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

EIGHTY-THIRD SESSION

In re Paré

Judgment 1661

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michel Paré against the World Heath Organization (WHO) on 17 November 1995 and corrected on 12 February 1996, the WHO's reply of 13 May, the complainant's rejoinder of 22 August and the Organization's surrejoinder of 2 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a citizen of Burkina Faso who was born in 1945, joined the WHO in 1974 as a clerk at grade OU.5 at Ouagadougou, where he worked under its Onchocerciasis Control Programme (OCP). It promoted him several times and in July 1989 put him on a P.4 post as budget and finance officer.

In a letter of 15 March 1993 the Director of the Programme told him of a rumour that he had perverted his official position for his own enrichment; pending the outcome of investigation he was suspended forthwith, albeit on full pay. In a letter of 19 March the Director informed him of the charges against him as budget and finance officer and as chairman of the Property Survey Committee of the Programme. Most of the charges were to do with the sale of vehicles removed from the Programme's pool and the importing of petrol.

In a letter of 23 March the complainant confessed to some of the charges but denied doing anything that practice did not condone. After correspondence the Director told him in a letter of 8 April that, being dissatisfied with his answers and explanations, he was ordering an internal audit by accountants from headquarters. The audit was done in the next few weeks and the Chief of the Office of Audit and Administrative Management submitted his report on 25 June.

In a letter of 10 July the Director informed the complainant of the findings, which he said showed misconduct within the meaning of Staff Rule 110.8, and asked him to reply within eight days. In a letter of 16 July the complainant answered in detail. For the most part he admitted what had been going on but made out that it was not serious and he was not liable anyway. By a letter of 27 July 1993 the Director gave him notice of dismissal as from 27 July for misconduct under Rule 1075.1.

On 20 August he appealed to the regional Board of Appeal. In its report of 22 July 1994 the Board recommended upholding his dismissal. The Regional Director for Africa did so and told him in a letter of 10 November 1994. On 26 January 1995 he appealed to the headquarters Board of Appeal. In its report of 30 June the Board held that the complainant had "abused his position, status and prerogatives as a senior WHO officer to the Organization's detriment" and recommended rejection. In a letter of 16 August 1995 to the complainant - the impugned decision - the Director-General endorsed the recommendation.

B. The complainant submits that his dismissal for misconduct was in breach of the material rules, particularly Rules 1075.1 and 1130, which do not allow such dismissal unless the staff member has been informed of the charges against him and been given his say.

Although the auditors allegedly heard witnesses, he was unable to cross-question most of them and so was denied the opportunity of defending himself.

There was no proof of misconduct and he was dismissed largely from personal or political motives or both.

He asks the Tribunal to quash the decision of 16 August 1995, order reinstatement and award him the costs of his appeals. Failing reinstatement, he claims "his salary for the 12 years of service remaining after his dismissal" and 300,000 United States dollars in damages. He applies for hearings and for the disclosure by the WHO of several items of evidence.

C. The Organization replies that the charges against the complainant are well-founded; that what he did amounts to misconduct within the meaning of Rule 110.8 and warrants dismissal under Rule 1075.1; and that there was no breach of due process.

On the last issue it points out that the Director's letter of 10 July 1993 set out the full particulars of the charges and said no more than what had already been said in earlier letters to him. What is more, he answered in great detail.

There was no breach of due process in withholding from him the reports of the Investigating Committee and the internal auditors since all the charges upheld against him and warranting the dismissal were set out in detail in the letter of 10 July 1993.

Contrary to what he contends, he did question a witness.

Lastly, the Organization sees no point in hearings.

D. In his rejoinder the complainant challenges the WHO's version of the facts and presses his pleas about breach of due process.

E. In its surrejoinder the Organization submits that the complainant's explanations are without merit and presses its pleas.

CONSIDERATIONS

1. The WHO recruited the complainant on 1 July 1974 as a clerk at grade OU.5 under its Onchocerciasis Control Programme in West Africa (OCP) at Ouagadougou, in Burkina Faso. It promoted him several times. On 1 September 1978 it appointed him to the post of finance officer at grade P.1. It promoted him to P.2 and then to P.3. On 1 July 1989 he became budget and finance officer at grade P.4. As chairman of the Programme's Property Survey Committee he was in charge of selling to the highest bidder motor vehicles removed from the Programme's stock.

On 21 February 1993 he had his appointment extended from 30 June 1993 to 30 June 1995.

The Director of the Programme had doubts about the propriety of his behaviour. The Director suspected him of deriving illicit gains for himself or persons unknown from the sale of the superannuated vehicles and the importing of duty-free petrol in the Organization's name for his own purposes. On 11 March 1993 the Director had two senior officers, the chiefs of Administration and Management and of Vector Control, make a thorough check of the management of the Programme's property over the last three years. On 15 March the complainant was told that he was suspected of abuse of his official position for private gain, there was to be an investigation, and he was suspended with pay under Rule 1120. In a letter of 19 March the Director told him of the charges and in accordance with Rule 1130 called him to account. He answered in a letter of 23 March. In a letter of 1 April the Director put further questions and he answered them in a letter of 6 April. On 8 April the Director said that he had asked for an audit by headquarters. The audit office submitted to the Director a report dated 25 June. In the light of the report the Director informed the complainant in a letter of 10 July of the substantiated heads of charge against him, again invited him to comment, and set out the material rules in an appendix. In a letter of 16 July the complainant answered the charges.

By a letter of 27 July the Director dismissed him forthwith for misconduct; granted him under Rule 1075.1 one month's pay in lieu of notice; agreed to compensate him for accrued annual leave; and gave exceptional consent to the grant of six months' pay in termination indemnity.

The complainant asked to see the reports on the investigation and the audit but was told that they were internal documents and that he had been told anyway of the charges in them.

On 20 August he appealed against the decision of 27 July to the regional Board of Appeal. The Board sent him the two reports. It recommended rejecting his appeal, and the Regional Director for Africa did so on 10 November 1994.

The complainant appealed against that decision in turn. On the recommendation of the headquarters Board of Appeal the Director-General rejected his appeal by a decision of 16 August 1995.

The complainant's claims are, in short, to the quashing of that decision, to his reinstatement and to his full costs. Failing reinstatement, he seeks the payment of remuneration for the twelve remaining years of service from the date of his dismissal and an award of 300,000 United States dollars in damages.

The Organization seeks the dismissal of his complaint. The charges which it has brought against him and which afford the grounds for dismissal and his objections to the impugned decision are taken up below.

2. The complainant has applied for hearings to take evidence from several witnesses and from himself and has asked the Organization to produce several items of evidence, which it has.

For the following reasons there is no need for hearings or for the taking of evidence from the proposed witnesses.

(a) The complainant has already had ample opportunity of stating his case.

(b) There is no need to take evidence from the author of the audit report, since the report has been submitted as evidence and the main facts it sets out are not contested insofar as they are cited in the decision to dismiss the complainant.

(c) There is ample evidence on the secret importation of petrol: see 5 below.

(d) There is no need to hear a witness about the terms of sale of two "Saviem" vehicles (IN 0444 BF and IN 1095 BF): the complainant has dwelt on the subject at length and the Organization has acted on what he said.

(e) Nor need the Tribunal hear evidence from a serving staff member and a former one to demonstrate that the auditors put witnesses under duress. For the most part the facts are not in dispute and the Organization has accepted the complainant's own statement.

(f) For the same reasons it would serve no purpose to hear a witness whom the complainant cross-questioned in the Director's presence in the internal appeal proceedings and who he says broke down while giving evidence about the ordering of one of the two vehicles from Côte d'Ivoire in February 1993.

3. The complainant pleads a procedural flaw. In the proceedings that culminated in dismissal the WHO would not let him see all the evidence, more particularly, the investigation and audit reports, or adduce evidence of his own, or refute the evidence against him, for example by cross-questioning witnesses.

Before an organisation imposes a disciplinary penalty such as dismissal it must warn the staff member and give him the opportunity not only of stating his own case but also of refuting the organisation's: in other words, there must be due process. So he must be told of the charges and of the evidence against him. If the proceedings are to be properly adversarial, he must be free to give his own version of the facts, refute that evidence, adduce his own, take part in the discussion of it, and at least once cross-question the expert and other witnesses. See, for example, Judgments 512 (*in re* Diaz de Borsody No. 2) under 5; 907 (*in re* Pereira da Cruz No. 2) under 4; 999 (*in re* Sharma) under 5; 1082 (*in re* Liégeois) under 18; 1133 (*in re* Manaktala) under 7; 1212 (*in re* Schickel-Zuber) under 3; 1228 (*in re* Kigaraba) under 4; 1251 (*in re* Tuffuor) under 8; 1384 (*in re* Wadie) under 5, 10 and 15; 1395 (*in re* Walter) under 6; 1484 (*in re* Thuillier) under 7 and 8. These requirements do not apply when the organisation is merely taking protective measures: see Judgment 1346 (*in re* Demonet).

It does seem wrong that the Organization refused the complainant the texts of the audit reports, which were analogous to evidence from expert witnesses, and that before he was eventually dismissed his right to fair and adversarial preliminary proceedings was somewhat restricted.

Yet in the circumstances there was due process. By his letter of 10 July 1993 the Director of the Programme informed him of the evidence against him that the two reports contained. The regional Board of Appeal let him see the reports and he was able to discuss them before both the regional and headquarters Boards. The headquarters Board heard the parties and the complainant's own witnesses. Indeed in his appeal to the headquarters Board he waived his objection to breach of due process prior to dismissal. That being so, and much time having elapsed since that decision was taken, it would be in bad faith for him to plead such breach now in support of an application for starting the procedure all over again. The salient point is that he did get a proper hearing as to the charges on which the dismissal rested. The truth of most of them he has not even challenged and, as for the others, he either admits to them or has had ample opportunity of exercising his procedural rights.

The conclusion is that there are no grounds for quashing the impugned decision for the purpose of ordering new proceedings.

4. (a) The Director's letter of 10 July 1993 set out the heads of charge against the complainant. It also quoted the main rules about the sale of WHO assets:

A.1 "All bids are submitted to the Property Survey Committee [PSC] which may accept a bid other than the highest, or may reject any or all bids when they consider this to be in the interests of the Organization".

A.2 "Should a member of the public and a staff member make an identical bid, preference is given to the staff member's bid."

"In addition, when the price offered by a staff member is very close to a higher price proposed by a successful bidder from outside, the staff member shall be considered first."

B. "Vehicles bought should be used for the personal purposes of the staff member and should not be sold later."

C.1 "The bid processing sheets and the bid are initialled by all the members of the Committee and listed in order of merit. Minutes on the bid opening are written and signed by the members before sending letters to the best bidders for each vehicle."

C.2 "As soon as a buyer pays the amount on his bid and receives a receipt from Finance, he is given the full file on the vehicle and he goes to SSO [Supply Service Officer]. The letter makes a request for authorization for customs formalities. As soon as this authorization is given, the beneficiary of the vehicle carries out the customs formalities."

C.3 "The Chairman of the PSC issues a certificate of sale to the beneficiary, who goes to the licensing office with the customs payment receipts."

C.4 "The PSC gives him a collection bill in the form of a memorandum which he presents to TMO [Transport Management Officer] before taking possession of the vehicle."

D. "... another possibility is to wait for an eventual withdrawal by the best three bidders. In such a case, we sell the vehicles by mutual agreement at reduced prices."

The charges in the Director's letter may be summed up as follows:

First come breaches of internal rules.

1. For the sale of vehicles in 1992 the order of the original list of bids was not followed. Of 44 vehicles 15 were sold to staff to the detriment of outsiders or staff who had made higher bids. In 13 of these cases the staff members paid the equivalent of the top bid: in the other two they paid less. The members of the Committee did not sign the minutes but the complainant as chairman used them to send out letters of attribution.

That was in breach of rules A.1, A.2 and C.1.

2. The complainant sold two vehicles registered in Togo to OCP staff for less than the amount of a bid from an OCP staff member that was equal to the best outside one.

That was in breach of rules A.1, A.2 and D.

3. For another vehicle the highest bidder got no letter of attribu-tion. The second highest was directly approached and got the vehicle for a figure that was 105,000 CFA francs above his original bid.

That broke rules A.1 and C.1.

4. From the sale in 1992 the complainant himself took two vehicles, one for resale and the other for a friend.

He thereby broke rule B.

5. On the complainant's instructions the same two vehicles were cleared through customs, made over to "non-OCP drivers" and taken to the complainant's own address: there had been neither payment nor declaration of sale nor "collection slip".

Rules C.2, C.3 and C.4 were infringed.

6. One vehicle was sold to an OCP staff member for 150,000 CFA francs by mutual agreement although his initial bid -- and not the best one at that -- had been 333,333 francs.

Rules A.1, A.2 and D were thus broken.

Besides, the chairman was not free to act on his own, as the complainant did.

Second come charges of breach of customs rules and procedures

1. ***Breach of the customs regulations of the Côte d'Ivoire applicable to vehicles sold in that country***

(a) For any vehicle sold in the Côte d'Ivoire the WHO must apply for customs discharge as the beneficiary of the tax exemption.

(b) For any vehicle sold outside the Côte d'Ivoire to a third party an application for customs discharge has to be followed by one for export.

(c) When the WHO itself applies for re-exportation no customs payment is required but formalities have to be met.

The two vehicles exported from the Côte d'Ivoire to the com-plainant's private address in Ouagadougou were misrepresented as being exported by the WHO. So was another exported to Mali for an OCP employee.

2. ***Breach of the customs regulations of Burkina Faso***

The complainant often had twelve-gallon drums of petrol imported from Togo for his own use. Under the customs regulations of the host country that amounted to smuggling.

Third are charges of misconduct.

1. ***The improper use of names***

Letters of attribution were sent to three people who were not the actual buyers of the vehicles. They say that their names were used without their knowledge. Two of the sales were of motor cars which the complainant bought under a false name, one for resale and the other for a friend.

2. ***Tampering with a receipt***

A receipt was issued on 4 March 1993 for the purchase of a vehicle. The complainant changed the date to 24 February 1993.

3. ***The sale of two vehicles by mutual agreement at a discount***

Two "Saviem" vehicles went by mutual agreement to a local dealer for 1,800,000 CFA francs although the Property Survey Committee had earlier turned down a bid of 3,120,050 francs as too low. On 14 January 1993 the complainant wrote a letter as a private person to himself as chairman of the Committee bidding 1,400,000 francs for the two vehicles. The TMO found the sum insufficient. The complainant then sold them himself without consulting the Committee. Though they had not been paid for he made over the papers to the buyer.

4. ***Delivery of vehicles without payment***

Under this head there is further reference to the same two vehicles that the complainant had delivered from the Côte d'Ivoire to his own address, before they had been paid for. The sum of 310,000 francs was not yet paid.

(b) In his letter of 16 July 1993 the complainant confessed to "breach of rules A.1 and A.2 of the procedure for some of the vehicles got rid of in 1992", but said he thought that the Committee had known all along and had "collectively condoned the breach".

He denied having "any malicious intent as to the two vehicles from Togo". "Was it not", he asks, "because we were sidestepping the rules that we entered explanations in the minutes for approval by the Director?"

He said that he had no comment to offer on matters that secretaries were in charge of.

He contended that of the two vehicles driven to his own address one was indeed for a friend, but the other was originally intended for someone -- Mr. Konate Kati -- whose name was on the delivery list. When Mr. Konate backed out after receiving the letter of attribution he felt bound to take over the deal himself. With the money paid by the friend he was able to do so promptly. For the other vehicle he had already paid 300,000 francs and would shortly be producing the balance of 310,000.

The reason why he sold a car for 150,000 francs when the original bid had been 333,333 was that that bidder too backed out and lowered his bid to 150,000, which the complainant accepted.

He said that breach of the customs regulations of the Côte d'Ivoire had nothing to do with him: some services of the Programme were to blame.

He does not deny smuggling petrol but says it was not as much as was made out.

He denies improperly using the names of Mr. Konate Kati and Mr. Kone Amara and says he used Mr. Robert Toe's with his consent.

He did not tamper with the receipt for 300,000 francs; he just got the cashier to correct it to show the actual date of payment, which was 24 February 1993.

He contends that the sale of the two vehicles for 1,800,000 francs meant no loss for the Organization, though he does admit to handing over the papers for the vehicles before they were paid for. And the Programme has suffered no loss since the vehicles for which there is no certificate of sale remain its property.

(c) The reasons stated for the dismissal are as follows. Citing the correspondence, the Director says that the investigation and the complainant's answers -

"afford ample evidence of your liability: you abused your official position to secure private gain for yourself and your friends to the detriment of the Programme. You failed to comply fully with WHO/OCP rules and procedures for the disposal of the Programme's assets. You made deals in utter disregard of the rules. You acted alone and neglected to tell the Property

Survey Committee. You infringed customs regulations and procedures by smuggling drums of petrol in OCP vehicles. You appropriated without payment two vehicles that you had someone remove from OCP premises."

The Director dismissed him on the grounds that such acts were inadmissible and tantamount to misconduct.

(d) The headquarters Board of Appeal held:

"The complainant admitted to the Board that he had 'stretched' the rules, whereas, as budget and finance officer, chairman of the Property Survey Committee and acting chief of Administration of the Programme, he had the duty of preventing abuse both within and outside the Programme. The Board observes, by the way, that it is unwise to vest so much responsibility in any one person when no provision is made for accountability.

The Board believes that the 'stretching' of the rules went far beyond any policy of giving preference to OCP staff without harm to the WHO's interests. Nor may the appellant plead any mitigating circumstances since the duty of safeguarding the Programme's property and finances was foremost his."

(e) In its pleadings to the Tribunal the Organization -- as did the Director -- rests its case on facts acknowledged by the complainant, save that he has withdrawn his confession to the smuggling of petrol. It concludes that those facts amount to misconduct warranting dismissal.

(f) The Tribunal holds likewise that there is no need to go beyond those facts and that suspicions about others that were mentioned at the outset of the disciplinary investigation may be discarded. An organisation that levels charges of misconduct must bear them out: see Judgments 635 (*in re* Pollicino) under 7, 969 (*in re* Navarro) under 16 and 1384 (*in re* Wadie) under 10.

5. The Tribunal will take up separately the charge that the com-plainant time and again broke customs regulations by importing cheaper petrol from Togo for his own use without declaring it to the customs of Burkina Faso.

On 2 April 1975 he was given a stern warning for having procured some eight gallons which he got a driver of the Programme to buy for him in Ghana. He thus infringed the customs regulations of Burkina Faso and the currency regulations of Ghana.

In his letter of 23 March 1993 he admitted to "having got drivers to buy petrol in Togo" but said that other staff had likewise abused the WHO's privileges. In his letter of 16 July 1993 he owned up to bringing in petrol from Togo in twelve-gallon drums but said that the Organization should not think that he had done it often nor, in particular, that Mr. Bazie, a driver, "had done so on all his trips to Togo in December 1992". He again alleged that other staff were just as guilty, or even more guilty, of breaking customs regulations.

In his pleadings he objects to the Organization's not taking evidence from the driver who brought in the drums, who could have proved that the complainant asked him only to bring them back empty so that they could be used for water.

Since he did not ask for the hearing of such evidence in the internal appeal proceedings the Organization did not abuse its authority by confining itself to his repeated admissions and declining to hear the driver. Nor will the Tribunal order a hearing, the complainant having failed to explain why he made false confessions. In his rejoinder he says that he was covering up for a friend who had asked the driver to bring back a drum of petrol duty free. His new version is the less plausible because it does not account for the repeated importation of petrol drums, because the friend is dead and because someone threatened with dismissal was unlikely to confess to misconduct he had not been guilty of.

The conclusion is that there are no grounds for not accepting the Organization's reading of the evidence.

6. Misconduct so serious as to warrant dismissal is such that letting the appointment continue would be intolerable.

(a) As a strong line of precedent has it -

"besides carrying out his allotted task an international civil servant has a duty to show such dignity of behaviour as not to harm the good name that the organisation must enjoy if it is to do its job properly. He must in particular abide by the law and respect the public order of the host state or of any other country it may assign him to."

See Judgments 1550 (*in re* Merchan) under 14 and 15, on abuse of the diplomatic pouch, 1584 (*in re* Souilah) under 9, and the precedents cited therein. The higher the rank the greater the duty of diligence.

Time and again the complainant broke customs regulations to the detriment of the host State under cover of privileges that the Organization is granted in order to carry out its mandate. His conduct was such as to

undermine the trust it must enjoy and to compromise the attainment of its objectives. That there was misconduct is indeed beyond gainsaying, especially in someone of his position who went on breaking the rules even after a warning in 1975.

(b) The complainant managed WHO assets. He was in charge of the resale of superannuated vehicles of the Programme under written rules intended not just to protect those assets but also to put trust in the Organization through fair and open management.

The complainant broke the rules on resale. Bidders were not put on a par. Some staff were given preference over others or over higher bidders. The order of the attributions was not always observed. The Property Survey Committee was not consulted as it should have been. Vehicles or vehicle papers were sometimes arbitrarily handed over before payment, just to suit the buyer. The complainant himself bought or tried to buy vehicles that ought to have been sold on. All that was not only in breach of the material provisions but cast discredit on the Programme and gave an impression of arbitrariness, favouritism and graft, even supposing that, as he says, he made no money himself out of it. Viewed objectively, such behaviour became intolerable for the Organization and amounted to misconduct.

(c) To pass muster, dismissal must be proportionate to the offence: see Judgments 1550 under 16 to 18; 1584 under 11, and the precedents cited therein. To ascertain whether it was in this case, it is necessary to assess the objective and subjective seriousness of what he did.

Not only was his misconduct serious in itself but his high position and repeated breach of the rules, even after being warned, made it worse. There was a risk, too, that he would not stop there. It was obviously vital to the Organization's interests and good name to get rid of him. He held a two-year contract, and his conduct made renewal of it unlikely. Dismissal was not disproportionate to his offences. The Director of the Programme did not misuse his discretion in taking such disciplinary action.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
E. Razafindralambo
Egli
A.B. Gardner

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