

NINETY-SEVENTH SESSION

Judgment No. 2326

The Administrative Tribunal,

Considering the complaint filed by Mr P. M. against the World Health Organization (WHO) on 28 October 2002, the Organization's reply of 3 June 2003, the complainant's rejoinder of 18 August and the WHO's surrejoinder of 10 December 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a Congolese national born in 1946, joined the WHO in 1983, at the WHO's Regional Office for Africa in Brazzaville (Congo), as a locally recruited clerk/typist. At the time of the material facts of the dispute, he was a secretary at grade BZ.5.

As a result of events in Brazzaville of 5 June 1997, the WHO decided to close its Regional Office and to transfer its activities temporarily to Harare (Zimbabwe). On 13 June the Regional Director agreed to send 12 staff members, including the complainant, on a mission to Pretoria (South Africa) to help prepare the 47th Session of the Regional Committee for Africa, which was to be held in Sun City (also in South Africa) in early September. The plan was for them to stay in Pretoria until mid July, after which they could be allowed home leave before returning towards the end of August for the Regional Committee meeting. Towards mid July, several of them, who had been internationally recruited, left on home leave. It had initially been envisaged that the other, locally recruited staff, could return to their respective countries, but it was ultimately decided that they would remain in Pretoria. The complainant's travel authorisation was amended on 18 July; it stated that he would assist the WHO's Liaison Office in Pretoria. The complainant went to Sun City from 27 August to 6 September and took part in the Session of the Regional Committee. In accordance with the travel authorisation that had been issued on 5 August for that visit, he returned on 6 September to Pretoria, where he was temporarily assigned to the Liaison Office. On 11 November 1997 the complainant underwent an orthopaedic operation in Pretoria, where he remained for post-operative examinations. On 4 March 1998 the Regional Director telephoned to ask why the complainant was still in Pretoria despite his instructions that all staff should return to the Regional Office after the Regional Committee meeting. The Liaison Office replied, the same day, that it was at the Regional Office's request that the complainant had stayed in Pretoria in order to replace a receptionist. It added that it had drawn the attention of the personnel services to the complainant's continued stay in Pretoria when it had been informed of the relocation of all the Regional Office's staff.

In March 1998 the complainant returned to Brazzaville. The city was then in phase IV of the United Nations security plan (suspension of programmes) and the Regional Office was continuing to operate from Harare. The Regional Office was reopened in Brazzaville on 1 October 2001. In the meantime, the complainant had requested a separation by mutual agreement, which took effect on 1 June 2001.

On 18 November 1999 the complainant notified the Regional Board of Appeal of his intention to appeal against what he deemed to be a refusal to grant him special leave, against his assignment to the Pretoria Office and against his return to Brazzaville. It appears from the Board's report dated 15 May 2001 that the complainant had sent the Board a letter, dated 22 February 2000, in which he accused the WHO:

– of refusing to allow him to take special leave in his home country like his other colleagues, which prevented

him from caring for his daughter, who subsequently died;

- of having assigned him to the WHO’s Liaison Office in South Africa after the 47th Session of the Regional Committee in Sun City, whereas the other secretaries were all transferred to Harare;
- of having notified him in February 1998 to return to Brazzaville at a time when he was on sick leave and when the city was in phase IV of the United Nations Security Plan, which forced him to “return to the Congo and cover long distances on foot [...], with adverse effects on his health”.

The Board concluded that his appeal was irreceivable, on the grounds that it had been filed after the 60-day time limit stipulated in Staff Rule 1230.8. On 3 July the Regional Director endorsed the Board’s recommendation to reject the appeal. In a letter of 27 August 2001, the complainant lodged an appeal against that decision with the Headquarters Board of Appeal. On 10 May 2002 the latter asked the complainant to specify, with respect to his departure from Brazzaville following the events of December 1998, which decision or decisions of the Organization he was challenging, as well as precisely which Staff Rules and Staff Regulations had supposedly been breached.

In its report of 25 June 2002, the Headquarters Board of Appeal concluded that the complainant’s claims concerning the refusal to grant him special leave in July 1997 and concerning his extended stay in Pretoria until February 1998 were out of time and therefore irreceivable; that, “since the situation in Brazzaville had apparently calmed down by February 1998, the Administration was justified in its decision to send the complainant back to his original duty station, where he [had] worked normally until December 1998” and that, “if he had wished to challenge the decision to send him back home in February 1998, he could have done so within the prescribed time limits, before the resurgence of the armed conflict which [had] forced him to flee from Brazzaville”; that, “[d]espite the Board’s express request, the complainant ha[d] failed to identify any specific administrative decision he was challenging, or any precise rule of the WHO which had supposedly been breached, with respect to his flight from Brazzaville in December 1998” and that “the complaint was [therefore] not in compliance with Staff Rule 1230.1”. The Board recommended rejecting the appeal. In a letter of 14 August 2002, which constitutes the impugned decision, the Director General endorsed that recommendation.

