

## SEVENTY-FIFTH SESSION

### *In re* ROGATKO

#### Judgment 1278

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. André Rogatko against the World Health Organization (WHO) on 27 October 1992, the WHO's reply of 16 December 1992, the complainant's rejoinder of 17 January 1993 and the Organization's surrejoinder of 5 February 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 420.2, 420.3 and 1040 and Articles VII(1) and VIII(1) of the Statute of the International Agency for Research on Cancer;

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. The complainant, a Brazilian citizen who was born in 1955, used to work at the WHO's International Agency for Research on Cancer (IARC) in Lyons. He held a two-year appointment as scientist (statistician) in the Unit of Biostatistics Research and Informatics at grade P.4 from 1 July 1990 to 30 June 1992.

The World Health Assembly set up the Agency in 1965. According to Article VII(1) of its Statute its secretariat is "Subject to the general authority of the Director-General" of the WHO and Article VIII(1) provides that its "administrative services and permanent activities ... shall be financed by annual contributions by each Participating State".

Before joining the WHO the complainant was working as an assistant biostatistician at a centre for cancer research in New York. He applied from there to the Department of Health and Human Services (DHHS) of the United States for a grant to finance five years' research. His application went to the National Institute of General Medical Sciences for approval. Before getting a reply he went in March 1990 to Lyons to attend an interview at the Agency for appointment to a post for a biostatistician specialising in genetic epidemiology. By a letter and a telegram both dated 6 April 1990 the Chief of the WHO's Manpower Resources Administration told the complainant he had been chosen to fill the post for two years starting at 1 July. By a letter of 14 May to the Chief of the Biostatistics Unit of the Agency he explained that his application for a national grant had received a "fundable" rating but the grant could not be transferred to Lyons. He added that the IARC might, if it wished, resubmit the application in its own name with suitable changes. On 18 June 1990 the Director of the Agency made a revised application to the United States Department (DHHS) for a grant for research to be carried out on the Agency's premises from 1 April 1991 to 31 March 1996.

On 4 July 1990 the complainant signed the WHO's offer of appointment, which warned that "under Staff Rule 1040, this fixed-term appointment does not carry an expectation of automatic renewal on completion of the agreed period of service". Rule 1040 says that "Temporary appointments ... terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension".

On 20 February 1991 the DHHS informed the Agency of the rejection of its application of 18 June 1990.

On 14 June 1991 the complainant's supervisors gave him a good probation report. But because of the break-up of the Soviet Union and doubt about whether its successors would continue to contribute funds the Agency announced savings in November 1991 which included "freezing" his post from 1 July 1992. In a memorandum of 5 December 1991 the personnel unit of the Agency informed him that his "position at the Agency" would be "maintained up to the end of [his] contract on 30 June 1992".

In a written declaration of 17 December 1991 the Chief of the complainant's Unit said that he had asked the complainant to "head a long-term research programme" and that even though his contract had been for only two years there was "mutual understanding that, given the importance of genetic epidemiology in cancer research, the Agency and [the Chief of the Unit] were expected to support his research in that area on a long-term basis, and

therefore beyond the two year limit".

On 7 January 1992 the personnel unit served him notice of termination at 30 June 1992 on the grounds that the work could not continue according to plan, and on 20 January he appealed to the headquarters Board of Appeal against the decision to terminate his contract at the end of the two years, claiming damages for breach of a promise of a long-term commitment beyond that period.

In its report of 12 June 1992 the Board concluded that there had been no breach of contract and recommended rejecting his claim. By a letter to him of 24 July 1992, the decision impugned, the Director-General notified endorsement of the recommendation.

B. The complainant submits that the Organization made him a binding promise to keep him in its employ beyond the two-year period of his contract. The promise took various forms:

(1) The Director of the Agency and the Chief of the Unit assured him in talks in March 1990 that the IARC had a long-term commitment to research in genetic epidemiology: otherwise they would have recruited a short-term consultant instead.

(2) The Director's application of 18 June 1990 to the Government of the United States for a research grant named the complainant as principal investigator who would "conduct and supervise the research at no cost to the Grant".

(3) The Chief of Unit's declaration of 17 December 1991 plainly constituted a long-term commitment to him beyond the two-year limit in his contract.

Citing Judgment 782 (in re Gieser), he contends that it makes no difference whether the promise is "written or oral, express or implied".

He takes issue with the WHO's attempt to pass off the Chief of Unit's declaration of 17 December 1991 as a mere "certificate of service" which it says he was not competent to issue anyway. A certificate of service and the declaration are quite different kinds of document. Besides, he never asked the Chief of Unit for a certificate of service or any other document to help him to get another job.

The WHO cost him three years' income, which he puts at 218,543 United States dollars, and another \$7,000 he spent to get permanent resident status in the United States for himself and his family. He claims those amounts in damages and \$700 in costs.

C. In its reply the WHO submits that what the complainant sees as a binding promise does not satisfy all the material conditions laid down in the case law: the promise must be substantive and given by someone competent or deemed competent to make it. The burden of proof is on him to show that a promise was made and he has failed to discharge it.

The complainant's account of talks with Agency officials no more constitutes proper proof than do the officials' own conflicting recollections.

His supervisor was not competent to make a promise of the kind imputed to him. Besides, his declaration of 17 December 1991 was just an "expression of a hope for the future" and affords no evidence of any binding promise. Nor was any commitment to keeping him on for at least five years implicit in the Agency's applying for a research grant. Though the application showed that the Agency regarded the complainant's research as a "continuing activity" it did not amount to a promise to extend his contract.

The Agency has a duty to beware of entering into long-term commitments beyond what available funds allow since it has no authority to enforce the payment of contributions or to borrow on capital markets. That is why most posts are offered on a temporary basis within the meaning of Rules 420.2 and 420.3: 420.2 says that "a temporary appointment is an appointment with a time limit" and 420.3 that "all staff shall be appointed initially on a temporary basis as defined in Rule 420.2". The decision to freeze the complainant's post was a form of saving required by one country's failure to pay its contribution for 1991 and the danger that it would not pay up in 1992-93 either.

Though the Organization "sympathises" with the complainant, granting him a longer contract would have meant

departing from its rules. Besides, his claim to damages is excessive since he suffered no loss of reputation or status and he must give credit for the WHO's payment of the costs of removal and the repatriation grant and for his earnings from other sources from 1 July 1992, when he took up employment in the United States.

D. In his rejoinder the complainant describes the WHO's reply as illogical. He submits that its issuing vacancy notices and keeping on a large clerical and administrative staff did not square with its alleged need for savings. Though the Organization blamed its budget problems on the collapse of the Soviet Union the press have reported problems inside the WHO that undermine its "credibility and image". In any event the Agency's Scientific Council, the body that monitors its work, has been left to assess the damage to the Agency's reputation and the waste of money due to the Director's decision to stop the research into genetic epidemiology, and the Agency will have to find someone else to take it up again.

As to the injury sustained he points out that he had to take the first job that came his way; he could not freely choose his place of residence; he failed to get a career appointment because most institutions in the United States offer one only to principal investigators on research grants; his earnings have dropped and he no longer has time to spend on research of his own. His wife and three children have yet to recover from twice having to change their country of residence in a short time.

E. In its surrejoinder the WHO submits that the rejoinder does not bring out any new facts or arguments. Press reports about the Director-General's re-election have nothing to do with the Agency's response to the deficit in its funding. A decision to suspend an item of work may be set aside only if taken for other than objective reasons: in this case the reason was the quite proper one of underfunding.

#### CONSIDERATIONS:

1. The International Agency for Research on Cancer (IARC), in Lyons, appointed the complainant, a Brazilian, as a grade P.4 "Scientist (statistician)" in its Unit of Biostatistics Research and Informatics.
2. The offer of appointment had been made to him in a letter and a telegram dated 6 April 1990 from the Chief of the WHO's Manpower Resources Administration. At the time he was an assistant biostatistician at the Memorial Sloan-Kettering Cancer Center in New York, which had helped him to get a permit for permanent residence in the United States, and he held an appointment there which was renewed each year.
3. On getting the offer he telephoned the Chief of the Unit to explain that he was not interested in a "short-term commitment of two years", and - he says - the Chief's reply was that the development of genetic epidemiology was a long-term project; that, though appointments at the Agency were for two years, they were "all renewed"; and that the position offered was financed out of the Agency's regular budget.
4. The complainant was informed in May 1990 that an application he had made for a grant from the National Institute of General Medical Sciences at Bethesda, in Maryland, to finance five years' research had received a "fundable" rating. Since the grant could not be used outside the United States he informed the Agency and, with his co-operation, the application was resubmitted on 18 June 1990 on the Agency's own behalf. It was signed by the Director, named the complainant as the principal investigator and gave the period of the project as from 1 April 1991 to 31 March 1996. It stated that the complainant would conduct and supervise the research at no charge to the grant.
5. His appointment began on 1 July 1990 and he signed on 4 July the standard form notifying his acceptance of appointment.
6. In January 1991 the Agency's application for the grant was turned down because, as the complainant learned from the National Institute, it came from the Agency. The Director and the Chief of the Unit told him at the time not to worry and they gave him good appraisals in his probationary performance report, which the Chief signed on 20 May and the Director on 14 June 1991.
7. When an alien who is a "permanent resident" like the complainant leaves the United States to work abroad in certain institutions, of which the WHO is one, he may apply to the United States authorities for permission to keep his permanent residence status provided he does not reside outside the country for more than two years. Such permission is known as "waiver". Since the complainant expected his absence to exceed two years he did not apply for such waiver at the time of his departure. Under United States rules on immigration he had until 30 June 1991 to

apply.

8. In November 1991 the Chief of the Unit of Biostatistics Research and Informatics warned him that the Unit would cease to exist on 1 January 1992 and that the programme in genetic epidemiology was being discontinued. The Director confirmed that information on 28 November 1991. The complainant asked the Chief to let him have a statement of which he offered a draft. The Chief agreed and gave him a document dated 4 December 1991 and later another one dated 17 December instead of the first. The second version reads:

"To whom it may concern

I hereby declare that I invited Dr. André Rogatko to initiate and head a long term research programme on genetic epidemiology of cancer at IARC in the Unit of Biostatistics Research. At that time, I was aware that Dr. Rogatko had been awarded a research grant from the National Institutes of Health, USA [which comes under DHHS], for a period of five years. Although the initially proposed contract was for a duration of two years, as is usually the case, it was of mutual understanding that, given the importance of genetic epidemiology in cancer research, the Agency and myself were expected to support his research in that area on a long-term basis, and therefore beyond the two year limit.

Dr. Rogatko joined my Unit on July 1st 1990 with the perspective of fulfilling what was expected from him, i.e. a long-term commitment on the development of genetic epidemiology in the Agency. Since then Dr. Rogatko has been satisfactorily fulfilling his duties as demonstrated by his appraisal report.

At the beginning of November, I was informed by the Director ... that the Unit of Biostatistics Research will no longer exist after January 1st 1992, and therefore, that the programme on genetic epidemiology started in that Unit will be discontinued.

The phrase "it was of mutual understanding" in the first paragraph replaced the words "it was clear" that had appeared in the original version of 4 December 1991.

9. By a letter of 7 January 1992 a personnel officer of the Agency informed the complainant that because of the Agency's "financial position" the programme could not now be developed as "foreseen" and that his contract would be terminated at 30 June 1992. He appealed against the decision to terminate his appointment at the end of the two years. The decision impugned is the final one of 24 July 1992 by the Director-General of WHO rejecting his appeal.

10. He submits that he was given to understand that the Agency had a long-term commitment to the development of research in genetic epidemiology and that it was in reliance on that understanding that he gave up his job at Sloan-Kettering, five years' funding by the National Institute at Bethesda and his status as a permanent resident of the United States. He uprooted his family on the strength of his expectations of a career at the IARC.

11. The Organization replies that in substance the complainant's case rests on an allegedly binding promise to continue his employment beyond two years.

It points out that Rule 420.3 requires that all initial appointments be on a temporary basis and that the form notifying acceptance of appointment, which the complainant signed, states that the "fixed term appointment does not carry an expectation of automatic renewal on completion".

It submits that the Chief of the Unit was not competent to issue the above statement of 17 December 1991; that in any event it contains no promise; that it was a mere inference from the Agency's application for the research grant that the complainant would have to be kept on; that that inference cannot constitute a promise of extension of appointment; and that the application amounted to mere confirmation of the Agency's intention at the time that the proposed research should be a "continuing activity".

12. In Judgment 782 (in re Gieser) the Tribunal stated the circumstances in which it would enforce a promise by an international organisation to a staff member. The promise must be substantive i.e. to act, or not to act, or to allow; it must come from someone who is competent or deemed competent to make it; the breach of it must cause injury to the person who relies on it; and the position in law must not have altered between the date of the promise and the date at which fulfilment is due. It does not matter what form the promise takes: it may be written or oral, express or implied.

13. The essence of the promise on which the complainant bases his claim is the statement that at the time when he was recruited the Agency had a long-term commitment to research in genetic epidemiology; in other words, that there was a promise that the research would continue in the long term. That, he argues, was a substantive promise and it was unqualified.

The statement by the Chief of the Unit in which the complainant was employed sets the facts out clearly and the application signed by the Director of the Agency for the research grant confirms them. Both the Director and the Chief of the Unit were competent to confirm the long-term commitment to research. Although the Organization says that the Chief of the Unit was not competent to write the statement of 17 December 1991, that is not at issue. If he ought not to have written it, that is a matter between him and the Organization. What is relevant is the evidence that it contains of the position as it was when the complainant took up duty with the Agency.

14. What is more, the WHO may not absolve itself from liability for keeping a promise by pointing to the provision that there shall be no expectation of renewal. It is clear that if the Agency had kept to its commitment to research, the promise of which persuaded the complainant to go to Lyons, there would have been no problem over the renewal of his appointment. It is inexcusable for the Organization to have lured the complainant with a promise of long-term commitment to research and then contend that it may break that promise with impunity.

15. Since the position has not altered in law since the promise was made all the conditions set out in Judgment 782 for the enforcement of a promise are fulfilled in this case. The conclusion is that the Organization had a duty to keep faith with the complainant and, if unable to keep its promise, should have compensated him for the injury he suffered.

16. The complainant is claiming damages in the amount of 218,543 United States dollars, the equivalent of his remuneration "in the last three years of the ... grant" from the National Institute of General Medical Sciences. The WHO retorts that from the putative loss of remuneration should be subtracted his earnings for employment, actual and anticipated, during the period from 1 July 1992 to 30 June 1995. The Tribunal accepts the Organization's argument. It will therefore set aside the Director-General's decision and award the complainant (1) the amount he claims for the three-year period less the equivalent of his earnings from employment to date and his anticipated earnings from employment in the remainder of that period; and (2) \$7,000, the estimated cost of his obtaining permanent resident status in the United States for him and his family.

17. He is entitled to \$700 in costs.

#### DECISION:

For the above reasons,

1. The Director-General's decision of 24 July 1992 is set aside.
2. The Organization shall pay the complainant damages in the amounts set out in 16 above.
3. It shall pay him \$700 in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
Mella Carroll  
Mark Fernando  
A.B. Gardner

