

***In re* MAGASSOUBA**

Judgment No. 324

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Computing Centre (World Health Organization) by Mr. Mamady Magassouba on 25 August 1976, the WHO's reply of 4 November 1976, the complainant's rejoinder of 24 January 1977 and the WHO's surrejoinder of 18 February 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the WHO Staff Rules (which also apply to the staff of the International Computing Centre), particularly Staff Rule 520;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The International Computing Centre is run by the World Health Organisation (WHO) but is also used by the United Nations, the United Nations Development Programme and others.

On 14 January 1974 the complainant joined the staff of the Centre as a computer operator on a two-year appointment at grade G.3. On 13 December 1974 he had his appointment confirmed and was given a salary increase of one step which took effect on 1 January 1975.

B. In September 1975 the complainant drew up a "test run" of his own and, although his supervisors had expressly refused him permission to do so, had it put through the computer by Mr. Micuta, a programmer analyst. The Administration took the view that the complainant had been guilty of misconduct in using the computer for his own purposes and set him to less responsible work "in which he might be watched and allowed less direct access to the computer". On 10 September 1975 the Director of the Centre told the complainant orally that on expiry his contract would not be renewed. On 18 December the Administration confirmed its decision not to renew his contract. According to the complainant the reasons it gave for doing so were that he had processed work without permission and so committed a misuse of funds, had improperly passed on computer print-outs and had acted beyond the scope and in breach of his duties as a staff member.

C. The complainant thought the decision unfair and appealed to the headquarters Board of Inquiry and Appeal. In its report of 19 March 1976 the Board recommended: "(a) that Mr. Magassouba's contract should be renewed for two years to allow for a harder effort at mutual comprehension and communication and for his full integration; and (b) that as a disciplinary measure his within-grade salary increase should be withheld for six months and then an interim report should be made to decide whether to lift the penalty". By a letter of 31 May 1976 the Director-General of the WHO told the complainant that he could not endorse the Board's recommendations. "I take the view", he said, "that your misconduct justifies the decision not to renew your contract beyond 31 January 1976. In particular, although you were aware of the safety rules in force at the International Computing Centre, you saw fit to ignore them and the consequences which their breach might have for the large stock of data stored at the Centre by several United Nations agencies. You also failed to take account of the confidential nature of any information your section dealt with." That is the decision now impugned.

D. The complainant asks for the decision to be quashed. He argues that it was based on errors of fact in that a simple test run cannot endanger the safety of the confidential data stored at the Centre. It overlooked essential facts inasmuch as the disciplinary measure imposed was out of proportion to the misconduct. It was discriminatory: "several staff members had already used the computer for private purposes to check their work" and the complainant was the only one to suffer disciplinary action. Lastly, the authority which took the decision based it on a mistaken and abusive interpretation of the texts, "some of which were quite unknown to the complainant".

E. The complainant asks the Tribunal to quash the Director-General's decision of 31 May 1976 for the reasons set out in paragraph D above: to order his reinstatement on a two-year appointment or, alternatively, award him damages amounting to not less than the equivalent of two years' salary; and to award him 15,000 French francs as costs. In his rejoinder he further asks that an inquiry be ordered into the circumstances of his departure from the International Computing Centre.

F. In its reply the WHO observes that the Tribunal has consistently taken the view that the holder of a fixed-term contract has no right to its renewal and, renewal being at the Director-General's discretion, the Tribunal may exercise only its limited power of review. The impugned decision is not tainted with any of the flaws which entitle the Tribunal to exercise such limited power of review. In particular, it is free from the flaws alleged by the complainant and listed in paragraph D above.

G. The WHO contends that the Director-General's decision was lawful and also fully warranted and that none of the claims for relief is valid. It asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

As to the evidence in the dossier:

1. The WHO accuses the complainant of carrying out a programming exercise on 9 September 1975 and so, for one thing, putting at risk the accuracy of data stored by the computer of the International Computing Centre. The complainant maintains that he carried out a "simple test run" which, "not having been put through the memory of the computer", could not interfere with its operation. In fact the Tribunal cannot tell exactly what the complainant did. He has not produced any document or documents to shed light on the matter or any precise information on the nature of the charges against him. Since documents and explanations of the kind any expert would need are lacking, the complainant's request for an expert inquiry should be dismissed. Nor does it appear likely that the hearing of witnesses would add anything worthwhile to the evidence in the dossier.

As to the Tribunal's power of review:

2. The impugned decision was based on the WHO Staff Regulations and Staff Rules, which apply to the staff of the International Computing Centre, and the purport of the decision was to refuse to renew the complainant's appointment when it expired on 31 January 1976. That is a decision of a discretionary nature and one which the Tribunal may quash only if it was taken without authority or violated a rule of form or of procedure, or if it was based on an error of fact or of law, or if essential facts were not taken into consideration, or if the decision was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

As to the complainant's pleas:

3. First, the complainant argues that the impugned decision is based on three errors of fact, namely wilful breach of the safety rules at the International Computing Centre, wilful disregard of the possible consequences for the important stock of data stored in the computer by several United Nations agencies, and disregard of the confidential nature of those data.

As to the first alleged error of fact, it appears from the dossier that the complainant did indeed wittingly and wilfully break the rules adopted by the International Computing Centre to afford users the security to which they are entitled. The complainant himself does not deny that. Indeed he admits that in presuming to put through a test run of his own he did not follow the instructions of his supervisors, who had expressly refused him permission to do so.

The Tribunal cannot check the other two allegations of errors of fact since it has no information on the real nature of the exercise carried out by the complainant. It was for him to provide the written evidence or at least the explanations which would have enabled the Tribunal to give an informed opinion. It cannot therefore treat as errors of fact the second and third grounds for the impugned decision.

In any case, even if they were proved to be errors of fact, the breach of the security rules would alone have warranted the decision not to renew the complainant's appointment. Use of a computer by an unqualified or unscrupulous person may lead to errors or breaches of confidence. That is why it is important to define exactly the duties of the staff of a body such as the International Computing Centre and require every single employee to show

strict respect for the limits of his duties. The complainant was employed as an operator and in exceeding his functions as such failed in a basic duty. In other words, whatever the actual consequences of his conduct may have been, it warranted the decision not to renew his appointment.

4. The complainant is wrong in contending that the impugned decision overlooked essential facts.

True, a report of 27 November 1975 on the complainant's performance does not mention what happened on 9 September 1975. Contrary to what he contends, however, that omission need not mean that the WHO chose to overlook his misconduct. In the space for general observations on the official's performance the author of the report merely wrote "None". He also crossed out the space left for a possible recommendation of a salary increase. Such absence of evaluation can only betoken the same desire to end the complainant's appointment as the WHO had, on his own admission, already notified to him on 10 September 1975.

The complainant further points out that because of the misconduct he was charged with he was merely given a warning and transferred to less responsible work. In his view the limited scope of such action shows that he had not committed misconduct serious enough to warrant not renewing his appointment. In fact the WHO at once considered ending the complainant's appointment on 31 January 1976 and in the meantime transferred him to a post in which he was closely watched. It therefore had no compelling reason to impose on him such a penalty as summary dismissal. Indeed what it showed was not inconsistency, but consideration.

5. The complainant also observes that other staff members used the computer as he did but suffered no penalty whatever and that he was therefore discriminated against. But he names only one of the staff members who he says committed such a breach of duty. The WHO has produced evidence to establish that that staff member did not go beyond the scope of his duties. His case is therefore not the same as the complainant's and so the charge of discrimination appears groundless.

It is true that the complainant did not act on his own but with the help of a programmer and that the WHO mistakenly extended the latter's appointment by one year, instead of letting it end on 31 December 1975 as it had intended. Both officials have now left the International Computing Centre, however, and so in the long run were treated equally.

6. Lastly, the complainant sees an error of law tantamount to an abuse of authority in the fact that the WHO has produced documents which apparently afforded the basis of the impugned decision but of which neither he nor, he maintains, other staff members were aware. The validity of the decision must be judged, however, by its purport rather than by any documents produced in the course of the proceedings. It appears clearly from the terms of the decision that it was correctly based on a breach of the safety rules at the International Computing Centre - in other words on a breach of the complainant's terms of appointment and of his acceptance thereof. The allegation of error of law is therefore not proved.

7. The other points debated by the parties are not material. In particular, there is no need to consider what training opportunities the Centre offers its staff since the complainant was given no promise on that score. It is also immaterial whether the complainant caused his employer any material prejudice. What matters is that he committed a breach of duty which warranted the decision not to renew his appointment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 November 1977.

(Signed)

M. Letourneur

André Grisel
Devlin

Roland Morellet

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