

## **FORTY-FIFTH ORDINARY SESSION**

### ***In re* MOLINA**

#### **Judgment No. 440**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Francisco Walter Molina on 23 October 1979, the WHO's reply of 19 December 1979, the complainant's rejoinder of 27 May 1980, the WHO's surrejoinder of 30 June, the complainant's further memorandum of 10 July and the WHO's observations of 13 August 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 420.4, 1060 and 1210.1 and WHO Manual section II.9.410;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. On 25 June 1978 the complainant was given a two-year appointment, subject to one year's probation, as a P.4 analyst under the WHO's Information System Programme (ISP). In a performance appraisal report dated 18 May 1979 his first-level supervisor, Dr. Mandil, ticked the heading "non-confirmation of appointment under Staff Rule 960 [later numbered 1060], as this staff member's services have not been satisfactory" and thereby recommended against confirmation. In a long appendix Dr. Mandil explained that the reasons for his recommendation were the complainant's lack of respect for his colleagues, whom he was trying to supplant, and his arrogance, which made him quite determined to have his own way at work despite repeated warnings from his supervisor. On 8 June the complainant appended comments running to over 40 pages and formally challenging his supervisor's remarks. In his view the real reason for the recommendation was that at a meeting held on 21 November 1978 and chaired by the Deputy Director-General, at which those present had been invited to comment frankly on the use of the computer by WHO staff, he had unwittingly expressed an opinion at odds with that of his supervisor, who had then taken to harassing and humiliating him and encouraging the other members of the staff to support arbitrary and groundless charges against him. Those charges had nothing to do with the complainant's performance and were subjective and emotional. Dr. Mandil's supervisor, Dr. Flache, an Assistant Director-General, heard Dr. Mandil's and the complainant's versions. He gave a hearing to the complainant on 24 May 1979 and to several of his colleagues and then, on 15 June, added his own comments to the report. "Without sharing entirely the negative views expressed by Dr. Mandil" he believed that it would not be in the WHO's interest to keep the complainant on the staff and therefore recommended terminating his appointment at the end of the probation period "on ground of unsuitability for WHO's services". On 20 June the Chief of Personnel informed the complainant that Dr. Flache had approved the recommendation of the Director of ISP for terminating his appointment on the grounds of "unsatisfactory performance and unsuitability to international service", but that his probation would be extended by one month, to 24 July. His appointment would then terminate and he would thus be given the one month's notice stipulated in Staff Rule 1060 (formerly 960).

B. On 11 July 1979 the complainant appealed to the Director-General asking him, in accordance with Staff Rule 1210.1, to review the decision to terminate his appointment. In his view it had been "made for reasons not connected with /his/ performance, conduct or suitability for international service" - the only criteria set out in the rules - and suffered from many procedural irregularities. The Director-General saw the complainant on 6 July but on 23 July wrote to him saying that he had regretfully reached the same conclusion as Dr. Flache: it would not be in the WHO's interests to keep him on the staff. The Director-General also rejected the allegations of procedural flaws and said that he had himself considered the comments by the complainant's supervisors, the complainant's own comments dated 11 July and those of the Ombudsman dated 26 June. It is the decision of 23 July 1979 which is impugned.

C. The complainant again alleges the following procedural flaws: (1) Extension of probation for the sole purpose of

giving notice of dismissal is not allowed under the rules. It is provided for neither in Staff Rule 1060, which relates to notice, nor in Staff Rule 420.4, which relates to the extension of probation. (2) Dr. Flache took his decision before the complainant had been given an opportunity to answer Dr. Flache's comments appended to the report. Manual section II.9.410 requires that the final decision should not be taken until the staff member has been given a hearing. (3) Dr. Flache ought not to have taken the decision himself since he had commented on the performance report and was therefore both judge and party. (4) The performance report is dated 18 May whereas the probation period was to expire on 24 June. The report was therefore premature since Staff Rule 420.4 requires that the probation report should be written not earlier than one year after appointment. (5) The terms of the decision are quite vague. In his arguments on the merits the complainant explains that the effect of the fifth flaw was that he was not properly informed of the criticisms of his performance, and it was difficult for him to defend himself since there were wide differences in the criticisms made by his first-level supervisor, by Dr. Flache in his decision of 20 June 1979 and by the Director-General in his decision of 23 July 1979. The complainant firmly maintains that the decision was really prompted by the incident on 21 November 1978 and was therefore taken for reasons not connected with his performance, conduct or suitability for international service. Since those are the only three criteria mentioned in Staff Rule 1210.1, the material rule, the decision is tainted with abuse of authority.