B. The complainant lists the “administrative decisions” he impugns. These include: the Organization’s refusal to allow him special leave, notified on 18 July 1997, which he considers led to the death of his daughter on 12 August (according to him, when the preparations for the Regional Committee Session were completed in mid July 1997, in view of the situation in Brazzaville he had asked for authorisation to travel to Libreville, in Gabon, in order to try to reach Pointe Noire, in the Congo, to assist his sick daughter); the travel authorisation of 5 August 1997, which was “not in conformity with [his] status as a member of the [...] emergency team in Pretoria”; and the decisions to “abandon” him in South Africa without assigning him to the Liaison Office, to “expose [him] to militia violence by sending [him] back to Brazzaville”, and to “abandon [him] in Brazzaville in July 1998 when all local staff had been transferred to Harare”.

He complains of discrimination, saying that at the end of the 47th Session of the Regional Committee, he was the only secretary who was not sent to Harare. He is surprised that the personnel managers in Harare were unable to inform the Regional Director of his situation, although his travel authorisation was quite clear. He maintains that, unlike his colleagues who were sent to Harare, he never received the “entitlements” and “allowances” connected with his “status as a staff member away from his normal place of residence”, adding that, during the seven months he spent in Pretoria, he received only half his daily subsistence allowance (per diem). He accuses the Regional Director of having obliged him to return to Brazzaville at a time when the city was in phase IV of the security plan, in breach of the United Nations instructions concerning security away from Headquarters.

According to the complainant, it was only in March 1998 that he realised that he had been sent back to Brazzaville not because the Organization needed his services there but because he was becoming “a burden”. It was at that stage that he took the necessary steps to lodge a complaint with the Regional Board of Appeal. He was unable to do so, however, because communications with Brazzaville had been cut off. After being forced to take refuge in the forest when the fighting grew worse, he was able to return home only in October 1999, whereupon he resumed his efforts to lodge an appeal.

The complainant asks for several witnesses to be heard and claims 200,000 United States dollars in damages.

C. In its reply the WHO recalls that under Staff Rules 1230.1 and 1230.8, a staff member may not bring an appeal against an administrative action or decision affecting his appointment status until all the existing administrative channels have been tried and the action complained of has become final. It doubts whether the supposed “impugned decisions” meet these requirements, since the complainant, in some cases, even fails to mention any decision at all. Nevertheless, even assuming the “decisions” were challengeable, the complaint is still, according to the WHO, irreceivable because it was filed beyond the time limit, which is 60 days for lodging an appeal before the Regional Appeal Board. Since the complainant notified his intention to appeal on 18 November 1999 in connection with facts which had occurred between one and more than two years earlier, his appeal was time barred, which was the conclusion arrived at by the two Boards of Appeal. In the WHO’s opinion, the complainant cannot plead communication difficulties related to the war in the Congo, since he had the opportunity to file an appeal within the prescribed time not only while he was in Pretoria but also on his return to Brazzaville in March 1998, especially when he met the person in charge of the “emergency team” there who was responsible for giving him his salary.

The defendant replies on the merits only subsidiarily. It maintains that it has no record of any request for special leave in July 1997 and that the complainant did not object to extending his mission in Pretoria. He continued to receive the applicable per diem in addition to his normal pay. Moreover, the travel authorisation of 5 August 1997 was in order. According to the WHO, the complainant was not “abandoned”, either in South Africa, where he was temporarily assigned to the Liaison Office, or in the Congo, where he continued to receive his salary even during long periods of inactivity. It argues that the decision to recall him to Brazzaville did not breach any rule and that by March 1998 the security situation was improving. It points out that most of the locally recruited staff of the Brazzaville Office stayed in Brazzaville and that in July 1998, contrary to the complainant’s assertions, none of them was transferred elsewhere, even though a few were sent on mission to Harare. It maintains that all security directives were complied with. It rejects the allegation of discrimination on the grounds that the locally recruited staff sent on mission to Harare were in a different situation in fact and in law. Lastly, it considers that the hearing of witnesses would serve no purpose.

D. In his rejoinder the complainant argues that in wartime “normal” procedures can no longer be strictly applied and that the Tribunal should therefore agree to take up his complaint. He explains that if he did not appeal against the decisions within the prescribed time limit, it was because he was not yet aware that what he took for bad management or precautionary measures were in fact premeditated acts intended to harm him. He accuses the Regional Director of having deliberately sent him to Brazzaville in order to prevent him from appealing, after he had asked him in Pretoria in October 1997 to make his relocation official.

