

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

SEVENTY-NINTH SESSION

Judgment 1432

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. F. A.-B. against the World Health Organization (WHO) on 25 July 1994, the WHO's reply of 12 October 1994, the complainant's rejoinder of 31 January 1995 and the Organization's surrejoinder of 7 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. In 1985 the WHO appointed the complainant, a citizen of both France and Mauritius, as a consultant on a short-term appointment. In 1986 it granted her a two-year fixed-term appointment and assigned her to a grade P.5 post at Brazzaville, in the Congo, first as a medical officer, then as "technical adviser to the Regional Director" of its Regional Office for Africa (AFRO). In 1988 it promoted her to grade P.6.

In an attestation of 4 July 1988 the Regional Director certified that it would be inadvisable for her to stay on in Africa, where she had contracted an illness, and recommended her for a post at headquarters in Geneva. She was accordingly in Geneva from

1 January 1989 under a two-year appointment, though she was not formally transferred from AFRO.

By a letter of 31 May 1990 the Director of Personnel told her that she was to be transferred for one year as from 1 January 1991 to the Division of Mental Health at headquarters. On 4 February 1991 the head of Personnel Resources Administration informed her that her reassignment was confirmed and that the post she would hold was at grade P.5. On 26 March 1991 - according to the complainant - or 26 May 1991 - according to the WHO - she was informed of the Director-General's decision to let her keep her own grade, P.6.

By a letter of 27 September 1991 the Director of Personnel informed her that for budgetary reasons her appointment would be terminated on 31 December 1991. On 5 November 1991 she had an end-of-service medical examination. The Chief of Contract Administration wrote to her on 3 December 1991 to confirm termination.

In mid-December 1991 the complainant went on holiday to Mauritius. By a medical certificate of 24 December 1991 her own doctor recommended sick leave until 24 January 1992, by another of 21 January he recommended it until 24 February.

By a memorandum of 29 January 1992 a personnel officer of AFRO told her that the Regional Director had decided to reassign her as from 1 January to a grade P.5 post at Brazzaville, though she would still keep grade P.6. She accepted the offer by a letter of 19 February.

By a fax of 21 February the Director of Personnel informed the personnel officer that she could not be reassigned until a medical examination and other formalities had been completed.

At the end of February she left Mauritius for Geneva, where she saw the Regional Director. On 8 March 1992 she travelled to Windhoek, in Namibia, on tickets paid for by AFRO. By a memorandum of 13 March the personnel officer told her that for reasons of health she was to be offered a post at Windhoek. He enclosed a post description dated 5 March and signed by the Regional Director. By a fax of 23 March the complainant replied that she would prefer the post at Brazzaville but would consider the post in Namibia "only as an initial and very temporary assignment".

By a cable of 25 March 1992 the personnel officer informed the Director of Personnel of the complainant's reassignment to Namibia and asked him to approve putting her on leave without pay from 1 January to 7 March 1992 so that her case could be sorted out. The Director agreed in a cable of 27 March.

Having fallen ill again she went to Geneva on 10 April.

By cables of 2 and 3 July 1992 the personnel officer of AFRO asked the Director of Personnel to start the administrative formalities for reassigning her to Namibia. In a fax of 7 July the Director explained the reasons why he could not. By a memorandum of 7 August the Regional Director asked the Director-General to clear up the complainant's status. The Director-General replied in a memorandum of 28 August that the findings of an inquiry he had ordered had led him to endorse the Director of Personnel's decision.

By a letter of 20 October 1992 AFRO told the complainant that she held no contract of employment. She appealed against the decision on 26 October 1992 to the regional Board of Appeal and on 2 November 1993 to the headquarters Board. In a report of 4 March 1994 the headquarters Board recommended rejection of her appeal. By a letter of 27 April 1994 - the impugned decision - the Director-General informed her that her appeal had failed.

B. The complainant has two pleas.

Citing Judgment 938 (in re Hill No. 2), which says "a staff member cannot be separated while on sick leave", she submits first that her appointment did not expire on 31 December 1991 but was extended until 24 February 1992, the date at which her sick leave ended. So the Organization acted arbitrarily by putting her on leave without pay for the whole period from 1 January to 7 March 1992 and then refusing to treat her as an employee in the same period.

Her second plea is that there was a contract properly concluded between her and the Organization for the post in Namibia. Citing again the case law, she submits that a contract exists when all the essential terms have been agreed on, and any point still pending is just a formality not requiring further agreement. She reached "full oral agreement" with the Regional Director and the Organization gave her airline tickets for Namibia. She was given written confirmation of the offer and actually performed the duties of the post for one month.

In her view the headquarters Board was mistaken. The WHO acted in bad faith by refusing to acknowledge her new

appointment on the grounds that she did not have medical clearance. She did have a check-up in November 1991, just before she left, and always kept the WHO informed about her health, as is plain from the personnel officer's memorandum of 13 March 1992 which actually mentions the subject.

She wants the WHO to recognise her entitlements to sick leave and, "subsidiarily", to leave without pay from 1 January to 24 February 1992; to grant her leave without pay from 25 February to 7 March 1992; to recognise that her appointment to the post in Namibia was valid as from 8 March 1992 up to 7 March 1994; to inform the United Nations Joint Staff Pension Fund that she remained affiliated until 7 March 1994; and to pay her the amounts due, plus interest at the rate of 10 per cent a year. She seeks moral damages and costs.

C. In its reply the Organization submits that the complainant's appointment ended in accordance with the rules on 31 December 1991. Judgment 938 is immaterial since WHO Staff Rule 740.5 says that entitlement to sick leave expires at the same time as appointment. Under Rule 470.1 the complainant would have been entitled to leave without pay only if she had been assigned to another post. But she was not.

The complainant had no contract of any kind with the Organization in 1992. She has produced no evidence of any "oral agreement", nor was any agreement reached on the essential terms of the contract: pay, grade, duties and duration were not defined, and the fact that she was given airline tickets does not amount to evidence of the existence of any contract. The offer of a post in Namibia was first mentioned in the memorandum of 13 March 1992 but her fax of 23 March was not proper acceptance

of it. Besides, none of the prior conditions for conclusion of a contract had been met. For one thing, the medical clearance required by Rule 430.1 and 430.2 was lacking. Having held several appointments already, the complainant must have known that such clearance was important and the end-of-service medical examination, which has a quite specific purpose, was no substitute. Besides, the Namibian Government never approved her reassignment.

In conclusion, the Organization observes that the Regional Director was not authorised to grant her an appointment, and she acted in bad faith by trying to force the Organization to treat her as a member of its staff.

D. In her rejoinder the complainant submits that Rule 740.5 provides simply that sick leave may not begin after expiry of appointment but means extending the appointment if it begins before expiry. There was a valid contract for reassigning her to Namibia. The Medical Service behaved inconsistently. Her fax of 23 March did amount to acceptance of the oral offer of a job she was doing anyway. She saw her own doctor before she left. It is wrong for an organisation that promises "health for all" to treat so lightly an illness she contracted in its service.

E. In its surrejoinder the WHO maintains that the documents she says she got before leaving for Namibia do not amount to any proper contract. The prior conditions for the issuance of a contract had not been met; she did not really accept the offer; and her own doctors' opinions do not replace clearance by its own Medical Service.

CONSIDERATIONS:

1. The complainant joined the staff of the World Health Organization in 1985. She held several fixed-term contracts. The last of them was to run out on 31 December 1991. By a letter of 27 September 1991 the Director of Personnel told her, while she was on duty at headquarters, that her appointment would end on 31 December 1991. She asked to be put on the list of staff available for any vacancies. She had an end-of-service medical examination on 5 November 1991, was granted leave in December to go on holiday, and went to her country of birth, Mauritius. Because she was to go back to Geneva for several days' work after the holiday she did not yet go through the end-of-service formalities. In a letter she sent on 23 December 1991 from Mauritius and which the Organization received on 22 January 1992 she applied for leave without pay. On 24 December 1991 she got a doctor's certificate recommending one month's sick leave. By a second certificate the doctor recommended extending sick leave until 24 February 1992.

2. On 29 January 1992 the complainant received an offer from the WHO's Regional Director for Africa of reassignment to a post at Brazzaville. She accepted subject to medical clearance in Europe. She returned to Geneva in late February and had medical tests. They showed that it would be unwise for her to go to any tropical climate, though it was not actually forbidden. At about the same time, and in circumstances on which the evidence does not shed light, she got an invitation, seemingly from the Regional Director, to take up a post at Windhoek, in Namibia. With airline tickets issued by order of the Regional Office she set off for Windhoek on 8 March 1992. There she got written confirmation of the offer. She accepted it on 23 March 1992 with the rider that she would rather have had the post at Brazzaville but was willing

to treat Namibia "only as an initial and very temporary assignment". After a month in Namibia she fell ill. She was sent to Geneva on 10 April 1992 and never went back.

3. She soon learned that, despite the Regional Office's backing, Personnel were refusing to acknowledge her appointment in Namibia and took the view that she had no contract of service with the Organization. She appealed to the regional Board and then to the headquarters Board of Appeal. The headquarters Board recommended rejection. By a decision of 27 April 1994, which she is impugning, the Director-General authorised the recovery of any sums paid to her on account of her stint in Namibia from 9 March to 10 April 1992 but granted her the pay and travel allowance she would have been entitled to as short-term consultant at grade P.5 over the same period. He thereby refused to grant her any contractual rights whatever.

4. The complainant submits that she was to be treated as having been on leave up to 7 March 1992 and from 8 March held an appointment in Namibia which is binding on the WHO. The Organization retorts that her contract of service ended on 31 December 1991 and she had no entitlement to leave thereafter. But the nub of its case is that she had no contract appointing her to the post she held for a few weeks in Namibia.

5. On the first issue that the WHO raises, there is no doubt but that her assignment to the Division of Mental Health at headquarters ended on 31 December 1991: she was given due notice of non-renewal and had the end-of-service medical examination. A certificate dated 24 December from her doctor in Mauritius said: "She needs one month's sick leave", and another one, dated 21 January 1992, prescribed another thirty days' rest.

But the effect was not to postpone the scheduled date of expiry of her contract. The fact is that she was not treated as having been on sick leave from 25 to 31 December 1991. So Judgment 938 (in re Hill No. 2), which she cites, does not support her case.

6. The second issue is whether despite the expiry of her contract she could be on leave from 1 January 1992. WHO Staff Rule 470.1 reads:

"A staff member ... who is re-employed within one year of the termination of his appointment, may, at the option of the Organization, be reinstated. ... the intervening absence shall be charged to annual leave and leave without pay as necessary ..."

The complainant is asking, if she may not get sick leave - and she may not, since her contract had expired - that at least she be treated as having been on leave without pay in accordance with 470.1 from 1 January to 7 March 1992. The WHO submits that 470.1 does not apply because it did not re-employ her within one year of the date of expiry of her appointment. So the answer to her plea turns on the main issue, which is whether or not the WHO did re-employ her for the job in Namibia as from 8 March 1992.

7. The WHO observes that it signed no contract with her; that there was no agreement, not even oral, about the essential terms of any appointment; that she had not unconditionally accepted its initial offer of the post; and that medical clearance is a prerequisite of any contract.

8. The Tribunal is satisfied that even though there was no formal written agreement between the Organization and the complainant

all the conditions that the case law requires were met for the existence of a legally binding contract.

9. First, a personnel officer gave the complainant notice by a memorandum of 29 January 1992 of the decision by the Regional Director for Africa to reassign her to a post at Brazzaville. She acknowledged receipt on 19 February 1992, gave express consent, and so had proper reason to expect reinstatement.

10. Secondly, on her return to Geneva, she was given airline tickets on the instructions of the Regional Office for Africa, and that was what induced her to go to Namibia. Several documents written before she left described the post she was to hold. Although, as the Organization submits, she fails to show that she was aware of them before leaving, she is highly unlikely to have been willing to set off without some inkling of what her duties were to be.

11. In any event the personnel officer sent her a memorandum of 13 March 1992 at Windhoek and it expressly refers to her appointment to post 3.3789 and sets out in full such matters as travel arrangements, grade, pay, subsistence allowance and other entitlements. A post description was appended. On 23 March 1992 she acknowledged receipt of the memorandum. Despite her reservations, which are set out in 2 above, she undoubtedly did accept the Organization's offer, especially since she was already in Namibia and carrying out the duties of the post on offer, and she was merely recording her desire for another assignment in future.

12. Lastly, there is ample evidence to show that the Organization did treat her as a staff member. It paid her an advance on salary.

It brought her out of Windhoek. And the Personnel Division, which may have been misinformed, approved on 27 March her return to duty on 8 March 1992. Indeed not until the following July did headquarters state reservations about the appointment and then opposition. It is immaterial to the fact of recruitment that the decision to recruit her may have been taken ultra vires or may not have followed the necessary formalities. For one thing, the Organization must bear the consequences of any decision taken by someone it has itself appointed for the purpose, in this case the Regional Director for Africa. For another, the lack of prior medical clearance for the new post does not amount to a fatal flaw in the mutual agreement between the WHO's agents and the complainant. Besides, as was said in 1 above, she had undergone medical examination on 5 November 1991.

13. The conclusion from the foregoing is that the Organization is to be deemed to have re-employed her. She should accordingly have been granted leave without pay from 1 January to 7 March 1992 in accordance with Rule 470.1 and the terms of Personnel's decision in its cable of 27 March 1992. She is further entitled to pay from 8 March 1992 to 7 March 1994, plus interest at the rate of 10 per cent a year from the date at which each sum fell due. She is reinstated in her pension rights for the same period.

On account of the WHO's attitude towards her she has sustained moral injury over and above the injury for which redress is afforded in 13 above, even though the decline in her health does not warrant an award of damages under this head. So the Organization must pay her moral damages, and the amount is set ex aequo et bono at 10,000 Swiss francs. Lastly, she is awarded 7,500 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 April 1994 is set aside.
2. The Organization shall pay her in damages the sums set out in 13 above and shall take all necessary action to restore her pension entitlements.
3. It shall pay her 10,000 Swiss francs in moral damages.
4. It shall pay her 7,500 Swiss francs in costs.
5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner