

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

110th Session

Judgment No. 2956

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. W. V. against the World Health Organization (WHO) on 20 February 2009 and corrected on 21 April, WHO's reply of 10 August, the complainant's rejoinder of 20 October and the Organization's surrejoinder of 10 November 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant's career is summarised under A in Judgment 2955, also delivered this day. Having been recruited locally as a member of the General Service staff, he spent all his working life in the WHO Regional Office for Africa in Brazzaville (Congo).

Owing to the outbreak of civil war in the Republic of the Congo, internationally recruited personnel were evacuated from Brazzaville in June 1997 and the Regional Office was provisionally closed. On 1 September 1997 the Office was temporarily set up in Harare (Zimbabwe), with some of the staff from Brazzaville. In response to

his own request, the complainant received a proposal of separation by mutual agreement in a letter of 13 December 1999.

In May 2000 he complained to the regional Administration that he had not been transferred to Harare. The Regional Personnel Officer informed him by a memorandum of 1 August 2000 that no General Service post, which had been filled by local recruitment in Brazzaville, had been transferred to Harare, that the regional Administration was waiting for Headquarters' permission to apply a circular of 2 May 2000 identifying the various options available to staff recruited locally in Brazzaville and that he would be given an opportunity to choose from these options, i.e. transfer or temporary relocation to Harare, or separation by mutual agreement.

On 20 October 2000 the complainant lodged an appeal with the Regional Board of Appeal, in which he asserted that he had been constructively dismissed and claimed damages and other relief. In its report of 21 March 2001 the Board concluded, firstly, that the complainant had not filed an appeal because he was not challenging "an actual decision of the Administration" and, secondly, that contrary to his allegations, the fact that he had not been transferred did not constitute dismissal as such, since he had continued to receive his monthly salary. The Board considered that the case should be referred to the Ombudsman with a view to reaching an amicable settlement. In November 2001 the Regional Office's gradual resumption of its activities in Brazzaville made it possible for locally recruited staff members, including the complainant, to return to work.

In November 2005 the complainant lodged an appeal with the Headquarters Board of Appeal, asking it to examine his claims in connection with the Regional Office's temporary relocation to Harare. An exchange of communications then ensued between the complainant and the Executive Secretary of the Headquarters Board of Appeal, in which the latter held that the complainant's claims had been submitted to the two appeal boards out of time, whilst the complainant, given that the regional Administration and the Ombudsman had not taken a decision subsequent to the Regional

Board's report of March 2001, asked the Headquarters Board of Appeal to issue its conclusions and recommendations on the case in order that the Director-General might take a decision. On 21 April 2008 the complainant sent another letter to the Headquarters Board of Appeal to inform it that the regional Administration had done its utmost to delay and obstruct the settlement of the dispute and to ask it to issue an opinion on the receivability of the case. On 28 April 2008 the Board's Executive Secretary confirmed that the appeal filed in October 2000 was irreceivable.

In June 2008 the complainant reminded the Regional Board of Appeal that no action had been taken on the report which it had issued in March 2001. On 24 November 2008 he submitted a statement of intention to appeal to the Headquarters Board of Appeal, challenging the refusal of the Regional Board of Appeal and the regional Administration to reply to his letters regarding the appeal which he had lodged in 2000. By a letter of 1 December 2008 the Executive Secretary of the Headquarters Board of Appeal maintained that the appeal filed in 2000 was time-barred and informed the complainant that his statement of intention to appeal was irreceivable. That is the impugned decision.

B. The complainant submits that he did all he could to obtain a decision after the report of March 2001 was issued, but that the regional Administration stonewalled and schemed to prevent the matter from being resolved. He states that, by so doing, the regional Administration acted unfairly and breached the applicable procedures. He considers that he was not responsible for the inertia of the regional Administration and the Regional Board of Appeal and that the Headquarters Board of Appeal should therefore have issued an opinion on his requests.

The complainant also argues that the persons who were to receive postings to Harare during the Regional Office's relocation were selected in an illogical and discriminatory fashion. In his opinion, the refusal to transfer him to Harare was unjustified and constituted constructive dismissal.

He asks for the payment of 90 months' gross salary to compensate for the fact that he was not transferred to Harare, 600,000 United States dollars in damages for the manner in which his case was dealt with, 100,000 dollars on the grounds that he was treated unfairly by the regional Administration, 200,000 dollars for moral injury and one symbolic CFA franc for the degrading treatment to which he was subjected by administrative staff of the Regional Office.

C. In its reply the Organization states first that the complaint is irreceivable *ratione materiae*. It points out that the complainant does not identify a particular administrative decision adversely affecting him. In addition, it considers that the decision of 1 December 2008 merely confirms that the appeals which the complainant had filed with the Regional Board of Appeal and the Headquarters Board of Appeal were irreceivable and that it does not therefore constitute an administrative decision which may properly be impugned before the Tribunal. If the Tribunal were to take the view that the decision can be challenged, the defendant submits that it is confirmative in nature and for that reason does not give rise to new time limits making it possible to circumvent the time bar on an appeal.

WHO further contends that the complaint is irreceivable *ratione temporis*, for it concerns events which took place between June and September 1997 and which were not challenged within the sixty-day time limit specified in the applicable rules.

Subsidiarily, the Organization submits that the complaint is devoid of merit because the complainant, as a locally recruited staff member, had no right to be transferred to Harare. It points out that he continued to receive his full salary in Brazzaville throughout the period when the Regional Office was relocated. It rejects the allegations of personal prejudice and unlawful acts on the part of the regional Administration and states that they are not supported by any conclusive documentary evidence.

Since the defendant considers that the complaint is vexatious, it asks the Tribunal to draw attention to the fact that if claims are repeatedly submitted to internal appeal bodies, even though they are

bound to fail because they are manifestly irreceivable, they may waste the resources of the Organization and the Tribunal, as they do in the instant case.

D. In his rejoinder the complainant contends that the Organization has failed to refute the submissions in his complaint. He explains that during the Regional Office's relocation, his appointment was not terminated by mutual agreement, no posts were abolished and there was no reduction of staff, hence the refusal to transfer him was unjustified. Moreover, he states that some locally recruited personnel in the General Service category were transferred from Brazzaville to Harare. He also comments that no action was taken on the memorandum of the Regional Personnel Officer of 1 August 2000 and asserts that the letter of 13 December 1999 wrongfully ended his appointment.

E. In its surrejoinder the Organization considers that the complainant's rejoinder contains no new argument and it maintains its position in full.

WHO invites the Tribunal to censure the "completely gratuitous and misplaced [...] personal attacks" contained in the complainant's rejoinder. It further requests the joinder of this complaint with the first complaint filed by the complainant with the Tribunal.

CONSIDERATIONS

1. On 1 September 1997 WHO transferred its Regional Office from Brazzaville to Harare for an undetermined period of time owing to the outbreak of civil war in the Republic of the Congo. This transfer did not concern posts in the General Service category which had been filled by local recruitment. The complainant, who was working in Brazzaville as a conference technician, therefore remained in that city where he continued to receive his salary, although his service with the Organization would seem to have been interrupted. The Regional Office for Africa began its gradual return to Brazzaville only in

November 2001, in other words some four years after its emergency evacuation.

The complainant was informed by a letter of 13 December 1999 that the Director-General was proposing a separation by mutual agreement under Staff Rule 1015. His appointment would end on 31 January 2000, at which point he would be entitled to the payment of a lump sum equivalent to 19.8 months of his net basic salary at the rate applicable at that date. The complainant would also be entitled to a cash payment equivalent to the number of days of accrued annual leave not taken at that date, up to a maximum of 60 days. The letter explained that staff members who accepted separation by mutual agreement on those terms could not apply for an appointment with WHO for three years as from the date of their separation. Although it referred to the complainant's earlier interest in such a separation, this proposal appears never to have been put into effect. The written submissions do not explain why this was so.

2. By a letter of 16 May 2000 the complainant asked for a transfer to Harare. The Regional Personnel Officer replied to him as follows in a memorandum of 1 August 2000:

“[S]o far no General Service post filled by local recruitment in Brazzaville has been transferred to Harare. We nevertheless regret the fact that we have been unable to give you, or several other members of staff who are still in Brazzaville, a temporary posting to Harare. While the actual circumstances of our relocation to Harare have made it impossible for us to move all the staff, our Administration is still concerned about this issue. A circular defining the various options available to locally recruited staff in Brazzaville was issued on 2 May 2000. At the request of the Staff Association the terms and conditions of this circular have, however, been revised by the Administration and new proposals have been submitted to Headquarters for approval.

We are [a]waiting Headquarters' decisions on this subject permitting us to apply this circular. We do understand your concerns, and those of the other staff members in the same situation as you, but you will be given an opportunity to say which of the options in the circular you intend to choose, i.e. transfer or temporary relocation to Harare, or separation by mutual agreement on specified terms and conditions.”

3. On 20 October 2000 the complainant filed an appeal with the Regional Board of Appeal, in which he complained that he had not been transferred to Harare and that he had been wrongfully dismissed. On 16 April 2001 he received a copy of the Board's report of 21 March 2001, which ended as follows:

“It is clear from studying the file that this is not an appeal, because it is not directed against an actual decision of the Administration. Nor is this really a dismissal, because the Appellant is continuing to receive his monthly salary.

