

EIGHTY-FIFTH SESSION

In re Seim

Judgment 1736

The Administrative Tribunal,

Considering the complaint filed by Mr. Anders Seim against the World Health Organization (WHO) on 24 September 1997, the WHO's reply of 19 December 1997, the complainant's rejoinder of 4 February 1998 and the Organization's surrejoinder of 16 April 1998;

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, a Norwegian who was born in 1948, joined the staff of the WHO on 31 July 1995 as a medical officer at grade P.5 under a two-year fixed-term appointment. He was put on a new post in the Dracunculiasis Eradication Unit of the Division of Control of Tropical Diseases (CTD). (Dracunculiasis is a disease caused by the Guinea worm.) In the first year of his appointment he was on probation.

In a probation report of 18 October 1996 his first-level supervisor recommended confirming his appointment and granting him a step increment, but said that he should improve his French.

His second-level supervisor, the Director of CTD, completed the report. He taxed the complainant with self-will and recommended extending the period of probation to 30 April 1997. The complainant got the report on 19 December 1996. On 30 January 1997 he wrote to the Director of Personnel asking for more specific comment but got no reply.

In another report, dated 14 March and covering the period from 1 August 1996 to 30 April 1997, his first-level supervisor said that he needed to get field experience and to improve working relations with colleagues and recommended seconding him for two years, still on probation, to the WHO's Regional Office for Africa. He got that report on 25 March and in comments of 28 March asked for specific examples of shortcomings in his performance. In comments of 2 April his second-level supervisor recommended terminating his appointment on 30 July 1997.

In letters of 29 April and 2 May 1997 the Chief of Contract Administration and Information told him that his appointment would be terminated on 30 July. He got the letters on 14 May and on the same day appealed to the Director-General, who rejected his appeal in a letter of 17 July 1997, the impugned decision.

B. The complainant submits that the decision shows a procedural flaw and so is unlawful. The Organization failed to send his first report by the end of the normal period of probation, as Staff Rule 540.1 required. The effect was to shorten the extension of probation and leave him little time for any real improvement. Citing Judgment 1246 (*in re Pavlova* Nos. 1 and 2), he argues that the time between the two reports was too short to give him a "proper opportunity of showing his mettle".

There were no objections to his performance in the first year of probation, apart from those of his second-level supervisor. He got on with other staff and heeded the comment that he was self-willed.

The argument that he lacks field experience is in bad faith: neither the job description nor the notice of vacancy mentioned such a requirement.

He asks the Tribunal to quash the decision of 17 July 1997, order his reinstatement as from 1 August with full

salary, emoluments and benefits and send the case back to the Organization for a new decision. He seeks damages for the loss of his right of abode in Switzerland. He claims costs.

C. In its reply the Organization submits that it gave him the report form to fill up in early June 1996, but he did not return it until 31 July. So his supervisors were unable to complete it by the end of the period of probation. The period was accordingly extended to 30 October 1996. Several problems cropped up and the report was not finished until 11 November 1996. But the complainant had been told in July 1996 of his shortcomings and so did have time to improve. He may not properly argue that the extension of probation gave him too little time to seek guidance and improve, since he had known since 19 December 1996 of his second-level supervisor's dissatisfaction.

Citing several incidents, the WHO contends that the complainant was too independent. He was unable to get on with others. A working party, set up according to a memorandum of 31 July 1996 to improve coordination of programmes, gave him the opportunity of working more closely with others. Despite constant talking-to and reminders his conduct showed no improvement between the two reports.

In the Organization's submission it stood to reason that he needed field experience to do his job properly. He fell short in technical competence, command of French, his work was sloppy, and he did not know enough about the way of life in the areas touched by dracunculiasis.

He broke secrecy about some of the work he was doing and gave vent to views on it that were at odds with stated WHO policy. That is not the sort of behaviour the WHO expects of its staff.

Extension is at the Director-General's discretion and the impugned decision shows no fatal flaw.

D. The complainant rejoins that, having asked him to apply for the post, the WHO knew what his experience and qualifications were. And having itself written the notice of vacancy and job description and approved his duties it may not attribute the non-renewal to lack of field experience, something that neither of those texts called for. He doubts that his own incompetence was the real reason for setting up the working party. He was not sloppy; he worked hard and well. He produces references attesting to his interest in the areas where dracunculiasis was rife and to his knowledge of the way of life there. He presses his other pleas.

E. In its surrejoinder the Organization denies ever asking the complainant to apply for his post. For all the criticisms he got, he proved quite unfit for team work. The evidence he offers, purportedly to show that he knew the areas well, in fact bears on other aspects of performance of his duties. The delay in writing his first report - for which he was himself partly to blame - was no reason for his failing to make good the shortcomings already pointed out to him.

CONSIDERATIONS

1. The complainant is a Norwegian doctor. He joined the World Health Organization on 31 July 1995 and took up a grade P.5 post in its Dracunculiasis Eradication Unit. He had an appointment for two years. After the prescribed one year on probation, which it extended to 30 April 1997, the Organization decided on 2 May 1997 not to confirm his appointment, to grant him one last extension of probation, up to 30 July 1997, and then have him go. He appealed, but the Director-General upheld the decision on 17 July 1997, rejecting his pleas about procedural flaws and substantive mistakes in his performance reports, and citing Staff Rules 540 and 1060. The complainant asks the Tribunal to quash that decision and reinstate him.

2. He submits that, though such decisions are at the Director-General's discretion, the Organization missed the deadline in Staff Rule 540.1 for his first performance report, in which his second-level supervisor recommended extending his probation, and that the report failed to say just how he was supposed to do better. He says that in any event his work was good and he cites several references attesting to his competence in fighting dracunculiasis.

3. He was recruited for two years and he had his one year of probation extended until he left. So the impugned decision is not dismissal but refusal to confirm his appointment after a trial period in which he had failed to pass muster. A firm line of precedent has it that an executive head has broad discretion in such matters, but that the decision must not be *ultra vires* and must be free of any mistake of fact or of law, or formal or procedural flaw, or abuse of authority, or any wrong inference from the evidence.

4. The complainant's strongest plea is that the report which prompted the extension of probation showed a

procedural flaw. Yet the flaw is not fatal.

5. Having a two-year appointment, the complainant was required under Rule 420.4 to complete at least one year's probation, or longer if necessary, to allow proper appraisal of his performance, conduct and fitness for international service. The Organization decided on the strength of two reports to extend his probation to 30 April 1997 and then to 30 July 1997, when his appointment expired.

6. According to Rule 540.1 the first report should have been written by the end of the standard period of probation, i.e. by the end of July 1996. Though he got the report form in June, not until 31 July did he enter a self-assessment for the period from 31 July 1995 to 30 July 1996. His first-level supervisor signed on 18 October 1996 and made no adverse comment other than that he needed to improve his French. But his second-level supervisor disagreed: the first-level supervisor's assessment was at odds with what he had said orally, that in his work the complainant was self-willed and uncooperative. The second-level supervisor signed the report on 11 November 1996 with a recommendation for extending probation to 30 April 1997 to allow time for proper appraisal.

7. The second report covered the period since 1 August 1996. The first-level supervisor entered comments on 14 March 1997: he found several shortcomings and said that the complainant lacked field experience, though he might get it if sent out to Africa for another couple of years. On 2 April 1997 the second-level supervisor said that the complainant did not have the technical skills needed for the job and was not yet fit for international service; he was against confirmation and recommended termination on 30 July 1997.

8. Of course the first report should have been done earlier and the complainant is right enough to cite Rule 540.1. But he is wrong to rely on Judgment 1246 (*in re Pavlova 1 and 2*), which set aside a decision on the grounds that performance reports had been late. His own case is quite different in that he was himself largely to blame for the delay, not having filled up the report form until 31 July 1996. Besides, his second-level supervisor had told him orally, before putting it in the report, that he was not cooperative enough. It is plain on the evidence that he knew full well that his performance had been found wanting; so he may not properly argue that he was told too late to be able to improve. And the second report, which came in time, is not challengeable on procedural grounds.

9. Procedural flaw apart, the complainant says, truly enough, that many people found him competent. Yet on the evidence he time and again ploughed his own furrow and paid scant heed to fellow staff or to the WHO's own line. The Organization came to the view that his conduct did not suggest fitness for the international civil service. In doing so it was simply looking to its own interests and there is no evidence of any misappraisal of the facts or of prejudice against him. A fixed-term appointment for two years carries no right to renewal; the decision to have him go was taken after extension of probation; and there was no flaw in the exercise of the discretion that the executive head of an international organisation enjoys in such matters.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

