FORTY-FIRST ORDINARY SESSION

In re GHAFFAR (No. 2)

Judgment No. 363

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Abdul Ghaffar on 14 November 1977, the WHO's reply of 31 January 1978, the complainant's rejoinder of 23 March and the WHO's surrejoinder of 5 May 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the WHO Staff Rules, particularly Staff Rules 830.1 and 1030.3, and the WHO Manual, particularly provisions II.2.280, II.2.305, II.2.315-325, II.2.327 and II.2.450;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant first served on the WHO staff from 1 May 1963 to 1 June 1972 as an administrative assistant. During that period he was stationed in Karachi and Mogadishu. On 9 December 1974 he was re-employed as a "senior secretary/administrative assistant" and sent to Dubai and then to Abu Dhabi. He was given a two-year appointment subject to one year's probation. During the probation period his performance was considered unsatisfactory and his appointment, not being confirmed, expired on 11 June 1976.(1)

B. The complainant contends that he is entitled to have the period during which he received the per diem installation allowance extended from 3 August 1975, when he was transferred from Dubai to Abu Dhabi, to 16 May 1976, when he left Abu Dhabi. The Regional Office of the WHO dismissed that claim and he appealed to the Regional Board of Appeal, which also dismissed it. He then appealed to the Headquarters Board of Inquiry and Appeal against the Regional Director's decision to endorse the Regional Board's recommendation, The Headquarters Board reported on 20 July 1977. Having studied the bills, documents and estimates submitted by the complainant, it recommended paying him $2,000 over and above the $4,000 he had already received for the material period. The Director-General endorsed the recommendation and so informed the complainant by letter of 17 August. The complainant agreed, and he was paid the further $2,000.

C. The complainant argues that because of very serious housing difficulties in Abu Dhabi he failed to find accommodation and had to stay in hotels, for some of the time with his dependants. The $2,000 paid to him cannot make up for the withholding of the per diem allowance which he is claiming. In his claims for relief he asks the Tribunal to order the WHO to pay him the per diem allowance for the period during which he and his four dependants stayed in hotels in Abu Dhabi, i.e. 203 days for himself and 104 days for his wife and three children, less 30 days' installation allowance received for his dependants at half the normal rate, i.e. 203 days' per diem for himself and 74 for his dependants. He also asks the Tribunal not to deduct the $2,000 from the amount of the allowance he claims but to treat that sum as payment to offset part of the losses due to such factors as inflation and devaluation of the dollar, and the fact that he had to sell personal effects such as his motorcar to pay his hotel bills.

D. The WHO says that under the relevant provisions of the Staff Rules and the Manual the complainant is not entitled to extension of the period of payment of the per diem allowance which he is claiming. It further contends that the sum of $2,000 paid to him was calculated on the basis of the bills, documents and estimates which he himself submitted. In any event he accepted the offer of $2,000 and was paid that sum and is therefore estopped from referring to the Tribunal a matter already settled by that acceptance. The WHO therefore asks the Tribunal to declare that the payment of the $2,000 to the complainant fully meets his claim and to dismiss the complaint.

CONSIDERATIONS:

1. Normally a staff member is expected to find his own living accommodation for himself and his dependants and to pay for it out of his salary and allowances. It is however recognised that upon a change of duty station a staff

member may not at once succeed in finding accommodation at normal rates. Accordingly the Staff Rules provide for the payment of an installation allowance. The allowance is paid at a rate per diem calculated in a certain manner and the conditions for receiving it vary over three periods.

In the first period of 30 days the allowance is paid automatically; MS II.2.280. In the second period an extended allowance may be given for a further 60 days at 60 per cent of the full rate. This allowance is conditional; MS II.2.315-320. Approval for it may be given provided that the staff member is incurring additional expenses by being required to stay in an hotel beyond the normal installation period and that he is actively engaged in a search for appropriate accommodation outside the hotel and has been unable to find it. Finally, in what may be called the third period which is indefinite, it is provided that in very exceptional circumstances the Organization might consider extending the installation allowance beyond the maximum periods established above where failure to do so would result in real financial hardship.

2. The complainant was transferred to Abu Dhabi on 3 August 1975 and remained there until 15 May 1976. He spent the whole time in an hotel, sometimes with and sometimes without his family. He attributes this to the extreme housing shortage in Abu Dhabi, to the difficulty of obtaining short rentals and to the uncertainty of his own term of service. The Organization were entitled to terminate his contract on 8 December 1975, i.e. after four months in Abu Dhabi, and an unfavourable appraisal report, given on 25 November and held in Judgment No. 320 to be unjustified, suggested that they would do so. In fact they extended it, first for four months and then for a single month.

3. The complainant was duly paid the installation allowance for the first period, amounting to US$4,770. His application for extended allowance was rejected by the Regional Director whose decision was sustained by the Regional Board of Appeal. On an appeal to the Headquarters Board of Inquiry and Appeal that Board recommended to the Director-General that a further $2,000 should be granted to the complainant. On 17 August 1977 the Director-General wrote to the complainant: "In order to finally settle your claim, I have decided to accept the Board's recommendation ... this amount will be paid to you on receipt of your payment instructions". The complainant gave the necessary instructions and has received the $2,000.

4. The complainant has appealed against the decision of 17 August on the ground that the Headquarters Board in its recommendations failed to apply either correctly or at all the relevant Staff Rules. The Organization, besides contending that on the true construction of the Staff Rules the complainant would be entitled to nothing more than the $4,770, objects that the complainant, having elected to take payment of the $2,000 is estopped from contending that he is entitled to anything more. The Tribunal will deal with this objection first.

5. It is true that a debtor is entitled to offer a creditor less than the amount of the claim - maybe less than he knows the creditor is entitled to - and, if he attaches to the offer the condition that it is to be accepted in full and final settlement, the creditor cannot accept the payment and reject the condition. But the Tribunal is not here dealing with a debtor and creditor situation. Debtor and creditor can negotiate a settlement, but the Director-General cannot negotiate; he has to decide upon what is just and, unless he errs in the exercise of his discretion, his decision settles the matter. Staff Rule 1030.3 provides: "The Headquarters Board of Inquiry and Appeal shall report its findings and recommendations to the Director-General with whom the final decision shall rest ... the Director-General shall inform the appellant of his decision and shall at the same time inform the appellant of the recommendations made by the Board".

When therefore the Director-General awards, as in this case, a sum of money as payable to the complainant, it is because he has decided that in the light of the Board's recommendations and of any other relevant circumstances such a sum is justly due. The sum becomes payable forthwith and the Director-General is not empowered to attach to this payment any condition that is not warranted by the Regulations. So, if which is very doubtful, the language of the letter of 17 August 1977 is sufficient to attach to the payment the condition that the complainant would by accepting it abandon his right of appeal to the Tribunal, this condition would be invalid and of no effect. The objection is over-ruled.

6. The complainant's case on the merits is that he is entitled to be paid extended installation allowance up to the end of his stay at a per diem rate, presumably that applicable to the

second period; he does not quantify the amount claimed. The Board did not accept this. On the contrary, under the provisions relating to the second period it awarded nothing at all.

It accepted the Organization's argument that the word "may" in MS II.2.317 (following on the use of the same word in the preceding rule: "The installation allowance ... may be extended") means that the extended allowance was discretionary and exceptional and, it would seem to follow, something that the Organization could pay or not as it wished. The Organization in its argument before the Tribunal relies on this interpretation of "may", saying that the word imports "a large measure of discretion in allowing or disallowing requests" for an extended allowance. The Organization submits also that the Board made no finding of fact which would justify a conclusion that the conditions governing the second period have been fulfilled.

7. If there is a large discretion in respect of the second period, it would seem to follow that from the language of MS II.2.327 that the discretion of the third period should be even larger. The Board does not however adopt this view. With the obvious intent of arriving at what it hopes will be regarded as a fair and sensible solution, the Board suggests that compensation should be paid to the complainant on the basis of what he is actually out of pocket. Accordingly, basing itself on the actual expenditure incurred by the complainant on hotel accommodation from beginning to end, it calculates that he paid $6,701 more than he would have had to have paid if he had found accommodation. From this it deducts $4,770, which is the total he received from the beginning to end in installation allowances. This leaves a balance due to him of $1,931 which the Board rounded off at $2,000.

8. As to the second period, the Tribunal does not accept the interpretation of "may" advanced by the Organization and apparently accepted by the Board. When a regulation or rule makes the payment of a sum subject to conditions and the question whether or not a condition is fulfilled is a matter for a discretionary judgment, "may" is a more appropriate word to use than "shall" or "must". The question whether circumstances "require" a staff member to stay in an hotel or whether he is "actively engaged" in a search for appropriate accommodation, are not pure questions of fact; they involve an element of judgment. The use of the word "shall" would indicate an objective standard, i.e. that an appellant board or tribunal was to aim at its own judgment. "May" makes it clear that the official whose duty it is to give or withhold approval is to apply his own judgment to the questions. If in good faith and on reasonable grounds he withholds approval, that concludes the matter. So in this sense he may or may not approve. But the use of the word "may" is quite inadequate to confer on the official a large and unbounded discretion so that, even where the conditions were manifestly fulfilled, he could for any other reason that appealed to him or for no given reason withhold the allowance.

9. The Organization contends that on the facts found by the Headquarters Board and on the evidence before it, the condition of active search was not fulfilled. The Board did not make a definite finding on this point, but it could hardly have recommended a reimbursement of $2,000 if it thought that the expenditure was due to the complainant's own lack of diligence in searching for accommodation. The Board found expressly that there were extremely difficult housing conditions prevailing in Abu Dhabi, but stated nevertheless that the documents did not provide sufficient evidence of the complainant's "strenuous efforts". In the opinion of the Tribunal the crucial point is that the complainant was never able to commit himself for longer than four months at the outside. This means that he could look only for a monthly tenancy and his evidence that monthly tenancies were non-existent is uncontradicted. There is not in the dossier any discretionary finding on this point that is binding on the Tribunal, which is therefore free to conclude on the facts, as it does, that the complainant searched sufficiently to ascertain that the only accommodation appropriate to him was not obtainable. Since he was paying out in hotel bills alone substantially more than he was actually receiving in salary and allowances and was having to raise money by selling his belongings, it would be surprising if he were neglecting any opportunity of finding anything cheaper. Accordingly the Tribunal finds that the claimant is entitled to be paid an extended installation allowance in respect of the second period.

10. As to the third period, the language of MS II.2.327 is so loose as to make it possible to argue that the rule confers no rights at all, that it is merely a notification that in certain circumstances ex gratia payments might be considered. But it would be surprising to find such a notification inserted in a manual which is concerned with rights and duties and surprising also to find that a staff member was made dependent on ex gratia relief for real financial hardship suffered in the service of the Organization. At any rate it is not argued that the provision is ex gratia; the Organization argues for the same "large measure of discretion" as it claims for MS II.2.317. This means that as in Rule 317 the discretion must be related to the conditions imposed, where certainly the breadth of language, "very exceptional circumstances" and "real financial hardship", allows for a wide discretion in interpretation. There is however nothing in the dossier to show that the Organization exercised any discretion in relation to the conditions imposed. In so far as a discretion was exercised in the recommendations of the Board, and therefore by the Director-General who adopted the recommendations, the Board must have been satisfied that both conditions were fulfilled since otherwise there would be no basis for the award of $2,000. Nevertheless, the

Tribunal will state its own conclusions on the evidence.