D. In his claims for relief the complainant asks the Tribunal to annul the appraisal report dated 18 May 1979 and all the consequences thereof; to order either his reinstatement up to the end of his two-year appointment, i.e. for eleven months, or, failing reinstatement, payment to him of eleven months' salary and allowances; payment of 100,000 United States dollars in compensation for the loss of career possibilities and professional standing, harassment, humiliation, hardship, pain and suffering and the other moral and material prejudice attributable to the Administration's actions; and payment of his costs.

E. In its reply the WHO rejects all the allegations of procedural flaws. (1) When a probation report is challenged, both sides need time to express their views, and the WHO's practice is therefore to extend the probationary period so as to respect the required period of notice. That is in no way harmful to the staff member's interests. (2) The WHO concedes that Dr. Flache's comments on the appraisal report ought to have been notified to the complainant before the decision was taken, but Dr. Flache did see him before making his comments, and besides the error was made good in that the final decision impugned was taken by the Director-General himself after reading the complainant's written observations and giving him a hearing in person. (3) Dr. Flache was the Assistant Director-General competent to take the decision not to confirm the appointment. Had the decision been taken by some other Assistant Director-General, the complainant might well have objected that the decision had been taken without authority. (4) For obvious practical reasons the probation report has to be written some time before the end of the probationary period - for example to let each side express its views. (5) Dr. Mandil merely ticked the relevant heading in the report, but his comments make it quite clear that his recommendation against confirming the appointment had nothing to do with the complainant's professional knowledge or skills but was founded on his inability to establish satisfactory working relations with his supervisor and the other staff members. In his comments Dr. Flache confined the grounds for his recommendation to unsuitability for international service, one of the three criteria mentioned in the rules, and the Director-General endorsed that. As to the merits, the WHO points out that the Tribunal has repeatedly affirmed - for example in Judgment No. 318 (in re Joyet) - that it exercises only a limited power of review over decisions not to confirm an appointment at the end of the probationary period. The Tribunal will interfere only where there has been an error of fact or of law, or a lack or abuse of authority. The whole purpose of probation is to find out whether the probationer should be kept on the staff. In this case the Assistant Director-General and then the Director-General, after himself reviewing the case in detail, came to the conclusion that it would be a mistake to keep the complainant on the staff. They took that decision in good faith and they drew no mistaken conclusions from the facts since the complainant's own observations make it plain that he felt bitter, that his belief in his own professional competence made for discord with his supervisor and other staff members and that the terms of his many memoranda were hardly likely to put their relations on any better footing. It was thus quite proper for the Director-General to conclude that working relations could never become harmonious. The WHO therefore asks the Tribunal to dismiss the complaint.

F. On 21 January 1980, before filing his rejoinder, the complainant applied to the Tribunal to order the WHO to disclose a report on an inquiry into staff-management relations in the ISP which the Director-General had had carried out by a member of the staff. The complainant argued that in ignoring the poor state of working relations in the ISP before taking his decision the Director-General left essential facts out of account. The WHO took the view, however, that the report was immaterial inasmuch as the state of relations between the complainant and his supervisor afforded in itself sufficient grounds for the decision. The Tribunal ordered disclosure of the report so that it could determine whether the report was confidential or could be forwarded in whole or in part to the

complainant. The WHO filed the report with the Registrar on 15 April 1980 stating that it was wholly confidential. The Tribunal acknowledged that it was and so informed the complainant and asked him to explain in his rejoinder why he believed that his relations with his supervisor - if indeed they were bad - were not just a matter between the two of them but were due to the behaviour of his supervisor and the other staff members.

G. In his rejoinder the complainant observes that the Director-General had ordered the inquiry into working relations in the ISP because the Ombudsman had pointed out that, besides the poor relations between Dr. Mandil and the complainant, there was the question of Dr. Mandil's management of the staff of his division, and that the two matters were inseparable. The complainant believes it to be clear that the inquiry revealed serious shortcomings in Dr. Mandil's management since, on the strength of the report on the inquiry, the Director-General set up an independent group to advise him on the ISP. That shows that the report did have a bearing on the complainant's dispute with the WHO and he asks the Tribunal to take account of it. He believes that at the very least the burden of proof is on the WHO to show that the way in which the complainant's supervisor treated his staff in general was not the way in which he treated the complainant. As for Dr. Flache's comments on the appraisal report, the WHO has admitted that it was wrong not to notify them to him before the decision was taken, but it mistakenly makes light of the error by saying that in any event the final decision was taken by the Director-General after full review of the case. When presented with an appeal against Dr. Flache's decision, the Director-General ought to have made sure that the decision had complied with the rules. In reply to the Tribunal's question about the relevance of the report the complainant says that his relations with the other staff were satisfactory, especially considering the state of anxiety in the ISP. As is clear from the evidence appended to the complaint, his supervisor's behaviour was the sole reason for the worsening of relations between them. Lastly, the complainant deplores the fact that the Director-General did not consider allowing him to complete his two-year appointment by transferring him for the remaining eleven months to some other branch. He invites the Tribunal to order disclosure of the report on the inquiry and of any decision which the Director-General took on the strength of it.

H. In its surrejoinder the WHO maintains that the report is immaterial. Moreover, it is just one man's assessment of the facts and therefore subjective. It cannot constitute any objective evidence which the Director-General would have been wrong to leave out of account. The WHO categorically denies that there has been any shift in the burden of proof and that it need show that the way in which Dr. Mandil treated his staff in general was not the way in which he treated the complainant. The complainant is mistaken about the advisory group: its function is not to inquire into the quality of personnel management, but to give technical advice on the operation of the programme, and it in no way reduces the authority of the Director of the ISP. Nor are there grounds for criticising the Director-General for overlooking the error of failing to notify Dr. Flache's comments to the complainant. The whole purpose of an appeal is to enable the Director-General to correct the mistakes of subordinates, and he did so in this case by studying the complainant's written comments of 11 July 1979 and earlier observations. Lastly, the complainant's appointment was terminated not during the probationary period - the WHO ought then perhaps to have tested him in some other work - but at the end of that period. Besides, a transfer would probably have been out of the question since his qualifications were highly specialised.

I. In a further memorandum dated 10 July 1980 the complainant states that on 28 April 1980 the Director-General declared his intention of altering the method whereby other WHO divisions were to use ISP services. The solution which the Director-General has in mind is exactly what the complainant himself proposed on 21 November 1978, the day on which, he believes, his supervisor began to feel hostility towards him. In its observations on the complainant's further memorandum the WHO states that the document to which the complainant refers does not relate only to the ISP but is much wider in scope. It deals with the difficulties all large organisations experience in introducing modern methods of management and data processing. It has no bearing on the dispute, which has to do with the complainant's suitability for international service and for employment in the WHO.

## CONSIDERATIONS:

### The Tribunal's power of review

1. On 25 June 1978 the complainant was given a two-year appointment, subject to twelve months' probation, as a P.4 systems analyst under the Information Systems Programme (ISP).

On 20 June 1979, before the end of the probation period, the Chief of Personnel informed the complainant that his appointment would be terminated on 24 July 1979 in accordance with Staff Rule 1060. Under that Rule an appointment may be terminated on the grounds of unsatisfactory performance or conduct or unsuitability for

international service.

Staff Rule 1060 allows wide discretion in taking decisions under it. The Tribunal may not therefore set aside such a decision unless the decision was taken without authority, or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

These considerations hold good for the review of all discretionary decisions, but the Tribunal will exercise special caution in reviewing a decision to dismiss a probationer. Otherwise probation would not serve its purpose as a trial period.

The disclosure of written evidence

2. Some time after the impugned decision had been taken the Director-General ordered an inquiry into staff-management relations in the ISP. The complainant asked that his counsel should be given a copy of the report on the inquiry and any decisions based thereon. The Organization objects on the grounds that such evidence is immaterial.

On 2 April 1980 the Tribunal asked the Organization to supply the report on the inquiry. The Tribunal examined the report, found it to be confidential and on 25 April decided not to communicate it to the complainant, at least at that stage. The Tribunal now finally confirms its decision for the following reasons.

The Tribunal finds that to a large extent and with regard to the essential issues the report of the inquiry confirms the Ombudsman's report which is included in the dossier and which levels serious charges against the complainant's first-level supervisor. It is therefore unnecessary to add to the dossier the report on the inquiry, drawn up at a later stage. In accordance with a general principle, the findings in reports of this nature should not be disclosed and, unless they are necessary to judicial redress, the Tribunal abstains from ordering the production of them.

The complainant's pleas

3. The complainant objects that his supervisors' appraisal reports and the minute of 20 June 1979 are worded differently and do not comply with the requirements of Staff Rule 1060. The differences in language are immaterial. Whatever the terms used, their meaning was clear: in his supervisors' opinion, the requirements of Staff Rule 1060 were fulfilled. Besides, the impugned decision, which was taken by the Director-General, does expressly refer to one of the criteria mentioned in the Rule, namely unsuitability for international service. Any doubt which the complainant may have had was therefore dispelled.

4. The complainant is mistaken in contending that there were breaches of due process of law which invalidate the impugned decision.

First, he argues that since the decision to terminate his appointment was notified to him on 20 June 1979 there was no reason to extend the probation period to 24 July just in order to respect the requirement of one month's notice. The argument fails. The extension of probation was not in breach of any provision of the Staff Rules, indeed it was to the complainant's advantage, and in any case he was not bound to accept it.

Secondly, the complainant protests that he was not asked to comment on Dr. Flache's appraisal report before he was told of the decision to terminate his appointment. The irregularity is admitted by the Organization but was corrected in his appeal to the Director-General, which gave him every opportunity to make whatever comments he wished on Dr. Flache's report. The argument would succeed only if the Director-General's competence had been more limited than that of Dr. Flache. Like Dr. Flache, however, the Director-General made an unfettered assessment of all factual and legal aspects of the case.

The complainant's third argument is that it was wrong for Dr. Flache to act in two capacities on the same day - first, as a supervisor making an appraisal report, then as a Deputy Director-General deciding to terminate his appointment. It is arguable that the person who takes the decision under Article 540.1 of the Staff Regulations should be a third person who is in a position to review independently the recommendations of the two superiors. But even if this were so it is, in this case, immaterial since the Director-General himself personally reviewed the whole matter and adopted the conclusions of Dr. Flache.

Lastly, the complainant contends that his first-level supervisor acted prematurely in writing the appraisal report on 18 May 1979, one month before the end of the probation period. The criticism is unfair. Since the decision to dismiss a probationer has to be taken before the one-year probation is over, the appraisal reports must be written several weeks earlier. Moreover, the complainant is inconsistent: he describes the appraisal report as premature; yet he objects to the extension of his probation and the delay in terminating his appointment.

5. Contrary to what the complainant believes, the Director-General did not overlook essential facts. Before taking his decision he reviewed a file which included appraisal reports, a report from the Ombudsman and the complainant's own detailed comments. Besides considering the written evidence he himself saw the complainant. There is nothing to suggest that he overlooked any material facts which it was open to him to take into account. In any event there is no need to consider whether or not he took account of the findings of the report on the inquiry since the Tribunal has refused disclosure of that report.

6. It remains to be seen whether clearly mistaken conclusions were drawn from the facts, as the complainant alleges. The Tribunal emphasises again the exceptional character of the Director-General's discretion in refusing to confirm probationary service. Perhaps the most important object of probation is to enable the Director-General to ascertain whether the probationer fits in with the Organization; this is something that can never be completely ascertained from his record or from interviews. Yet the work of a group may be ruined by incompatibility and the Director-General has to bear the heavy burden of seeing that it is not.

In this case he has concluded in effect that there is sufficient evidence to show that the complainant was incompatible. If he had based this solely upon the complainant's inability to achieve an harmonious working relationship with the first-level supervisor, there is ample evidence to show that in this respect the complainant would not have been exceptional. But there is other evidence of incompatibility. In a case in which the Director-General has personally and after the exercise of great care concluded that there is sufficient evidence to show that the complainant has "not satisfactorily adjusted to WHO service" it is virtually impossible for the Tribunal to intervene.

In the particular circumstances of the case, there was no reasonable possibility of transferring the complainant to some other unit.

7. It appears from the foregoing that the complainant's pleas are unfounded and that the complaint must be dismissed as far as the claims for reinstatement and damages are concerned. On the other hand, it should be allowed as regards the claim for the annulment of the appraisal report, dated 18 May 1979, of the first-level supervisor, whose prejudice can be inferred from the dossier as a whole. Moreover, even if keeping Mr. Molina in the Organization's service could possibly be considered inexpedient, this should not be construed to mean that he is unfit for a career as an international official in some other organisation.

#### DECISION:

For the above reasons,

1. The appraisal report dated 18 May 1979 should be annulled and removed from the files of the Organization.
2. The other claims are dismissed.

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

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel  
Devlin  
H. Armbruster

