

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

## FIFTY-FIRST ORDINARY SESSION

In re IDO

Judgment No. 588

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the World Health Organization (WHO) by Mr. Fasséna Ido on 3 November 1982 and brought into conformity with the Rules of Court on 2 December, the WHO's reply of 25 February 1983 and the complainant's letter of 7 June to the Registrar stating that he did not wish to file a rejoinder;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rules 1040, 1070.4, 1230.1, 2, 3 and 8 and 1240.2, and article 10 of the rules of procedure of the Regional Board of Appeal;

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. In 1975 the complainant was seconded to the WHO for ten years from the Ministry of Public Health of his country, Upper Volta. He worked as a clinical nurse under the WHO's Onchocerciasis Control Programme in Ouagadougou. He held a series of fixed-term contracts and in October 1979 became leader of an evaluation team. His performance appraisal reports for 1977-78 and 1979-80 said that he was good at his work but awkward to get on with. In a minute of 23 April 1981 Dr. Bâ, his supervisor, said he was not cut out for team work. He wrote rejecting the criticism. On 26 May Dr. Bâ made an adverse appraisal of his recent performance. On 27 May the Director of the Programme told him that his contract, which was to expire on 31 August, was extended by only three months and that he must do better. Dr. Bâ signed another bad report on 20 November and the complainant objected, but the Director approved it and decided to withhold his salary increment. On 23 November 1981 the Director wrote saying that his contract was renewed for a final three months, to 28 February 1982, the minimum period of notice stipulated in Rule 1040 (Completion of fixed-term appointment) when a fixed-term staff member was not reappointed; but he was not to turn up for work. On 28 December he filed a notice of appeal, and on 28 January 1982 an appeal, with the Regional Board of Appeal, in Brazzaville. After 28 February he went back to the Ministry. On 8 June, having no decision on his appeal, he inferred rejection in accordance with Rule 1230.8.2, which requires a "definitive reply" within three months for regional staff, and sent notice of appeal to the headquarters Board of Inquiry and Appeal. On 24 June the Secretary of the Regional Board assured him it was going ahead with his appeal, which had been held up by delays in communication. On 1 July he wrote to the Secretary of the headquarters Board asking for a decision. The WHO put in a reply on his regional appeal and on 23 September he filed a rejoinder. The Regional Board met on 13 October. On 14 and 18 October he sent headquarters telexes demanding a decision by 20 October. On this date the Board reported to the Regional Director for Africa: it recommended confirming non-renewal but awarding the complainant an indemnity under Rule 1070.4 (Termination for unsatisfactory performance). On 3 November 1982 he filed his complaint challenging the decision of 23 November 1981 and what he took to be implied rejection of his appeal. The Regional Director endorsed the Regional Board's recommendations and so informed him by a letter of 13 January 1983.

B. The complainant contends that his appeals were held up so as to make his complaint to the Tribunal time-barred. He could not risk waiting any longer for a decision. As to the merits, he maintains that his appointment did not expire under Rule 1040 since he was seconded until 1985; he was dismissed. The decision was inspired by personal prejudice within the meaning of 1230.1.1. There was incomplete consideration of the facts, as referred to in 1230.1.2, in that the Director of the Programme made no proper inquiry into Dr. BA's strictures. His career was blocked and his pursuit of correspondence courses hampered, and he was not shown proper respect at work. He sets out several conditions for his reinstatement. He claims 10 million United States dollars in damages.

C. The WHO invites the Tribunal to dismiss the complaint as irreceivable on the grounds that the internal means of

redress were not exhausted. There was no presumption of rejection of the regional appeal by 8 June 1982: on 27 April the complainant was sent a letter inviting him to comment on the proposed composition of the Regional Board. That, and the Board's letter of 24 June, showed that his appeal was going ahead. It is true that Rule 1230.3.3 required the Board to report in ninety days and the Regional Director to take his decision sixty days thereafter; but such time limits simply do not work in a region where the post is unreliable and people are often away on mission. Nor were the means of redress exhausted at the headquarters level since an appeal to headquarters lies only when the regional procedure is completed. In the WHO's view the complaint is also devoid of merit. The complainant's contract duly expired under Rule 1040: his secondment, which was until 1985, could be ended at any time, as indeed it was when his appointment ran out on 28 February 1982. There was no flaw in the non-renewal. Although his supervisors had found fault with him, he was given ample warning and an opportunity to reform. He did not do so, and yet he was given another three months to make sure that the period of notice was respected. There is no evidence of any personal prejudice. He was treated with consideration since he got an ex gratia payment of one and a half months' salary.

## CONSIDERATIONS:

### Receivability

1. Like Article VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rule 1240.2 requires that the internal means of redress be exhausted before an appeal will lie to the Tribunal. The Staff Rules say that appeals may be submitted in turn to two boards, the Regional Board of Appeal and the headquarters Board of Inquiry and Appeal. The time limit for filing an appeal is sixty days from the date of receipt of the challenged decision. An appeal may be filed with the Regional Board by making a statement of intention to appeal (Rule 1230.8.3). An appeal to the headquarters Board must be filed within 60 days of the date of receipt of the Regional Director's decision. Both Boards shall report their findings and recommendations, to the Regional Director or to the Director-General as the case may be, within 90 days of the date on which they receive the appellant's statement of his case (1230.3.3). The Regional Director or the Director-General shall take his decision within sixty days of the date on which he has received the Board's report (1230.3.1 and 1230.3.2). The period of ninety days in which a Board must report may be extended in accordance with 1230.3.3 in fine if the parties so agree.
2. The appeal procedure is intended to serve the Administration's own interest as well, the purpose being to ensure thorough investigation before the final decision is taken. Because of the rule that the internal means of redress must be exhausted the complainant incurs the risk of a time bar if no definite time limits are set for filing the internal appeal. But where a complainant, in strict observance of the time limits, has done his utmost to secure a decision and the appeals body has nevertheless failed to report, it is only just to allow an exception to the rule.
3. By a letter of 24 November 1981 the complainant informed Mr. Theoret, the Personnel Officer, of his intention to appeal against the Programme Director's decision of 23 November. But the date on which the Regional Board says he actually filed his appeal is 28 December 1981 -- 28 January 1982 being merely the date of his brief -- and under Staff Rule 1230.3.3 the Regional Board had ninety days, i.e. up to 28 March 1982, in which to report its findings and recommendations to the Regional Director. Furthermore, article 10 of the rules of procedure of the Regional Board -- and the WHO does not deny that they apply -- says that the names of the Board members who will hear the case must be notified to the appellant not more than three days after he files his appeal. First, the names were notified to the complainant by a letter of 27 April 1982 secondly, the Board did not report until 13 October 1982, over six months after the time limit had expired. The report was sent to the Regional Director by a letter of 20 October 1982. The Director failed to take his decision within sixty days; he did not notify it to the complainant until 13 January 1983. Thus none of the time limits in the rules was observed. The WHO gives no convincing explanation of the serious delay but merely refers in vague and general terms to the difficulties of postal communication and the frequency of missions in regions like Africa.
4. There is greater force in the plea founded on 1230.3.3 in fine, which allows extension of the time limit for the Board's report. In support of his appeal the complainant did submit a brief dated 23 September 1982. But this was filed long after 28 March 1982, the time limit for the report. Nor could the filing be construed as consent to extension of the time limit. As early as 8 June 1982 he had gone before the headquarters Board on the grounds that the names of the Regional Board members had been notified to him over three months after he had filed his regional appeal and that it had presumably been rejected. He filed a brief dated 17 June 1982 in support of his appeal to the headquarters Board. In a letter of 1 July to that Board he said that he "had no objection to awaiting the final decision from Brazzaville or, preferably, to having a joint reply from Brazzaville and Geneva". He added:

"Should the Regional Board decide to reply instead of Geneva, I agree to the appointment of the regular Board members; should there be a joint reply by Geneva and Brazzaville, Geneva need only send me the names of the regular members as promptly as possible." In a letter of 2 September 1982 to the Secretary of the headquarters Board he expressed surprise that nothing had been done about his appeal. In a telex of 14 October to the Secretary he observed that "although Brazzaville decided to hear the case on 3 October 1982, and not Geneva, I have not yet heard anything final".

What appears from this correspondence is that the complainant filed his brief of 23 September 1982 with the Regional Board because he had misunderstood the position of the Secretary of the headquarters Board regarding his successive appeals to the two Boards. He cannot therefore be presumed to have knowingly agreed to the extension of the ninety-day time limit which, without consulting him, the Regional Board had allowed itself from 28 March 1982. The reason why he submitted a brief to the Board on 23 September 1982 was that he wanted a final decision, which might have relieved him of the need to pursue his case before the headquarters Board. Not only did he fail in this, but the delay caused by the Regional Board was compounded by the Regional Director. Since he complied with the time limits in the Staff Rules and the Boards were wholly to blame for the delays, it cannot be held against him that he declined to wait for a decision by the Regional Director and appeal against it to the headquarters Board, or indeed that he failed to challenge the Regional Director's actual decision. That decision was taken after 28 May 1982, the date of expiry of the sixty-day time limit set in Rule 1230.3.2 for acting on the Regional Board's report, and over two months, too, after the date on which the Director actually received the report.

5. Two things are evident. One is that the complainant did his utmost to secure a decision from the Regional Board of Appeal. The other is that he did not pass by the headquarters appeal procedure: he filed an appeal with headquarters on 8 June 1982, within the sixty days stipulated in 1230.8.5, against the implied decision to reject his regional appeal. In support of his headquarters appeal he filed a brief on 17 June 1982. He also wrote to the Secretary of the headquarters Board on 1 July and 2 September and sent telexes on 14 and 18 October 1982 trying to get a final decision from Geneva or Brazzaville by 20 October.

The headquarters Board thus had before it a formal appeal against the implied rejection of the regional appeal and was required to report within the time limit for making its recommendations. It was therefore in a position to rule on the appeal, if only to declare it irreceivable. In any event, the WHO may not object to the complainant's strict compliance with the time limits in the Staff Rules and the Statute of the Tribunal, when his purpose was to ensure that his complaint would not be time-barred. As the WHO acknowledges in its reply of 25 February 1983 (paragraph 35), the complaint, filed with the Tribunal on 3 November 1982, was clearly submitted within the time limit. It is therefore receivable.

The merits

6. The complainant joined the WHO on 21 August 1975. He submits that he had a renewable five-year appointment and that in 1980 it was indeed renewed for five years. The WHO replies that what he had was a one-year appointment which was extended each year up to 31 August 1981. Neither point of view is supported by any evidence in the dossier. What is beyond doubt is that the complainant was seconded from the civil service of his country for a period of five years and that that period was renewed up to 1985. In any event the Programme Director decided on 27 May 1981 that his appointment, which was to expire on 31 August 1981, should be extended by only three months, to 30 November. The Director warned him that if his services proved inadequate or his conduct unsatisfactory during the period from 26 May to 30 November 1981 he would take further action, including possibly the termination of the appointment. The complainant did not challenge the decision of 27 May 1981, and there is no doubt that by virtue of the decision he was on a short-term three-month appointment from 1 September to 30 November 1981. That is the appointment which on 23 November the WHO renewed only for the period of notice.

7. Non-renewal of a short-term appointment is a matter of discretion. But the decision is subject to review by the Tribunal and may be quashed if it was taken without authority, or was irregular in form or tainted with procedural flaws, or if there was an error of law, or misuse of authority, or a mistake of fact, or if essential facts were overlooked, or if clearly mistaken conclusions were drawn from the evidence. The Tribunal will review the decision to see whether there is any such flaw, but will be the more cautious in doing so in this instance because the complainant has had a series of appointments lasting over six years in all.

8. The decision not to offer the complainant a further appointment was taken by the Programme Director, and his authority is not in question. It is based on Staff Rule 1040 on the completion of temporary appointments. At least from 27 May 1981, when the complainant was granted a three-month contract, he came under Rule 1040 as the holder of a temporary appointment. He had to be given three months' notice expiring on 28 February 1982, and he was. The non-renewal was no more than the consequence of the decision of 27 May 1981, and the reasons for that decision, in particular the report on the complainant's performance and conduct during the preceding period, are no longer challengeable in determining the lawfulness of the impugned decision. The reason for the decision of 27 May 1981 was that his services had been found thoroughly unsatisfactory and that he had done little or none of the work assigned to him. The decision added: "This is your last chance to improve" and "If I have reason to believe that your performance and conduct have not come up to standard I shall have to take other action, including possibly the termination of your appointment in accordance with the Staff Rules". A report of 20 November 1981 by Dr. Bâ, the complainant's supervisor, covered the period following the decision of 27 May 1981 and said his conduct had not improved and that he was not yet performing his main duties properly. In his comments on the report the complainant challenged Dr. Bâ's assessment, but in fact it did no more than bear out the appraisals of his earlier supervisors. In endorsing the adverse comments in the last report the WHO did not rely on isolated or incorrect facts or draw clearly mistaken conclusions from the evidence. Indeed the complainant is not saying that it did. What he maintains is that the Programme Director made an incomplete inquiry into the facts. Thus he is contesting the Director's integrity and professional competence with subjective allegations which find no support in the dossier. The Director took account only of what was revealed by the report on the period covered by his previous decision, and he considered the complainant's comments thereon. His decision to terminate the appointment shows none of the defects set out above and is sound in law. The complaint is therefore devoid of merit.

9. It is immaterial whether there is any truth in the charges of prejudice which the complainant founds on an incomplete examination of his case by the Programme Director; whether he lost several opportunities for promotion and training; whether he was shown disrespect as team leader or in the actual text of the impugned decision and whether the decision, which was correctly based on Staff Rule 1040, caused him the material and moral injury he assesses at 10 millions United States dollars.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable Lord Devlin, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Devlin

E. Razafindralambo

A.B. Gardner