

Registry's translation, the French text alone being authoritative.

FORTY-NINTH ORDINARY SESSION

In re LHOEST (No. 2)

Judgment No. 537

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the World Health Organization (WHO) by Mr. Charles Jean Lhoest on 29 December 1981 and brought into conformity with the Rules of Court on 22 January 1982, the WHO's reply of 31 March, the complainant's rejoinder of 26 May and the WHO's surrejoinder of 17 June 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Section 700 and Rule 930 of the WHO Staff Rules as in force up to 31 December 1977, WHO Staff Regulation 12.2 and WHO Staff Rules 020, 1030.3 and 1050.4;

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. The complainant, a Belgian citizen, joined the headquarters staff of the WHO in 1960. For reasons of health he had to stop work on 28 May 1979. On 16 June 1980 the Chief of Personnel informed him that he would be paid a disability benefit from the United Nations Joint Staff Pension Fund and that his contract of appointment would be terminated for reasons of health, in accordance with Staff Rule 1030, on 2 December 1980. He is entitled to a termination indemnity under Rule 1030.3.4. However, the sums paid as disability benefit have been deducted. The deductions are stated to have been made under Rule 1030.3.4, the English text of which prescribes:

"[A staff member ...] shall receive a termination payment at the rate set out in Rule 1050.4, provided that the total payments in 1030.3.2 [the disability benefit], 1030.3.3 and 1050.4 due in the 12 months following termination are not more than one year's pensionable remuneration less staff assessment."

The French version of the rule, as approved by the Executive Board of the WHO on 21 January 1978, omitted the reference to 1030.3.2, and on 5 December 1980 the complainant asked the WHO to calculate his indemnity in accordance with the French version. On 17 February 1981 the Chief of Personnel confirmed the deductions, and the complainant appealed to the Board of Inquiry and Appeal. In its report of 11 September 1981 the Board recommended that the Executive Board be invited to confirm one version or the other and that the complainant's claim be reviewed in the light of the Board's decision. By a letter of 5 October 1981, which is the decision impugned, the Director-General informed the complainant that he rejected the recommendations.

B. The complainant observes that of the two language versions of Rule 1030.3 approved by the Executive Board the French is more favourable to him. Although the Administration decided in March 1980 to bring the French into line with the English, it failed to seek the Board's approval, and the French version approved by the Council is therefore still valid. Both versions are authentic, and the Administration may not choose between them. Besides, the complainant stopped work in 1979, before the Administration even sought to alter the French version. Had the valid French text been applied he would have received a net total of 62,120.30 Swiss francs. In fact the WHO has wrongly deducted the annual amount of his disability benefit to give a total of only 3,469 Swiss francs. He observes that he consented to the termination only in expectation of the larger sum, and the cut has caused him serious financial hardship. He invites the Tribunal to declare that the French text of Rule 1030.3 as adopted by the Board in 1977 should be applied, to quash the decision of 5 October 1981 and to award him 10,000 French francs as costs.

C. In its reply the WHO observes that both at 16 June and at 3 December 1980 the two language versions were identical. It doubts whether the irregularity alleged by the complainant that the Board did not formally approve the corrected French version - falls within the scope of Article II of the Statute of the Tribunal. In any case the

complaint is devoid of merit. The Administration was entitled to remove the disparity between the two versions, which was due merely to an oversight in producing the French text. It was clear from the paper submitting the new rule to the Board and dated 8 December 1977 that the proposed amendments to Rule 1030 were mere matters of drafting and not intended to alter the substance. The old rule, 930.3, already required deduction of Pension Fund benefits from the termination indemnity where the total of indemnity and benefits exceeded the equivalent of one year's salary. The Board's intention was therefore not to depart from that rule, and all that was needed, since the error was not wilful, was a correction of the French version. There was no obligation under WHO Staff Regulation 12.2 to submit such a correction to the Board.

D. In his rejoinder the complainant observes that according to Regulation 12.2 and Rule 020 the Staff Rules may be amended by the Director-General only subject to confirmation by the Executive Board and without prejudice to the acquired rights of the staff. The complainant had an acquired right which was impaired by the purported "corrected", and the "corrected" French version could not properly come into force until approved by the Board. The Administration wrongly asserts its right to correct a rule where there was no wilful error and whether it alone declares correction was needed. This is contrary to legislative practice and to the WHO's own practice. The paper submitting the text to the Board and dated 8 December 1977 stated that some amendments were only changes of drafting: even if there is no change of substance the Administration apparently feels obliged to seek the Board's approval. The paper even said that some changes were being submitted because the English and French versions were not always identical. Why then was the correction removing the disparity between the versions of Rule 1030 not also submitted to the Board? Lastly, it is mistaken to say that the amendment did not change old Rule 930: the old and the new rules are quite different.

E. In its surrejoinder the WHO repeats that there was no intention in 1977 of altering the substance of the old rule, and observes that it was, beyond doubt, the English version which fulfilled the Board's purpose and intention. All that the Director-General did was to bring the French into line by correcting a typing error. There is a distinction between an amendment affecting the staff's rights and the mere correction of an obvious material error, the procedure for the latter being less formal. Besides, even if the correction of the French was invalid, the complaint would fail because the WHO is bound to carry out the Board's purpose and intention by applying the English version.

CONSIDERATIONS:

1. The complainant used to hold a permanent appointment with the World Health Organization but had to stop work on 28 May 1979 because of serious illness. On 5 December 1979 he was granted sick leave "under insurance cover" not to exceed one year. His health had not improved by the end of the year and he was awarded a disability benefit by the United Nations Staff Pension Committee.

The matter in dispute between the complainant and the WHO relates to a "termination payment" payable to him by virtue of Staff Rule 1030.3.4.

2. The text the complainant is relying on is the French version of Rule 1030.3.4 as in force in 1979. This provides that a staff member whose appointment is terminated under Rule 1030 shall receive a termination payment at the rates set out in Rule 1050.4, provided that "the total payments in 1030.3.3 and 1050.4" due in the twelve months following termination are not more than one year's pensionable remuneration less staff assessment.

If this is the correct rule there is no doubt, and the WHO does not deny, that from the complainant's termination payment are deductible only payments that may have been due to him under 1030.3.3 and 1050.4.

The WHO contends that there was a material error in the rule and that it needs to be supplemented by reference to the English version. This prescribes payment of the termination payment at the rates set out in Rule 1050.4 provided that "the total payments in 1030.3.2, 1030.3.3 and 1050.4" due in the twelve months following termination are not more than one year's pensionable remuneration less staff assessment. Thus the English text provides for the deduction of sums paid under Rule 1030.3.2 whereas the French does not. It is Rule 1030.3.2 that provides for payment of a disability benefit in accordance with the rules of the Pension Fund. If the disability benefit is subtracted from the complainant's termination payment he will obviously be paid much less. Indeed he says that if the French version of 1030.3.4 is applied he gets 62,120.30 Swiss francs; by the English version, he is paid only 3,469 Swiss francs.

The text of 1030.3 was approved by the Executive Board in 1978. The French was in the terms which the complainant cites; the English included the reference to 1030.3.2.

3. The WHO's first plea is that the text the Board really adopted was the English, the French translation being erroneous.

Its second plea is that the error was put right in a new edition of the Staff Rules published in March 1980. Since the complainant retired in December 1980, he cannot in any event rely on a superseded text.

4. The second part of this plea fails. The Executive Board adopted the French version of 1030.3.4, and the Executive Board alone could amend it. Instead it was the Director-General who decided to alter the French text, and the fact that he did is immaterial since according to Rule 020 the Director-General's authority is limited to making proposals for amendment. Only where the alteration consists merely in correction of a straightforward material error, is the Director-General competent to act. Accordingly his so-called "correction" is in itself null and void. Either he discovers an error, and the original text must be applied; or else he alters the adopted text without being competent to do so.

5. What the Tribunal has to decide is which text the Board actually adopted.

Both the French and the English are authentic. In such circumstances the Tribunal will interpret the texts according to the usual methods. This approach may of course put the complainant in an awkward position. A staff member may act on an explicit provision and later discover it to be erroneous. This may be an important consideration of equity, but it cannot be maintained on that account that it is for each staff member to choose the language version which suits him best. The Organization's negligence - and that is undoubtedly what the error is - may be remedied by awarding compensation where the complainant proves injury attributable to the Organization.

In his paper of 8 December 1977 the Director-General explained to the Executive Board that the amendments he was inviting it to approve formed part of an overhaul of the rules, which had not been properly brought up to date for over twenty years. Most of the changes were, he said, merely a matter of drafting. But he did propose some substantive changes he thought necessary for the efficiency of personnel management and to bring WHO rules into line with those of the United Nations system in general. The altered provisions were reproduced in Appendices I and II to the paper, but 1030.3.4 appears neither among the new rules in Appendix I nor among the amended ones in Appendix II.

The Executive Board approved the new rules without change on 21 January 1978.

6. From the foregoing one thing is clear. Since there was no substantive change in 1030.3.4 in 1978, the corresponding text is to be found in the old set of rules. It was in fact Rule 930.3, which read:

"Staff members whose appointments are terminated for physical or mental disability shall receive a termination payment at the rates provided in Rule 950.4, not exceeding that amount which, together with the benefits provided in Section 700 equals one year's salary."

Thus both old Rule 930.3 and new Rule 1030 set restrictions on the amount of the termination payment.

The dispute relates to one of those restrictions, the deduction of the disability benefit, and the Tribunal will determine whether such deduction is covered by Section 700. The answer is not quite straightforward.

Section 700 of the old rules, in the form submitted to the Tribunal by the WHO, had four parts, of which only the first two are relevant in this case.

Rule 710, which was headed "Accident and illness insurance", related to illness insurance benefits, which are covered in the new rules by 1030.3.3. There is no difficulty on this point.

Rule 720, entitled "Compensation for service-incurred accidents or illnesses", provided for the grant of compensation in such contingencies. It read:

"A staff member shall be entitled to compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the Organization, in accordance with rules established by the Director-

General. Any benefits payable by the Staff Pension Fund, under the Organization's accident and illness insurance policy or from the Staff Health Insurance shall be taken into account in establishing the compensation payable."

7. The WHO argues that this rule is the same as new Rule 1030.3.2, which says that a staff member terminated under Rule 1030 "may be entitled to a disability benefit in accordance with the rules of the Pension Fund".

The argument is mistaken. There are in fact appreciable differences between old Rule 720 and new Rule 1030.3.2. One is that the old rule applied only in the event of service incurred accident or illness, whereas Rule 1030.3.2 is general. Other differences are also relevant. For example in the old text the compensation prescribed in Rule 720 was to some extent subsidiary, whereas in Rule 1030.3.2 it is not.

The WHO observes that the purpose of the reference to Section 700 in old Rule 930.3 was not to indicate when the disability benefit was to be deducted from the payment due in the event of termination for reasons of health. On the contrary, says the WHO, what Rule 930.3 meant was that the payment calculated at the rates set in Rule 950.4 should be reduced by a sum which, added to amounts payable under Section 700, would equal one year's salary. And the disability benefit is one of the amounts payable under Section 700.

8. The Tribunal takes the view that, although Rule 930.3 referred to the full text of Section 700 as relevant in determining the maximum amount of the termination payment, the restrictions applied only in respect of the benefits due to the individual staff member under the section. In fact Rule 720 would not have applied to the case of the complainant, whose illness is not service-incurred, and had his appointment been terminated under the old rules he could not have relied on Rule 720. Admittedly he would in all likelihood have been paid a disability benefit under some other rule, but the WHO does not cite any other provision of the old set of rules which would have precluded the accumulation of benefits and payments.

The WHO's argument accordingly fails, and the case can be settled without difficulty. Inasmuch as it was not the Executive Board's purpose to alter the number of deductions which may be made from the termination payment, only the French text reflects the Executive Board's intent, provided at least that the staff member's illness is not service-incurred. This may not appear a fair solution, but it is the one required by strict interpretation of the texts. The impugned decision must therefore be set aside and the complainant referred back to the WHO for recalculation of the Rule 1030.3.4 payment in accordance with the French text of the rule.

9. The Tribunal also awards the complainant 2,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed and the complainant is referred back to the WHO for recalculation of the benefit prescribed in Rule 1030.3.4.
2. The complainant is awarded 2,000 Swiss francs in costs.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

