when he took early retirement. He contends that under Rule 320.4 he is entitled to further pay on that count. His post, No. 3.2764, ought to have been upgraded to BZ.9 because he was fit to perform the duties of an administrative assistant; indeed his supervisor had recommended the upgrading. Administration and boards alike were prejudiced against him.

He seeks the quashing of the Regional Director's decision of 28 June 1994 and the Director General's of 7

December 1995, the upgrading of post 3.2764 to BZ.9 from 1987 to 1990 and to BZ.10 from March 1990, the payment of the further sums accordingly due, and the payment of the special duty allowance from the date at which it stopped until 31 July 1995.

C. In its reply the WHO submits that the complainant's claim to the upgrading of post 3.2764 might be "deemed out of time and irreceivable" because he failed to lodge timely internal appeals against the decisions taken in 1987 and 1992 against upgrading to BZ.9. Likewise his claim to the special duty allowance is irreceivable because it is out of time and in any event quite new.

On the merits the Organization contends that according to Manual paragraph II.1.30 the grading of a post does not depend on the quality of the incumbent's performance or on his seniority. There cannot be regrading anyway failing some appreciable change in the nature of the duties. The duties of the complainant's post were still those of a secretary, whatever others he may have been asked to perform. The lack of one performance report, which the regional Board mentioned, does not amount to failure to keep his records up to date. Nor was he discriminated against. Nor may he in good faith plead that he got no notice of the termination of his status as acting administrative assistant as from 1 July 1987: a personnel action form dated 10 June 1987 told him that payment of the special duty allowance would stop at 1 July 1987 in accordance with Staff Rule 320.4. So his claim to payment of it is unsound.

D. In his rejoinder the complainant contends that the Organization ought to have put the post of administrative assistant up for competition or else kept him on the post, which was vacant. He maintains that the Administration never told him that he was to stop performing those duties and he cites Staff Rule 580.1, which requires the Administration to inform a staff member in writing of any change in his status.

E. In its surrejoinder the defendant presses its objections to receivability. It says that the complainant's claim to the upgrading of his post is a challenge to the decisions taken in 1987 and 1992. And his claim to the allowance is made for the first time in this complaint.

On the merits the defendant argues that the complainant's main plea, which is that he went on performing the duties of the administrative assistant's post from July 1987 until the date of retirement is irrelevant to his claim to the upgrading of his own post to BZ.9 and BZ.10. Moreover, it rests on a mistaken allegation of fact.

CONSIDERATIONS

1. The WHO appointed the complainant on 1 March 1982 to post 3.2764 in its Regional Office in Brazzaville as a clerk-typist at grade BZ.5. It upgraded his post and so promoted him to BZ.6 on 1 June 1982. On 1 July 1986 it had him take on for twelve months the duties of a post for an administrative assistant, No. 3.0069, that was graded BZ.9. In November 1987 it put a revised description of his own post, 3.2764, to the Standing Committee on Reclassification of Posts with a recommendation from his supervisor for the upgrading of it to BZ.9. It thereupon went up to BZ.7 from 1 December 1987. After further applications for upgrading to BZ.9 the Standing Committee recommended on 30 August 1990 keeping the grade at BZ.7. The Regional Director agreed. In August 1991 the complainant again applied for BZ.9, but the Committee recommended only BZ.8. By a decision of 19 March 1992 he was promoted to BZ.8 as from 1 March 1992.

2. On 4 March 1993 he appealed against that decision to the regional Board of Appeal claiming the upgrading of his post to BZ.9 from 1987 to 1990 and to BZ.10 from 1990 to 1995. On the Board's recommendation the Regional Director rejected his appeal on 28 June 1994. On appeal the headquarters Board of Appeal too recommended rejection and the Director General endorsed that recommendation in a decision of 7 December 1995, the one now under challenge.

3. The Organization submits that the complaint is out of time and therefore irreceivable. There is no need, however, to rule on that plea since for the reasons set out below the complaint fails in any event on the merits.

4. At issue are the grades the complainant held from 1987 until 1990 and from 1990 until 1995. The WHO promoted him to BZ.7 in 1987, when the grade he wanted was BZ.9, and to BZ.8 in 1992, when he was claiming BZ.10 as from 1990. In support of his claims he cites Staff Rules 560.1 and 560.2. The case is not

about transfer from one post to another, but about the regrading of the post he was on. The rules he is relying on are immaterial to upgrading: they are about the right to promotion on regrading. And here they were correctly applied since the successive upgradings of the complainant's post to BZ.7 and BZ.8 duly brought about his promotion.

5. In support of his claim to upgrading the complainant cites his supervisor's recommendations and his competent and devoted performance of the duties of the post he was temporarily assigned to, No. 3.0069.

6. Those arguments are, however, irrelevant. The basic rules on grading are in Manual paragraph II.1.30, which reads:

"The following basic principles of post classification must be adhered to:

30.1 there should be equal pay for work of equal value;

30.2 posts of approximately equal difficulty and responsibility should be placed in the same grade;

30.3 a change in the grade of a post should result only when a significant change in the level of its duties and responsibilities has occurred;

30.4 the grading of a post depends upon the assigned duties and responsibilities required and not on the qualifications, job performance, seniority or other characteristics of an incumbent."

So grading hinges neither on quality of performance nor on seniority. The sole criteria are the duties and responsibilities of the post. And the grade cannot change unless there is a "significant change in [their] level".

7. As was said in Judgments 1067 (*in re Glenn*) under 2 and 1152 (*in re Korolevich*), also under 2, upgrading requires close familiarity with the conditions in which the staff member works. The assessment of the type of work performed and the level of responsibility is a value judgment, and only those whose training and experience equip them for the task may make such an assessment. The decision is, in other words, a discretionary one. So it is subject to review only on limited grounds and will not ordinarily be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. Consistent precedent has it that the Tribunal will not substitute its own assessment or direct that a new one be made unless it is satisfied on the evidence that there is a fatal flaw of that kind. So the complainant's performance of his temporary duties, even though his supervisor thought highly of it, is irrelevant to the question of upgrading his post 3.2764 to BZ.9. The plea fails.

8. The complainant argues that the defendant made an incomplete consideration of the facts in that it had no report on his performance from June 1987 until May 1988. Again the plea cannot succeed since, as was said above, grading depends on the content of the post and not on the incumbent's qualifications or performance.

9. The complainant contends that the descriptions of two other posts, 3.0624 and 3.3267, which are for administrative assistants and do bear grade BZ.9, include the same duties as his own. He objects to the upgrading of a BZ.8 post for an assistant to BZ.9 only six months after the holder of that post joined the unit. He infers that the boards were prejudiced against him.

10. Whether posts are much the same is an issue of fact. The regional Board said that it had made a thorough review of the descriptions of various posts that had formerly been graded BZ.7, BZ.8 and BZ.9 and had compared post 3.2764 with posts 3.0069 and 3.0624. It came to the conclusion that the duties of the latter two were more important and that the Standing Committee on Reclassification of Posts had been right to upgrade 3.2764 in 1987 to BZ.7 and in 1992 to BZ.8. Even supposing that someone else at grade BZ.8 did rise swiftly to BZ.9, his case differs in that he was already on a BZ.8 post whereas the complainant was claiming promotion from BZ.6 to BZ.9. There being no evidence to cast any doubt on the regional Board's findings and conclusions, the Tribunal holds that the comparison the Board made does not bear out the charge of prejudice. The conclusion is that there is no fatal flaw in the decision not to upgrade the complainant's post.

11. He claims payment of the special duty allowance up to 31 July 1995, when he took early retirement, on the grounds that he went on performing the duties of post 3.0069 until that date, the defendant having failed to tell him that he was not to do so.

12. According to Staff Rule 320.4 temporary assignment to duties of a post at a higher grade than that of the staff member may not in any event exceed 12 months and it is only from the fourth month that the staff member is paid the special allowance. The defendant says that a personnel action form dated 10 June 1987 told him that he was not to get the allowance after 1 July 1987, i.e. at the end of the maximum period of 12 months allowed in 320.4. It explains that such a form is, in accordance with Manual paragraph II.4.150, sent to the staff member to inform him of any change in his contractual situation or entitlements. And it is the form that, according to Rule 580.1, constitutes "an amendment to the terms of appointment under Rule 440.3". That is how the headquarters Board of Appeal construed the rules: it held that the personnel action form sufficed to tell the complainant that the temporary attribution of the other duties was to end. There being no reason to depart from that view, the complainant's plea cannot be sustained.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Mella Carroll
E. Razafindralambo
Egli
A.B. Gardner