He rejects the WHO’s arguments and asserts that by September 1998 the fighting had spread throughout the Brazzaville region. He refers to two documents annexed to the complaint as evidence that he was due to leave for Libreville in mid July 1997. He believes he was discriminated against, since he was the only member of the team sent to Pretoria to prepare the 47th Session of the Regional Committee who was obliged to stay there pending the departure for Sun City and the only one whose travel authorisation for Sun City entailed a return to Pretoria. He says he does not hold the Organization responsible for his daughter’s death, but considers that it should be charged with “premeditating homicide” and he reiterates that by sending him back to Brazzaville – which could not have been in the interest of the Organization since programmes had been suspended – it had deliberately opted to expose him to militia violence. Lastly, he contends that he was never on mission in Pretoria but had been *de facto* “relocated” there.

E. In its surrejoinder the defendant submits that the complaint is irreceivable. The complainant’s argument regarding “wartime” does not stand because there was no war in South Africa and the “relative quiet” that prevailed in Brazzaville in March and April 1998 in no way prevented him from appealing within the prescribed time limits against his return to Brazzaville. It formally denies there was any sort of conspiracy against him, pointing out that in any event it does not affect the time limit for appeal.

In the WHO’s view, the documents annexed to the complaint to which the complainant refers do not prove that he requested special leave in July 1997. It contends, moreover, that special leave is not a right and that the decision to extend his mission in Pretoria was taken in the interest of the Organization, in the light of his qualifications, since he was the only bilingual secretary. It argues that the complainant’s delayed objections in that respect – considering that he opposed the extension only two years later when he filed his appeal with the Regional Board of Appeal – cast doubt on his good faith. Lastly, it explains that the decisions concerning the temporary assignment to Harare of some staff members of the Office in Brazzaville were taken in the light of service requirements and of their

financial implications, but that the Organization was under no obligation to send staff recruited locally in Brazzaville to Harare.

CONSIDERATIONS

1. The complainant, a staff member of the WHO of Congolese nationality locally recruited to serve in the Organization's Regional Office in Brazzaville, challenges the Director General's decision of 14 August 2002 to endorse the recommendation of the Headquarters Board of Appeal that his appeal be rejected as time barred.

2. The provisions of the Staff Rules referred to by the defendant read as follows:

Rule 1230.1

"Subject to the provisions of Rule 1230.8, a staff member may appeal against any administrative action or decision affecting his appointment status [...]."

Rule 1230.8.3

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. [...]"

3. The Tribunal's first observation is that, with respect to his allegation that he was "abandoned in Brazzaville" in July 1998, despite the request of the Headquarters Board of Appeal the complainant does not refer to any specific administrative decision which may be challenged, nor to any specific provision which was supposedly breached. In this respect his appeal therefore contravened the provisions of the above mentioned rules and was quite rightly found irreceivable.

4. With respect to the other impugned "decisions", the complainant does not deny that he appealed after the 60-day time limit stipulated in Rule 1230.8.3, but he justifies his late appeal by arguing that, "as part of the plans drawn up against [him], a strategy had been deployed to prevent [him] from complaining" and that he had only become aware of this when he was "expelled" from Pretoria and sent back to Brazzaville. In his view, any notion of a time limit in the circumstances is entirely relative. He considers that since it was "a plot [...], the person behind it had every interest in making sure that any chance of appeal was ruled out".

Like the Headquarters Board of Appeal, the Tribunal notes that the travel authorisation which the complainant considers to be a decision to refuse his request for special leave is dated 18 July 1997 and that, in accordance with the provisions of Rule 1230.8.3, the intention to appeal should have been notified within 60 calendar days of receipt of the travel authorisation.

Since the complainant notified the Regional Committee only on 18 November 1999, his appeal was out of time.

Similarly, with respect to the complainant being "abandoned" in South Africa as a result of the travel authorisation of 5 August 1997, which supposedly constituted a decision he could challenge, the appeal should have been filed not later than October 1997. The appeal filed in 1999 must therefore be considered time barred.

In view of the fact that these "decisions" were taken and notified while the complainant was still in South Africa, where he stayed on for several more months, the arguments he puts forward to justify his late appeal must be discarded. There was nothing to prevent him from appealing within the prescribed time limit, even if, as he alleges, it was all part of a "plot" against him, since there was no impediment, while he was in South Africa, to his filing an appeal with the Regional Appeal Board.

5. The complainant was notified of the decision to send him back to Brazzaville in February 1998. He returned there in March 1998 and worked there normally until December 1998, according to the findings of the Headquarters Board of Appeal. He therefore had the opportunity to challenge that decision within the prescribed time limit, especially when he met the person in charge of the "emergency team" set up in Brazzaville prior to the resurgence of the armed conflict in the city. His appeal against that decision was therefore quite rightly deemed irreceivable.

6. According to Article VII, paragraph 1, of the Statute of the Tribunal, a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

According to the Tribunal's case law, to satisfy that requirement the staff member must have duly lodged an internal appeal with the competent body within the prescribed time limit (see Judgment 2010 in particular). In the present case, since the complainant filed his appeal with the Regional Appeal Board after the 60 day limit stipulated in Staff Rule 1230.8.3, his complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal and must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet