EIGHTY-THIRD SESSION

In re Weiss

Judgment 1632

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gian Mario Weiss against the World Health Organization (WHO) on 29 July 1996, the WHO's reply of 22 November 1996, the complainant's rejoinder of 7 February 1997 and the Organization's surrejoinder of 18 April 1997;

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. The complainant, an Italian who was born in 1951, joined the staff of the WHO in 1981 under the first of several short-term appointments, the last of which expired in May 1983. In 1987 he got a two-year appointment as an associate professional officer on funding from the Government of Italy, and the WHO extended it in 1989 until 31 May 1990. In June 1990 he got the first in another string of short-term appointments. On 1 June 1991 he took up a two-year appointment as a technical officer in the Programme on Substance Abuse (PSA) at grade P.3 on post No. 1.3836. In form 172, "Notification of decision on position request", which the chief of Budget signed on 1 May 1991, the Administration described post 1.3836 as "time-limited" for a period of 24 months. In June 1993 the WHO extended that appointment by two years.

In a letter of 14 November 1994 the Director of the Programme told him that the Organization was not going to extend his appointment beyond the date of expiry, and in a letter of 27 February 1995 a senior officer of the Division of Personnel confirmed that his appointment would end at 31 May 1995 under Staff Rule 1040.

On 28 April 1995 the complainant gave notice of appeal. In a report dated 13 March 1996 the headquarters Board of Appeal recommended rejecting his appeal, yet paying him the equivalent of three months' salary without allowances by way of compensation for delay in processing it. By a letter dated 3 May 1996, which he impugns, the Director-General endorsed the Board's recommendation.

B. The complainant submits that the decision he is impugning is unlawful. He has three pleas. The first is that there were no grounds for the non-renewal, which the WHO ascribed to "budgetary constraints". The second is that it failed to comply with the rules, particularly Staff Rule 1050.6 on the difference between posts of indefinite and limited duration and Rule 1050.2 about the "reduction-in-force" procedure. His final plea is that the Administration's "manoeuvres" caused undue delay in the internal appeal.

He seeks the quashing of the decision of 3 May 1996 and reinstatement as from 1 June 1995 with payment, plus interest, of all entitlements due from that date less any occupational earnings he may have had from then until actual reinstatement. He claims damages for the delay in the internal proceedings and 5,000 Swiss francs in costs.

C. In its reply the WHO contends that the challenged decision was a proper exercise of discretion warranted by a shortage of funds. His post having been of limited duration, the complainant was not entitled to a reduction-in-force procedure. The WHO observes that the 13,724 Swiss francs it has already granted him for delays in the internal proceedings was compensation enough under that head.

D. In his rejoinder the complainant refutes the Organization's reply, expands on his pleas and broadens his claims.

E. In its surrejoinder the WHO presses the objections it raises in the reply and maintains that it was under

no obligation to extend his appointment. If his complaint succeeded, the reduction-in-force procedure would offer more appropriate relief than reinstatement.

CONSIDERATIONS

1. The WHO appointed the complainant as from 1 June 1991 to post No. 1.3836 at grade P.3. His appointment was with a programme for the prevention and control of alcohol and drug abuse, known as the Programme on Substance Abuse (PSA). It was for two years, the first to be probationary.

2. A form -- No. 172 -- headed "Notification of decision on position request" and dated 1 May 1991 had the following entry:

"Establishment approved as follows:

time-limited post for period 1.6.91-31.5.93 (24 months)

extension of post subject to continued need and availability of funds."

Another form, headed "Approval of post description" and dated 14 May 1991, described the new post as "effective 1 June 1991 to 31 May 1993".

3. On a form headed "Extension/Termination of Contract" and dated 3 December 1992 the complainant's supervisor asked for the extension of his appointment by two years until 31 May 1995. On 19 January 1993 the Director of Personnel signed a "personnel action" form so extending his appointment, which was described as a "fixed-term" one. The Organization has produced no evidence of any decision to extend the post by another "time-limited" period.

4. By a letter dated 14 November 1994 the Director of the Programme informed the complainant that "the funding source which provided for your post for four years is no longer available" and that the post -- No. 1.3836 -- would cease to be funded at 31 May 1995. The Director said that since his contract ended at that date there was no way of extending it with the Programme. After correspondence the chief of Contract Administration and Information, in the Division of Personnel, informed him by a letter dated 27 February 1995 that his contract would not be renewed and that his appointment would therefore end at 31 May in accordance with Staff Rule 1040.

5. On 28 April 1995 the complainant gave notice of appeal to the headquarters Board of Appeal. Much delay was attributable to the Organization in processing his appeal, but the hearings ended on 14 February 1996 and the Board reported on 13 March 1996. It concluded that post 1.3836 was a headquarters one funded from extrabudgetary sources; that as such it was "time-limited" and not subject to the "reduction-in-force" procedure provided for in Staff Rule 1050; and that the notice of non-renewal given to the complainant on 27 February 1995 had been "in accordance with the applicable Staff Rules and Regulations". It "found no evidence to support [his] allegation of incomplete consideration of the facts", which afforded grounds for appeal under Rule 1230.1.2. It recommended rejecting his appeal but paying him the equivalent of three months' salary in compensation for the delay, which it said had "caused hardship". By a letter dated 3 May 1996 the Director-General informed the complainant that he was accepting the Board's recommendations. The Organization accordingly paid him three months' salary in compensation for the delay.

6. The complainant is impugning that decision on two grounds: absence of factual justification for it, and failure by the Organization to observe the provisions of the Staff Rules and Regulations. He claims further compensation for inordinate delay.

The observance of the material rules

7. The provision under which the Organization gave the complainant notice of termination, Rule 1040, reads as follows:

"Temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agree period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract. Such a staff member who does not wish to be considered for re-appointment shall also give that period of

notice of his intention."

The complainant contends that he should have been given notice under Rule 1050.

8. Rule 1050.2 used to provide:

"When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director-General, based on the following principles ..."

The "principles" then appear in clauses numbered 1 to 5. In several judgments since 1982, however, the Tribunal has ruled on cases in which a post of indefinite duration that was abolished had been held by a WHO staff member with a fixed-term appointment which expired at the same time. The issue was whether the applicable Rule was 1040 or 1050. The Tribunal held that in the absence of a specific provision in the Rules the right to the application of the reduction-in-force procedure arose on the abolition of a post of indefinite duration even though the staff member might have only a fixed-term appointment: see Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In response to those judgments the Organization amended the material provisions of its Staff Rules and Manual. The Rules now read:

"1050.2 When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General, based upon the following principles: ...

1050.3 Termination under this Rule shall require the giving of at least three months' notice to a staff member holding a career-service appointment or a confirmed fixed-term appointment of one year or more and at least one month's notice to any other staff member.

1050.4 A staff member whose appointment is terminated under this Rule shall be paid an indemnity in accordance with the following schedule and with due regard to Rule 380.2.

...

1050.5 The appointment of a staff member who has satisfactorily served the Organization for five years or more shall be considered as having been terminated under this Rule if the appointment was not renewed because of the abolition or intended abolition of a post.

1050.6 Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. It is not in dispute that the complainant's post, No. 1.3836, was created for a definite period of two years and was therefore one of limited duration. In accordance with the rules it would have automatically lapsed at the end of the two years unless an express decision were taken to extend it. Although the Organization did take a decision to continue the post, there is, as was said in 3 above, no evidence that the decision was to continue it for any further specific period. The only inference to be drawn from the evidence that is before the Tribunal is that after expiry of the period of two years for which it was created the post was extended indefinitely, "subject to continued need and availability of funds". The form headed "Notification of decision on position request" -- referred to in 2 above -- offers, after the words "Establishment approved as follows", the following options:

"time-limited post for period [dates to be entered], extension of post subject to continued need and availability of funds";

"indefinite, subject to continued need and availability of funds."

So there is nothing inconsistent in having a "time-limited post" and an "indefinite" post subject to the same contingencies.

10. The rules on the categories of post falling within the two definitions and determined by the Director-General are set out at Manual paragraph II.9.260, which provides:

"Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or

programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:

260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office; ..."

11. The headquarters Board of Appeal concluded that post 1.3836 was "a Headquarters post funded from extra-budgetary sources, and that as such it was of a time-limited duration and not subject to a Reduction-in-Force procedure". But what the Board should have done was look at the definitions in the Staff Rules and decide which of them applied to the complainant's post. Only if the definition of a post of limited duration applied were the categories of post determined by the Director-General relevant.

12. The Organization argues that it had no obligation to explain in extending the contract that the post was one of limited duration. But that is not the point. The Organization has produced no document at all about the decision to continue post 1.3836 and in the absence of a decision to establish it for another definite period its continuance must have been indefinite.

13. The conclusion is that a post that was originally of limited duration became one of indefinite duration and the complainant was therefore entitled to the application of the reduction-in-force procedure provided for in Rule 1050.2. Rule 1050.2.5 provides:

"a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

The termination of the complainant's appointment under Rule 1040 was therefore invalid.

The justification for termination

14. His other plea is that his post was not linked to any specific funding and that the Programme on Substance Abuse had enough funds at its disposal anyway to continue financing it. The Organization answers that senior managers have the right to determine the priorities of programmes and to decide accordingly whether or not to extend a particular appointment.

15. The Tribunal accepts that it was on his own assessment of what was in the best interests of the Programme and the Organization that the Director of the Programme had to decide what use to make of the extrabudgetary funds allocated or pledged to it. His decision against extending the complainant's appointment was not a misuse of his discretion.

The delay in the internal appeal proceedings

16. Lastly, the complainant objects to the amount he was granted for the delay in dealing with his internal appeal. The amount that the headquarters Board of Appeal recommended and that the Director-General granted him was the equivalent of three months' salary without any allowances: it came to 13,724 Swiss francs.

17. Under Staff Rule 1230 a Board of Appeal should report its findings within ninety days of receipt of the full statement of appeal and the Director-General should inform an appellant of his decision within sixty days of the receipt of the Board's report. So some five months are allowed in all. In this case the complainant filed his statement of appeal on 26 May 1995 and he got the final decision on 3 May 1996, i.e. over six months beyond the allowable maximum.

18. The complainant considers the sum of 13,724 Swiss francs inadequate particularly as he "maintained his home in Geneva" in the expectation that the appeal would be disposed of within the five months. He says he suffered loss in excess of the sum awarded, though he puts no figure on it.

19. The Organization says that the sum that the complainant's representative claimed was 10,000 United States dollars, which was less than the equivalent of the three months' salary he actually got. The complainant retorts that the figure of $10,000 was only an example of an award that the Tribunal had made for undue delay in Judgment 1319 (*in re* Moscoso).

20. Since by virtue of the present judgment the complainant is, as is explained below, to be granted arrears

of pay from 1 June 1995, no further award need be made by way of compensation for the delay in dealing with his internal appeal.

Relief

21. The WHO contends that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

22. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof, which were raised in Judgment 1045 (*in re* Mitastein), were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

23. The present complainant is likewise entitled to reinstatement with payment of the salary, allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

24. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 23 -- without actually reinstating him in a post commensurate with his grade and experience -- and of carrying out the procedure under the same conditions.

25. The complainant is entitled to payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Organization shall either reinstate the complainant as set out in 23 or pay him damages as set out in 24.

3. It shall apply to him the reduction-in-force procedure.

4. It shall pay him interest at the rate of 8 per cent a year on the sums due.

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

6. His other claims are dismissed.

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

Delivered in public in Geneva on 10 July 1997.

William Douglas
Mella Carroll
Mark Fernando

A.B. Gardner

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