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

SIXTY-NINTH SESSION

In re LABBEN

Judgment 1026

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mahmoud Labben against the World Health Organization (WHO) on 15 June 1989 and corrected on 12 July, the WHO's reply of 15 September, the complainant's rejoinder of 20 October and the Organization's surrejoinder of 28 November 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rules 375, 730, 750, 1030, 1040, 1050 and 1230 and WHO Manual provision II.7, Annex E (Rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of the WHO);

Having examined the written evidence;

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

A. The complainant, a Tunisian born in 1942, joined the staff of the WHO in 1974. He served in Zaire until 1976, in the Comoros until 1978 and in Rwanda until 1985 on P.3 posts as a health inspector and under contracts that ran for four to 24 months.

On 10 July 1985 he had his appointment in Rwanda extended by two years from the then date of expiry, which was 2 December 1985. But on 4 October the Government of Rwanda told the WHO that it wanted a sanitary engineer instead. By a telex of 2 December the WHO informed the complainant that his appointment was terminated under Staff Rule 1050* (*1050.1 reads: "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished"; and 1050.4: "A staff member whose appointment is terminated under this Rule shall be paid an indemnity ...".) on the grounds of the abolition of his post and he would be paid a termination indemnity under 1050.4. Although he was entitled under 1050.3 to only one month's notice he was given the three months required under 1040 for non-renewal of contract and under 1030.3.1 for "termination for reasons of health".

He was put on sick leave as from 14 January 1986, and by a letter of 21 January the WHO told him that his appointment would continue for as long as he was on the sick leave. It ended on 15 November 1986. The WHO's medical service and his own doctor found him fit for sedentary work by then, but the Organization said that it had no suitable employment for him and confirmed the termination.

On 15 February 1987 he appealed to the African Regional Board of Appeal. In its report of 19 October 1988 the Board recommended rejecting his appeal, the Regional Director did so on 14 December, and he appealed to the headquarters Board of Appeal on 26 December. In its report of 20 February 1989 the headquarters Board too recommended dismissing his case but suggested compensating him for the delay in handling it and paying him the "end-of-service grant" provided for in Rule 375 over and above the 1050.4 indemnity. By a letter of 7 April 1989, the decision challenged, the Director-General rejected his appeal and refused the 375 grant but allowed him reasonable costs and the sum of 5,000 United States dollars in compensation for the delay in dealing with his case.

B. The complainant observes that although he was ready to take on any sedentary job the WHO might offer him it still terminated his appointment and although, as the doctors agreed, he was not in good health it ended his sickness insurance coverage as well. It added insult to injury by taking two years over his case. The Regional Board's report was superficial and error-ridden; the headquarters Board's report, though slightly more favourable, recommended too little compensation for the delay.

He asks the Tribunal to order the WHO to compensate him for service-incurred illness under Rule 730 and

acknowledge his entitlements to sick leave "with insurance coverage" and membership of the sickness insurance scheme; to reinstate him in suitable sedentary employment or else have him awarded a disability benefit by the United Nations Joint Staff Pension Fund; to grant him the end-of-service grant provided for in Rule 375; to pay him for the remaining period of his prematurely terminated contract; to pay him compensation for the delay over his appeals, which was contrary to Rule 1230.3; and to meet his costs.

C. The WHO submits that the complainant's claim to compensation for service-incurred illness is irreceivable under Article VII(1) of the Tribunal's Statute. He has not applied for compensation under the rules in Annex E to WHO Manual provision II.7 and has therefore failed to exhaust the internal means of redress. Besides, there is no reason to suppose that his illness resulted - to quote paragraph 4(a) of the rules - "directly from particular hazards to the staff member's health or safety to which he was exposed solely as a result of his assignment by the Organization to an area in which these hazards existed".

He is entitled neither to further sick leave nor, since he is no longer on the staff, to sickness insurance.

The WHO was and is under no duty to employ him. There was no sedentary work that he was qualified for either in the field or at headquarters. He does not say what sort of work he can do or make efforts of his own to find any. His claim to a disability benefit cannot be entertained because it is the United Nations Administrative Tribunal that hears complaints about decisions of the Pension Fund.

The benefits provided for in Rules 375 and 1050.4 are mutually exclusive.

The complainant's claim to payment of salary for 1986 and 1987 has no basis in law. His appointment was duly terminated under Rule 1050.1 on the grounds of the abolition of his post. He has never challenged the application of that provision, he does not do so in his complaint, and any challenge to it would be irreceivable anyway because he failed to follow the internal appeal procedure properly.

Though the Regional Board did delay in hearing his appeal that was not the Director-General's fault, and he has been awarded adequate damages on that account.

D. In his rejoinder the complainant enlarges on the merits of his claims to compensation for service-incurred illness and to insurance coverage, dwelling at length on the doctors' findings about his fitness for employment. Since he was terminated, not because of the abolition of his post, but on grounds of health, the material rule is not 1050 but 1030. The Organization made no real effort to find him work though it could easily have placed someone of his experience and attainments. He presses his claim to the award of a pension. He contends that the entitlements provided for in Rules 375 and 1050 are not mutually exclusive. He reaffirms that the dilatoriness of the appeal proceedings caused him distress and that the award of compensation was too small.

E. In its surrejoinder the Organization points out that the complainant's rejoinder failed to address its objections to the receivability of his claim to compensation for service-incurred illness. The termination was due to the abolition of his post before he began his sick leave; so the material rule is 1050, and his internal appeals did not challenge the decision to apply it. He has not sought review of the decision on the grounds of the worsening of his health. His claim to the application of 1030 is irreceivable. Besides, even if it had been applied he would have fared no better. For the reasons the WHO set out in its reply the Tribunal may not entertain his claim to the grant of a pension. The Organization is not bound to reinstate him since it has no vacancy. As for his other claims, his rejoinder raises no new material issue.

CONSIDERATIONS:

1. The complainant took up duty with the WHO on 12 March 1974 as a health inspector at grade P.3 and was assigned to public health projects in Zaire, the Comoros and Rwanda under contracts ranging from four to 24 months. On 10 July 1985 he had his appointment renewed, for two years, from the end of 1985 to the end of 1987. But by a telex of 2 December 1985, which a letter of 12 December confirmed, the Organization told him that his appointment would end in January 1986 because his post was to be abolished: the Government of Rwanda, his country of assignment under his latest appointment, had reported that what it needed was not a health inspector but a sanitary engineer. He was given one month's notice, to expire on 10 January 1986.

A letter of 21 January told him, however, that the period of notice and his appointment would end on 9 March 1986 instead if he was not on sick leave at that date. The complainant was put on sick leave from 14 January until further

notice. On the recommendation of the Director of the Joint Medical Service his sick leave ended on 15 November 1986, since by then he was found to be fit for sedentary work, and a letter of 9 December informed him of the termination of his appointment as from 16 November 1986.

On 15 February 1987 he appealed to the African Regional Board of Appeal. Not until 19 October 1988 did the Committee report, and it recommended rejecting his appeal. On 7 April 1989 the Director-General decided, on the recommendation of the headquarters Board of Appeal, to reject his further appeal to that Board, but granted him the sum of 5,000 United States dollars by way of compensation for the dilatoriness of the appeal proceedings. That is the decision he is impugning.

2. He makes six claims. He wants:

(1) compensation for service-incurred illness and recognition of his entitlements to sick leave with insurance coverage and to membership of the sickness insurance scheme;

(2) reinstatement in sedentary employment or else the award of a disability benefit under WHO Staff Rule 1030 and Article 33 of the Regulations of the United Nations Joint Staff Pension Fund;

(3) the end-of-service grant provided for in Rule 375, as distinct from the termination indemnity;

(4) salary for 1986 and 1987;

(5) compensation for the two years' delay in the appeal proceedings;

(6) an award of costs.

3. As to the claim, under (1), to compensation for service-incurred illness, the Organization points out, and the complainant does not deny, that he did not put it to the internal appeal bodies. As the WHO contends, the claim is irreceivable because he has not exhausted the internal means of redress and there is no final decision.

To his claim to recognition of his entitlements to sick leave with insurance coverage, the WHO's answer is that he was granted leave covering the last ten months, up to 16 November 1986, and that not until that date, when he was declared fit for sedentary work, did it end his appointment.

According to Staff Rule 750.1 sick leave shall be granted to staff unable to perform their duties because of illness, and it was in keeping with that rule that the Organization ended his leave on 16 November 1986 on the medical officer's declaring him fit.

As for his insurance coverage, the WHO observes that the ending of it was the outcome, not of any decision, but of his ceasing to be a staff member. Since the complainant does not take that point the Tribunal has no reason to question the construction the Organization puts on the rules of the insurance scheme.

Claim (1) fails.

4. Claim (2) is to reinstatement on grounds of health in sedentary employment or else to the award of a disability benefit under Staff Rule 1030 and Article 33 of the Fund regulations.

The WHO's answer to the claim is that the complainant had his appointment ended because he held a post of limited duration which it abolished in keeping with Rule 1050.1, that Rule 1030 applies only to termination for reasons of health and that he failed to challenge the termination in his internal appeals.

The complainant cannot deny those statements, which indeed the evidence bears out. The WHO's telex of 2 December 1985 gave him notice of termination and said that the reason was "the abolition of your post". That decision was confirmed by its letter of 12 December 1985, and its further letter of 21 January 1986 informed him that "because of the abolition" of his post his appointment was terminated with three months' notice in keeping with Rules 1050.1 and .3.

The telex and letters made it clear enough that the reason for termination was the abolition of his post and that the decision was founded on Rule 1050.1. Since he had challenged neither abolition nor termination by lodging a

timely internal appeal his termination on the grounds of abolition became unchallengeable. His appeal of 15 February 1987 to the Regional Board came too late to constitute a valid challenge to his termination under Rule 1050.1.

That rule does not require the Organization to reassign the terminated staff member. In any event, as the WHO observes, claim (2) is unfounded on that score. The complainant cannot properly deny that, as the Chief of Personnel told him in his letter of 9 December 1986, the Organization had made efforts to find him another post. It cannot be taken to task for having failed to find a post he was qualified and fit for.

In support of his claim to the grant of a disability benefit he cites Article 33 of the Fund Regulations. As the WHO points out, it is not this Tribunal but the United Nations Administrative Tribunal that hears disputes over the application of the Fund Regulations.

5. Claim (3) is to payment of the end-of-service grant provided for in Rule 375 over and above the termination indemnity prescribed in 1050.4. In his submission the two sums may be granted together because they do not have the same basis and are not mutually exclusive: the 375 grant is a material reward whereas 1050.4 indemnity compensates for breach of contract.

The plea is misconceived.

Rule 375 applies only to a "staff member holding a fixed-term appointment" and to one "whose appointment is not renewed after he has completed ten years" of service. Rule 1050.4, which comes under the heading "Abolition of post and reduction in force", applies only to a "staff member whose appointment is terminated", whether it is for a fixed-term or of unlimited duration. The wording alone shows that the two rules cover distinct contingencies: non-renewal of an appointment that has expired, and termination of an appointment before the date of expiry. Since the rules apply at different points in the contractual relations between employer and employee the benefits cannot be combined.

The complainant's own case plainly comes under 1050, which is about the termination of an appointment that still has time to run: his appointment had been extended on 10 July 1985 up to 31 December 1987 and was prematurely ended on 16 November 1986.

Claim (3) therefore fails as well.

6. Claim (4) is to payment of salary for 1986 and 1987: the complainant believes that he is entitled to his salary up to 31 December 1987, the date of expiry of the last renewal of his appointment.

For the reasons stated in 4 above the claim is irreceivable. It is a futile attempt to appeal against his termination, which is immune to challenge for his having failed to lodge a timely internal appeal. He would be entitled to payment of salary up to 31 December 1987 only if the termination were set aside, and it cannot be.

7. As for claims (5) and (6), the WHO acknowledged on 7 April 1989 that it should compensate the complainant for the injury he suffered because of the dilatoriness of the internal proceedings and should allow him costs. So it seemingly admits to some liability for the shortcomings of its representatives and appeal bodies. But its offer of compensation does not measure up to the degree of moral and material injury it has caused the complainant, whose health has grown much worse since termination. The Tribunal believes that more reasonable awards would be $8,000 in damages and $2,000 towards costs.

8. Though Articles 11 and 12 of the Rules of Court provide for oral proceedings and the hearing of experts, the Tribunal sees no reason to allow the complainant's application for them. Both he and the defendant have filed evidence and submissions enough to shed full light on the issues such further proceedings might have addressed.

DECISION:

For the above reasons,

1. The WHO shall pay the complainant 8,000 United States dollars in damages for the injury attributable to the dilatoriness of the internal proceedings, plus interest at the rate of 10 per cent a year as from 7 April 1989, the date of the impugned decision.

2. It shall pay him $2,000 in costs.

3. His other claims are disallowed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

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