11. The Tribunal is satisfied that the circumstances were very exceptional. It bases this conclusion not merely on the exceptional housing conditions in Abu Dhabi but also in the lack of assistance given to the complainant by the WHO Representative. The Board considered that he "should have made much more intensive efforts". His mistreatment of the complainant, as recorded in Judgment No. 320, made it impossible for the complainant to plan ahead and to make proper arrangements for his wife and family. Had he assured the complainant, as he should have done on his transfer to Abu Dhabi, that he could safely plan for a stay of 18 months, the complainant's search for accommodation might have been fruitful. Such lack of consideration and such mistreatment must surely be very exceptional.

The Tribunal is satisfied also that there was "real financial hardship". The Tribunal takes that to mean that the cost of the transfer and installation would, unless it was lightened, place an appreciable financial burden on the complainant. It is agreed that his monthly salary and allowances amounted to less than 4,000 dirhans. The calculations made by the Board show that his monthly expenditure for loding and food was 5,603 dirhans, although he had his wife and family with him for only half the time. The calculations show also that what the Board calls the "excess costs", i.e. the excess cost of hotel life over normal life in rented accommodation, was 2,940 dirhans a month or about three-quarters of his monthly remuneration. The Tribunal concludes that these figures signify real financial hardship.

12. Accordingly an installation allowance is payable in respect of the third period. The rate for the third period is not specified in Rule 327, but the full rate can hardly have been intended. Rule 327 would read more clearly if for "extending the installation allowance" there were substituted "continuing the extended installation allowance"; but this is what in the opinion of the Tribunal it must mean. The complainant is therefore right in his contention that by basing itself on actual costs the Board devised "an ad hoc formula in my particular case" instead of basing itself on the Rules. It is an attractive idea that Rule 327 should be invoked only to the extent necessary to relieve the financial hardship. But that would mean a reimbursement and not an allowance. The object of an allowance is to settle in advance the difficult questions that often arise on reimbursement, e.g. whether the hotel chosen by the staff member was more expensive than the Administration considered suitable, and to let the staff member know from the first what he has to spend. It is impossible to interpret "the installation allowance" in Rule 327 as meaning a reimbursement of excess costs or to calculate it in any manner other than that prescribed by Rule 320.

13. The complainant has asked also for compensation for inter alia the fact that he had to raise money to pay his hotel bills by selling his personal belongings, including his car and his wife's jewellery at throw-away prices. The Tribunal has no difficulty in believing that after he had spent his initial installation allowance, he must have been desperate for money. His hotel bills exceeded his income by about 40 per cent and left him still to provide for all his other expenses and to support his wife and family in Pakistan when they were not with him. On the Board's computation and on the assumption (which is not justified by the terms of MS II.2.280) that the whole of the initial installation allowance is intended to meet only lodging expenses, he had somehow to find an extra $2,000, i.e. 8,000 dirhans, simply to pay his hotel bills. This is a situation which the Organization should not have allowed to arise. If instead of selling his belongings he had been able to borrow the money, he would doubtless have had to pay a very high rate of interest; accordingly the Organization should pay a high rate on the sums unjustifiably withheld. The Tribunal will take 1 January 1976 as being about the middle of the period which should have been covered by extended installation allowance and order that interest on the amount to be paid under this Judgment should run from 1 January 1976 at the rate of 20 per cent per annum until the date of payment. In the case of the first $2,000 of that amount, payment means of course the actual date when the $2,000 were paid.

DECISION:

For the above reasons,

1. The decision of the Director-General of 17 August 1977 is quashed.

2. It is declared that the complainant is entitled to be paid extended installation allowance calculated in accordance with MS II.2.320 for the period from 2 September 1975 until 16 May 1976.

3. It is ordered that the sum so calculated, less $2,000 already paid, be paid to the claimant by the Organization with interest thereon in accordance with paragraph 13 above.

4. It is ordered that the Organization pay to the complainant $500 in respect of his costs.

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 13 November 1978.

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. The complainant appealed to the Tribunal against the decision not to confirm his appointment and by Judgment No. 320 the Tribunal ordered his reinstatement.

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