The case must therefore be referred to the Ombudsman for amicable settlement [...].”

The accompanying letter signed by the Chairman of the Regional Board of Appeal clarified those statements as follows:

“Indeed, after examination, it transpires that this is not an appeal *stricto sensu* because it is not directed against an actual administrative decision.

We are therefore forwarding a copy of the report to the personnel officer and the Ombudsman in order that each may contribute solutions according to his area of competence.”

4. The complainant retired on 31 December 2004. On 10 November 2005 he filed an appeal with the Headquarters Board of Appeal, in which he referred to the report of the Regional Board of Appeal of 21 March 2001. After several exchanges of letters, the Executive Secretary of the Headquarters Board of Appeal wrote to him on 28 April 2008 to confirm that his appeal had been filed out of time and that, since it was irreceivable, it had not been submitted to the Board.

On 24 November 2008 the complainant notified the Headquarters Board of Appeal of his intention to appeal against the “[d]eliberate failure to reply” and the “stubborn refusal” of the Regional Board of Appeal and regional Administration to “answer all [his] letters concerning [his] appeal in 2001, despite numerous reminders, the whole thing being set against a background of various delaying tactics and all sorts of wiles to prevent the successful outcome of this appeal”. On 1 December 2008 the Secretary of the Headquarters Board of

Appeal replied that his statement of intention to appeal was irreceivable because his initial appeal had been submitted out of time.

The purpose of the complaint filed with the Tribunal is to challenge that reply.

5. The Organization's request that this complaint should be joined with that filed on 6 February 2009 will not be granted because the two complaints are unrelated to one another.

6. In the defendant's opinion the complaint is irreceivable. In substance the Organization repeats the argument which led to the final dismissal of the appeal on 20 October 2000, that is that none of the complainant's claims, which were made several years after the events of which he complains, concerns a clearly identified administrative decision.

This objection has no merit. It is true that the submissions in the complaint and rejoinder are not crystal clear and the wording employed by the complainant, which is sometimes fanciful, is on the limits of what is admissible before an appeal court. It is, however, sufficiently plain that the complainant is asserting that his right to be heard was continually breached throughout the proceedings that followed the breakdown of the talks in which the Organization made its settlement proposal of 13 December 1999.

7. Those proceedings are coherent, at least as from 1 August 2000, when WHO announced its intention to resolve the dispute which had arisen from the fact that some of its personnel had been kept in Brazzaville during the temporary relocation of its Regional Office for Africa to Harare. In light of the available evidence, the Tribunal can only conclude that no effect was given to this undertaking. In particular, there is nothing to indicate that specific action was taken on the report of the Regional Board of Appeal of 21 March 2001, which ought to have been forwarded to the "personnel officer and the Ombudsman in order that each may contribute

solutions according to his area of competence”. Where an organisation invites an official to enter into settlement discussions or makes a formal proposal to him or her, good faith and the duty of care require it to abide by that undertaking and to take the initiative in subsequent proceedings (see Judgment 2584, under 13).

8. The Organization does not allege that it went any further than its statements of 1 August 2000 and 16 April 2001, with the result that the complainant still does not know whether the “personnel officer” and the “Ombudsman”, mentioned in the letter accompanying the report of the Regional Board of Appeal, reached any decision on his case and, if they did, why his claims were finally dismissed. This therefore amounts to a refusal to take a decision for which no justification can be found in any of the submissions.

Furthermore, the complainant, who sent the Headquarters Board of Appeal a reminder regarding his appeal on 21 April 2008 followed by a statement of intention to appeal on 24 November 2008, was told by the Board’s Executive Secretary that his appeal was irreceivable, although this official plainly had no authority to take a decision in place of the Board itself.

9. The Tribunal therefore finds that the complainant’s claims in relation to his continued stationing in Brazzaville during the temporary relocation of the Regional Office for Africa to Harare were not examined as announced in 2001 and that no final decision could have been taken on these claims after the Headquarters Board of Appeal had given its opinion.

It follows that the complaint must be allowed and the decision of 1 December 2008 set aside. The Organization must make a final determination as to whether or not the complainant’s claims are well founded.

10. The complainant shall be awarded 3,000 Swiss francs in compensation for the moral injury suffered on account of the flaws in the internal proceedings.

11. Since he succeeds in part, the complainant is also entitled to costs in the amount of 2,000 francs.

DECISION

For the above reasons,

1. The decision of 1 December 2008 is set aside.
2. The case is referred back to WHO in order that it may proceed as indicated under 9, above.
3. The Organization shall pay the complainant 3,000 Swiss francs in compensation for the moral injury suffered.
4. It shall also pay him costs in the amount of 2,000 francs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 November 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet