

EIGHTY-SIXTH SESSION

***In re* Gramegna (No.2)**

Judgment 1788

The Administrative Tribunal,

Considering the second complaint filed by Mr. Marco Antonio Gramegna against the International Organization for Migration (IOM) on 4 May 1998, the IOM's reply of 2 July, the complainant's rejoinder of 17 July, the Organization's surrejoinder of 7 August, the complainant's letter of 22 September to the Registrar of the Tribunal and the Registrar's letter of 23 September 1998 inviting the Organization to comment thereon, to which the Organization did not answer;

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. Facts relevant to this dispute and information on the complainant's career at the IOM are to be found under A in Judgment 1787 of today's date on Mr. Gramegna's first complaint.

By a letter of 16 January 1998 the Director General told the complainant, who had been on sick leave since 6 November 1997, that he was to go from headquarters, in Geneva, to Bangkok as chief of mission at grade P.5; it was the only job free and after his sick leave he would have time to learn his new duties, as the then chief of mission would not be leaving Bangkok until the end of June.

By a letter of 22 January 1998 he asked the Director General to reconsider: other posts he had applied for were still vacant; he had an appeal pending against the appointment of Mr. William Hyde as chief of the Programme Support Division; and he was not well enough to take on the job in Bangkok. In a letter to him of 27 January the Deputy Director General upheld the decision of 16 January. In a letter of 30 January the complainant told the Deputy Director General that he would appeal and he asked for the suspension of his transfer pending a report by the Joint Administrative Review Board. He enclosed a medical certificate from his own doctor advising against his leaving Switzerland.

On 5 February he put to the Review Board his appeal against transfer. In its report of 31 March the Board recommended rejecting it. By a letter of 6 April 1998 the Director of the Administrative Support Department informed him of the recommendation and the Director General's endorsement of it. That is the decision he is challenging.

B. The complainant pleads a mistake of fact: when he was told of the transfer four of the posts he had applied for were still free and the Board had not yet reported on his appeal against the appointment of Mr. Hyde. So the Director General was wrong to say that the only job free was the one in Bangkok.

The procedure that led to the impugned decision was arbitrary. The Organization took him off his duties though it had not conveyed to him any decision to abolish his post. It made no attempt to see about reassigning staff affected by the reform of its secretariat. It simply put their posts up for competition, many of them for external competition. It thereby failed in its duty towards staff who had lost their posts. The Director General overlooked his poor health.

In disregard of precedent the Organization failed to consult him about the transfer. In taking up his appeal the Board acted in breach of his right to a hearing.

He seeks the quashing of his transfer and an award of moral damages. He claims 5,000 Swiss francs in costs.

C. In its reply the IOM challenges the complainant's version of the facts. By 16 January 1998, when he was told of his transfer, the Director General had picked candidates on the recommendation of the Personnel Advisory Board for four of the posts he had applied for.

The Organization did give priority to serving staff in filling posts after the reforms. Out of 49 posts it filled in 1997 in the Professional and Director categories it opened only five to outside applicants. It abolished the complainant's one as part of the overhaul of its secretariat. It kept the staff abreast of the reforms and their consequences. It did not ignore the state of the complainant's health: after getting the medical certificate from his own doctor it asked for a second opinion in accordance with Staff Rule 5.333. That took longer than expected, which was no doubt a pity, but it did not act arbitrarily.

It acknowledges its duty to consult a staff member when transfer may harm his private or professional interests. But the complainant's dignity and interests were never in jeopardy. It rebuts his arguments about the Board's hearing of his appeal.

D. In his rejoinder the complainant presses his pleas and his claims.

E. The Organization presses its pleas in its surrejoinder.

F. In a letter of 22 September 1998 to the Registrar the complainant says that the Director General told him on 20 August 1998 that on the strength of a second medical opinion he was cancelling the transfer to Bangkok. He presses his claims to damages and to costs.

CONSIDERATIONS

1. The IOM overhauled its secretariat in 1997. The complainant had since 1992 been on a P.5 post at its headquarters as chief of division in its Department of Planning, Research and Evaluation. It told him that that post was to go. He applied for vacancies. By a letter of 16 January 1998 the Director General told him that none of his applications had succeeded but, having looked for posts that were expected soon to become free, the Director General had found one which fully matched his qualifications, grade and experience: he was to be chief of mission in Bangkok as from the end of June.

2. Having tried in vain to get the Director General to change his mind, the complainant appealed against the decision on the grounds of poor health, among others. On 6 April 1998 he was told that on 3 April the Director General had rejected his appeal on the recommendation of the Joint Administrative Review Board.

3. That is the decision he is challenging and his complaint is receivable. He submits that poor health barred his transfer to Bangkok and that the decision was unlawful, being arbitrary and resting on mistakes of fact. It showed procedural flaws too: the IOM neither consulted him beforehand nor let him have his say.

4. By a letter of 20 August 1998 the Director General told him that the transfer was cancelled because a second medical opinion had advised against his leaving Geneva. So his claim to the quashing of the decision of 16 January 1998 shows no cause of action and the Tribunal need not entertain it. But he is also claiming moral damages and 5,000 Swiss francs in costs. The transfer having been revoked, he can show no actionable injury.

5. Having won satisfaction only after filing suit, the complainant is entitled to costs in the amount he claims: 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Tribunal need not entertain the complainant's claim to the quashing of the Director General's decision of 16 January 1998.

2. The Organization shall pay him 5,000 Swiss francs in costs.

3. His other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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