

FORTY-SIXTH ORDINARY SESSION

In re ALEXIS

Judgment No. 444

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Puthota Gnanapragasam Alexis on 14 April 1980, the WHO's reply of 28 July, the complainant's rejoinder of 15 August and the WHO's surrejoinder of 18 September 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rule 320.1;

Having examined the written evidence, 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. From March 1968 to April 1977 the complainant was employed by the International Labour Office. His original grade was ND.04, step 2, and, when the project to which he was assigned and his appointment came to an end, he held grade ND.05, step 6. On 6 June 1977 he joined the staff of the WHO and was assigned to a project for water supply and sewerage in Madras at grade ND.04, step 1. His appointment was twice extended, up to 11 November 1977. On 2 November 1977 he was given a 16-month contract in the same post and at the same grade. On the strength of his period of service with the ILO he then applied for promotion to grade ND.05 or to step 12 of grade ND.04. He nevertheless signed the contract in the hope that account would be taken of that application. The Director of the WHO Regional Office dismissed his application on 15 December 1977 on the grounds that salaries were determined on the basis of the duties and responsibilities pertaining to the post in accordance with the WHO's classification policy. The complainant appealed, citing Staff Rule 520.1, which provides that in "exceptional circumstances" salary may be fixed at a higher step in the grade to maintain the staff member's former income level. The Regional Board of Inquiry and Appeal did not report until 26 July 1979. It found no evidence of incomplete consideration of the facts and no exceptional circumstances which warranted a higher grading. Since, however, the complainant had held temporary appointments for many years, since what he was asking for was not impossible under the rules and since his duties were somewhat more responsible than those set out in his post description, the Regional Board left it to the Regional Director's discretion to determine whether or not to make an *ex gratia* payment to the complainant - who had in the meantime resigned, on 20 May 1978, and taken up employment in Bahrain. The Regional Director refused to make such a payment, and the complainant appealed to the Headquarters Board of Inquiry and Appeal claiming payment of 20,000 rupees, the difference between the amounts he had received and those he would have received had he been awarded the higher grade. The Board recommended dismissing the appeal and the Director-General did so on 29 January 1980.

B. In his complaint, which impugns the decision of 29 January 1980, the complainant refers to the submissions he made to the two Boards of Inquiry and Appeal and contends that essential facts were left out of account and that Staff Rule 320.1 was misapplied. He maintains that he agreed to temporary appointments at the offered level only because they were for short periods. In fact such appointments went on for an undue length of time. In determining his grade and remuneration in November 1977 the WHO took no account of his qualifications nor of his period of service with the ILO in duties at an equivalent level. The Regional Board recognised that some of the duties pertaining to an abolished post had been transferred to the complainant, who was thus carrying out more responsible duties than those set out in his post description. He also protests against the delay in hearing his internal appeal. Lastly, he observes that both boards acknowledged that his case deserved a sympathetic hearing, but feels that it is sheer hypocrisy to express sympathy and then do nothing about it when something could have been done.

C. The complainant asks the Tribunal: (1) to quash the impugned decision; (2) to make him an *ex gratia* payment amounting to 20,000 rupees; (3) to award him compensation for the inordinate delay in the hearing of his appeal; and (4) to make any other order it thinks fit.

D. In its reply the WHO observes that all officials are appointed at the grade corresponding to the duties and responsibilities of their post, which are assessed according to objective rules of classification. The WHO will

merely determine whether the applicant has the qualifications and experience required. A staff member may later apply for review of the classification of his post if he feels that it is wrong. As in this case, sometimes when there are several candidates the successful one may be over-qualified, but that does not oblige the Organization to offer him a grade and remuneration higher than those pertaining to the post. Since the complainant was not transferred from the ILO, the WHO was not bound to take account of his period of service with the ILO. The reason for extending his temporary appointments was explained to the two boards, namely delay in receiving the funds from the United Nations Development Programme (UNDP) which were to finance his post. As soon as the funds were confirmed - on 19 October 1977 - the complainant was offered a fixed-term appointment and he was credited with his service since 6 June 1977. The WHO was not unsympathetic: it considered all his claims and gave full reasons for not allowing them. Nor did he suffer any injustice on account of the delay in hearing his case since he had resigned a little over one month after lodging his appeal. The complaint is therefore unfounded. His claim for payment *ex aequo et bono* is not a claim alleging non-observance of the terms of his appointment and the provisions of the Staff Regulations - the only kind of claims which the Tribunal is competent to hear.

E. In his rejoinder the complainant challenges the construction which the WHO puts on the term "exceptional circumstances" in Staff Rule 320.1. Both boards recognised that his case was one in which the Director could have exercised his discretion. They also acknowledged that his actual duties were more responsible than those pertaining to his grade. His case is therefore not based on a purely personal opinion. Besides, contrary to what the WHO maintains, at the time of his appointment it was very difficult to find suitably qualified applicants and as a matter of fact his qualifications did not exceed the requirements of his actual duties. The delay in getting UNDP funds is a "lame excuse". Why were funds missing for his own post but not for others who came under the budget of the same project? The WHO treated him most unsympathetically throughout, and that is why, in sheer frustration, he decided to resign. It is astonishing that the Regional Board should be able to delay a case with impunity. He utterly rejects the WHO's argument that the Tribunal is not competent: what he is alleging is non-observance of Staff Rule 320.1, and that is a matter which falls squarely within the Tribunal's competence.

F. In its surrejoinder the WHO observes that there is no provision in the staff rules or anywhere else which explains what is meant by "exceptional circumstances" and that its practice has been to apply the rule only where no suitable candidate can be found unless a higher salary is offered. That was not the case here. The WHO does not bargain with candidates over their initial salary, but determines it by reference to the classification plan. There was neither error nor oversight in this case, and the complainant freely accepted his appointment on the terms offered. If he later came to the view that his duties were more responsible than those set out in the post description, he ought to have applied for review of the classification in accordance with the normal procedure. Overqualification does not warrant higher pay. Lastly, the WHO says that, while it does not suggest that delays in hearing an appeal are of no significance, in this case the complainant suffered no injustice.

CONSIDERATIONS:

1. On 6 June 1977 the complainant was engaged by the Organization as a secretarial assistant on a temporary contract for two months. It was in the minds of both parties that this would be replaced by a fixed-term appointment. The complainant was not, however, offered such an appointment until November 1977, his temporary contract being meanwhile extended. This has caused him some loss in that not all the emoluments obtainable under the fixed-term contract were dated back to 6 June. The Organization says that the fixed-term appointment could not be made until the availability of UNDP funds was confirmed. The complainant contends that he was "assured" in June 1977 that the appointment would be converted within two months. He does not however claim (or, if he claims, has not proved) that the assurance was anything more than an expression of hope and belief. The claim under this head fails.

2. Staff Rule 320 1 reads

"On appointment the net base salary of a staff member shall be fixed. At step 1 of the grade of the post he is to occupy. In exceptional circumstances it may be fixed at a higher step in the grade in order to maintain the staff member's former income level."

The fixed-term appointment was offered to the complainant on 11 November and accepted by him on 22 November. He says that he "immediately started negotiations" for a higher salary, but his request was rejected on 13 December. He bases his complaint against the rejection on Staff Rule 320.1 as quoted above. This rule confers a power on the Director-General for use in exceptional cases but it confers no right on an appointee. A person

seeking an appointment is of course at liberty to refuse the appointment if he considers the salary offered to be too low. But if he accepts the appointment at the salary offered and applies for a rise, the rule imposes no duty on the Director-General of any sort, whether discretionary or otherwise, to grant the application. The complaint under this head fails.

3. The complainant seeks payment of a compensation "as the ex gratia action recommended by the WHO Regional Board of Appeal". This is based on an expression of sympathy from both the Regional and Headquarters Boards of Appeal and on an invitation by the former to the Director-General to consider ex gratia action, an invitation which was declined. There are matters outside the competence of the Tribunal, which is concerned only with non-compliance with the Staff Regulations or with terms of appointment.

4. Finally, the complainant seeks compensation "for the inordinate delay caused by the WHO Regional Board of Appeal". The appeal was brought on 6 April 1978 and decided on 26 July 1979. The Board attributes the delay in part to the complainant's failure "to specify clearly whether he wished his case to be heard on a documentary basis only", but also to "the nature of the procedures for appointment of the Board and the travel obligations of staff members". The Board noted that the appeal had "been dealt with at some stage by five different Secretaries" and stated its intention of considering how such delays might be reduced. It is unnecessary for the Tribunal to consider what remedies are open to a complainant who is injuriously affected by procedural delay, since it is clear in any event that he cannot be entitled to compensation without showing financial loss or moral damage, neither of which appears in this case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, 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, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner