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

NINETIETH SESSION

***In re* Bouzaïene** **Judgment No. 2010**

The Administrative Tribunal,

Considering the complaint filed by Mr Naceur Bouzaïene against the World Health Organization (WHO) on 4 November 1999 and corrected on 17 February 2000, the WHO's reply of 23 May, the complainant's rejoinder of 27 July and the Organization's surrejoinder of 28 September 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, an accountant of French nationality born in 1952, was hired by the WHO as a consultant for six months from 6 July 1998. His duties were to include training staff at the Regional Office for Africa, in Harare (Zimbabwe), in financial management, as well as evaluating audit reports and checking the Office's internal control mechanism. However, before leaving for Harare he was to spend two months at WHO headquarters in Geneva to familiarise himself with the Organization's financial and accounting procedures.

His departure for Harare was scheduled for 1 September 1998 but the acting Director of the Division of Budget and Finance informed him in a letter of 26 August that his contract would be terminated as from the following day because an assessment of his capabilities during the two months he had spent at headquarters had not been positive. The Organization would pay him thirty days' salary in lieu of notice. On 8 September the complainant wrote to the Director-General challenging that decision. By a letter of 29 October 1998 the Director of the Personnel Division upheld it, explaining that the sole reason for it was the complainant's inaptitude for the job of personnel trainer at the Regional Office. On 30 April 1999 the complainant filed an appeal with the Headquarters Board of Appeal against the decision to terminate his appointment. In its report of 24 June the Board concluded that the appeal was out of time and therefore irreceivable. By a letter of 9 August 1999 the Director-General endorsed the Board's conclusion and rejected the appeal. That is the impugned decision.

B. According to WHO Manual paragraph II.12.550, "The appointment of consultants may be terminated by the Organization at any time upon thirty days' notice, unless otherwise specified in the offer of appointment". The complainant pleads breach of that rule on two counts: first, his contract specified the term of his appointment and could not be terminated before its expiry and, secondly, "the termination [came] after the prescribed thirty days". He adds that, contrary to Manual paragraph II.12.580, there was no appraisal of his performance, yet the reason given for his termination was that he was unfit to perform his duties. He asserts that no one commented on the quality of his work in the two months he spent preparing for his mission. He considers the decision arbitrary.

The complainant claims payment of his salary, including per diem, until the expiry of his contract, compensation for injury in an amount equivalent to six months' additional salary, to include per diem, and 34,200 United States dollars in damages. He also claims costs.

C. In its reply the Organization pleads that the complaint is irreceivable because the internal appeal was out of time. The complainant should have challenged the decision to end his appointment within sixty days of it being notified to him, but he lodged his appeal more than eight months later.

In subsidiary argument the Organization contends that the complaint is devoid of merit. First, the fact that the contract specified an expiry date, as all temporary contracts do, did not exclude implementation of Manual paragraph II.12.550, which is about early termination. Furthermore, the complainant contradicts himself: he asserts on the one hand that his contract could not be terminated before its expiry and, on the other, that it could be terminated only within the first thirty days. Secondly, that paragraph does not say that the contract may be terminated only within the first thirty days, but that it may be terminated subject to thirty days' notice. Thirdly, a performance report is not a prerequisite for terminating a consultant's appointment. Fourthly, the decision was not arbitrary: the complainant's knowledge of financial procedures and mechanisms and his command of English had turned out to be quite inadequate for the duties he would have to perform. To have kept him on would have been contrary to the interests of the Organization. Lastly, it considers the complainant's claims to be excessive.

D. The complainant rejoins that although he received the impugned decision, it was never "notified" to him. In his view, the sending of a mere letter does not amount to notification: the decision should have been sent to him by registered mail with acknowledgement of receipt or by an *acte extrajudiciaire*. Moreover, the decision should have stated the available means of redress and the time limits for using them.

On the merits the complainant submits that Manual paragraph II.12.550 fails to specify whether the appointments it refers to are fixed-term or indefinite. In his submission, fixed-term appointments may be terminated "only on serious grounds, which were not demonstrated here". Furthermore, under II.12.550 only the employee may terminate the appointment by giving thirty days' notice; termination by the Organization must be within the first thirty days, which correspond to a trial period. Lastly, he maintains that the WHO was bound to prepare an evaluation report on his performance and that the case law requires that a warning must be given sufficiently early to allow the staff member to improve.

E. In its surrejoinder, citing the Tribunal's case law the Organization maintains that the internal appeal was out of time. It submits that the time limit starts to run from the date on which the staff member learns of the decision through official channels, no specific notification procedure being necessary. The absence of any indication of available remedies can invalidate the notification only "in exceptional circumstances", which was not the case here.

As for the drafting of an evaluation report on his performance and the warning about the quality of his work, the Organization contends that the case law the complainant cites refers only to appointments of at least one year.

CONSIDERATIONS

1. The WHO hired the complainant as a consultant for the period from 6 July 1998 to 6 January 1999 to carry out a mission in Harare (Zimbabwe). Before going there he was to spend two months at headquarters in Geneva to be briefed on what his work would involve and to familiarise himself with WHO financial and accounting procedures.

By a letter of 26 August 1998 he was informed that the WHO had decided to terminate his appointment as from 27 August 1998, on the grounds that it had become clear after his two months at headquarters that he was unfit to carry out the mission in Harare. On 8 September 1998 the complainant wrote to the Director-General challenging that decision. The Organization upheld it in a letter of 29 October 1998.

2. On 30 April 1999 the complainant appealed to the Headquarters Board of Appeal against his "unlawful dismissal, with no evaluation". On 24 June 1999 the Board concluded that the appeal was irreceivable since it was filed outside the time limit prescribed in the Staff Rules, and recommended that the Director-General reject it. The Director-General endorsed the recommendation and so informed the complainant in a letter of 9 August 1999. That is the decision the complainant is impugning in his complaint of 4 November 1999 to the Tribunal.

3. The Organization submits that the complaint is irreceivable because, having failed to appeal to the Board of Appeal within sixty days, the complainant did not exhaust all means of redress available to him under the Staff Regulations, as Article VII of the Statute of the Tribunal and the case law require.

4. After asserting in his internal appeal that he knew neither of the Board's existence nor of the procedure he should follow, the complainant seems to have abandoned that plea - which would in any event have failed - in favour of the argument that the Organization gave him no notification setting an irrefutable date of termination of his appointment. In his view, it could not "claim that an ordinary letter of 30 August 1668 [*recte* 1998] set off the two-

month time limit".

5. Staff Rule 1230.8.3 provides:

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made ..."

6. The Tribunal observes that the complainant, while not denying that this rule applies to his case, is more concerned with demonstrating the absence of any notification with an irrefutable date: he was informed of the decision of 26 August by ordinary letter, not by a registered letter with acknowledgement of receipt or an *acte extrajudiciaire*.

7. The evidence shows that the complainant did receive the decision of 26 August 1998 terminating his appointment, that he challenged it by a letter of 8 September 1998 to the Director-General and that it was upheld in a letter of 29 October 1998. The complainant does not deny receiving the letter of 29 October, indeed he attaches it to his complaint. Furthermore, on 4 January 1999 he wrote to the President of the Tribunal about the termination of his appointment.

Since the Staff Rules establish no specific procedure for the notification of final decisions, the time limit for appeals set in Staff Rule 1230.8.3 began to run as soon as the complainant learned officially of the decision adversely affecting him, even if the notification gave no indication of the means of resisting it and the time limits for doing so.

The conclusion is that, whether the decision of 26 August 1998 or the letter of 29 October 1998 confirming it is taken into consideration, by filing his appeal with the Headquarters Board of Appeal on 30 April 1999 the complainant exceeded the prescribed sixty-day time limit. The Board was therefore right to find his appeal irreceivable.

8. Under Article VII of the Statute of the Tribunal, a complaint is not receivable unless the decision impugned is a final one and such remedies as are available under the applicable Staff Regulations have been exhausted. To satisfy that requirement the staff member must have duly lodged an internal appeal with the competent body within the prescribed time limit.

Since the complainant failed to file an internal appeal with the Board within the sixty days set in Staff Rule 1230.8.3, his complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute and must accordingly be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.