

FORTY-SIXTH ORDINARY SESSION

In re HEYES

Judgment No. 453

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Eric Norman Heyes on 8 July 1980, the WHO's reply of 12 September, the complainant's rejoinder of 19 January 1981 and the WHO's surrejoinder of 26 March 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 530, 540, 1040, 1060, 1070 and 1210.1;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant, a British subject, was appointed to the staff of the WHO on 11 May 1979 to serve on a project for the development of health information services in Burma. His appointment was subject to one year's probation. He soon experienced difficulties and in particular objected that his working conditions were unsatisfactory and that he was not provided with proper transport and the minimum equipment for performing his duties. His supervisor, the WHO Programme Co-ordinator in Burma, was first Dr. Kim and then Dr Wijeyaratne. After consulting Dr. Kim Dr. Wijeyaratne wrote a probation report on 11 March 1980. He proposed extending the probation period by six months on account of the complainant's difficulty in adapting to local working conditions, the embarrassment he had caused by complaining directly to the Burmese Government and in general his lack of tact and patience. The report went up to Dr. Kim, who had since been appointed Chief of Planning and Co-ordination, as "second-line" supervisor. He recommended that, having failed to adjust to the conditions of international service, the complainant should not have his appointment confirmed, and the Regional Director accepted the recommendation. On 17 April 1980 the complainant appealed to the Director-General under Staff Rule 1210.1 against the decision taken under Staff Rule 1060 not to confirm his appointment. On 30 April the Director-General informed him that he upheld the decision; he said that although no doubt was cast on the complainant's professional abilities the evidence as a whole indicated that he was unsuited to international service. The complainant is impugning the decision of 30 April 1980.

B. The complainant files twelve claims. (1) Unfair dismissal. He alleges that the rules about giving notice of non-confirmation were not complied with. The Director-General was wrong in stating in the impugned decision that Staff Rule 1070 ("Unsatisfactory performance or unsuitability for international service") was not applicable to his case. The WHO informed him neither orally nor in writing in what way he was unsuitable for international service. At no time during his appointment was he given any warning. His supervisors acted hastily and without thought of the consequences and made statements that "can be shown to be lies". (2) Failure to reimburse certain travel expenses of the complainant and his wife. (3) Failure to pay the expenses of his travel for medical treatment. (4) Failure to reply to his application for a further appointment with the WHO. (5) Failure to reply to the letter he wrote on 21 March 1980 to the Director of the Legal Division in Geneva. (6) Failure to advise on reports of suspected cases of smallpox. (7) Failure to advise on the misappropriation of United Nations transport which he reported. (8) Failure to give correct information on material conditions in the duty station. (9) Failure to support field staff in the performance of their duties (lack of supplies and means of transport and his supervisor's indifference). (10) Failure to provide medical care for field staff families. (11) Failure to pay his last month's salary. (12) Failure to reimburse the expenses he incurred on having to move to another Office without reasonable notice (he had found suitable accommodation near the WHO Office where he first had to work but was suddenly transferred to another some seven miles from his home).

C. The complainant claims reimbursement of unrecovered expenses, recovery of lost earnings for the period from 11 May 1980 to 10 May 1981 and an official apology from the WHO.

D. In its reply the WHO submits that the Tribunal is not competent to hear pleas (2) to (7), (10), (11) and (12), either because they are irrelevant to the subject of the complaint or because other remedies have not been

exhausted. Apart from appeals against decisions not to confirm an appointment, which under Staff Rule 1210.1 will lie directly to the Director-General, all disputes must first be referred to a board of inquiry and appeal. As to the merits, the WHO observes that the complainant was informed in detail by his predecessor of the conditions of his employment. Dr. Kim informed him as early as November 1979 of the criticisms which afforded grounds for the decision. Many letters from the complainant show his failure to get on well with his colleagues and with the national counterparts. Contrary to what he contends, that was a shortcoming which had nothing to do with his professional competence, but rather showed inability to adjust to working conditions. Thus, no mistaken conclusion was drawn from the facts. The staff of field projects commonly have to work in frustrating circumstances which require patience, tact and moderation. Staff Rules 530 and 540 allow the Director-General and his subordinates wide discretion in assessing a probationer's performance and in deciding whether or not to confirm his appointment, and the Tribunal will not interfere with such decisions unless an error of fact or an abuse of authority has been committed. The complainant is mistaken in what he says about notice of non-confirmation. Staff Rule 1060 clearly requires one month's notice and was observed in this case. Lastly, as regards the applicability of the guidelines set out in Staff Rule 1070 on unsuitability for international service, it is clear from the comments of the Chief of Planning and Co-ordination on the complainant's performance appraisal report that account was taken of those guidelines. He said: "Mr. Heyes lacks tact and has not shown the reserve expected of international civil staff members in their dealing with their national and international colleagues". The complainant is therefore mistaken in alleging that he was unaware of the criticisms against him, and he knew full well from a reading of Staff Rule 1070 that he was required to adjust to working conditions. The WHO accordingly invites the Tribunal to dismiss the complaint.

E. In his rejoinder the complainant alleges that several "anomalies" of project management compelled him, having failed to make himself understood, to make the language of his letters as clear as possible. He was, he maintains, in an impossible position. Both he and his wife were ill; his personal belongings, including many reference books needed for his work, had not arrived; and he had serious difficulties over his housing and motor car. When he reported that vehicles donated by into national agencies to the Department of Health had been transferred to other ministries, he was told to keep quiet. Dr. Wijeyaratne failed to take proper account in the performance appraisal report of the fact that he had been working an eleven-hour day for nearly a year, and that he managed to motivate and change the attitudes of many Burmese. He acted with "complete diplomacy" towards Burmese counterparts and international staff. He submits a long list of witnesses, either Burmese or international officials from the WHO, the United Nations Children's Fund (UNICEF) and the Agency for International Development, who could bear out his allegations. He recognises the need for diplomacy in running such field projects but points out that it should not preclude honesty and truthfulness. He feels that he always served the WHO faithfully. Dr. Kim and Dr. Wijeyaratne were the only supervisors of his to be dissatisfied with his services and it was their management which caused the failure of the project. The decision he is impugning is tainted with the mistaken conclusions which the Director-General drew from the facts: on the strength of allegations by Dr. Wijeyaratne the Director-General believed that there was conflict between the complainant and his Burmese counterparts. The Director-General was also misled into thinking that the complainant had written many letters to his Burmese counterparts complaining about the situation. As to the receivability of some of his claims, he maintains that he did want to make some of those claims but was put under pressure not to do so. The WHO knows quite well that in any case it is now too late for him to appeal to the Board of Inquiry and Appeal. He contends that the reason given for the decision - his alleged unsuitability for international service - was false. First, the WHO ought to have allowed him to disprove it by giving him another assignment when it became clear that his original one was impossible, for example by granting his application for a transfer. Secondly, he ought to have been warned of such a serious criticism during the probation period. The criticism disregarded the impossible conditions in which he had to work and his state of health. He therefore presses his claims for relief and his application for oral proceedings and the calling of witnesses.

F. In its surrejoinder the WHO rejects the complainant's main two pleas in his rejoinder, which relate to his relations with his Burmese counterparts and to the letters he addressed to them. It has never alleged that there was any conflict between the complainant and his counterparts. All it is saying - and it is borne out by the written evidence - is that his supervisors found him lacking in tact. Nor has it ever contended that he sent many letters to the Burmese authorities: what it mainly objected to was the letter he wrote of his own accord to the Director-General of the Burmese Department of Health. That letter and his remarks in his rejoinder on the WHO's working methods in field stations show that he has not fully grasped that those methods consist simply in advice and co-operation and that his supervisors were not mistaken in taking the view that he had failed to adjust to the difficult conditions of his employment.

CONSIDERATIONS:

1. The Director-General's decision is in the circumstances of this case conclusive unless it can be shown to have been based upon a clearly mistaken appreciation of the relevant facts. The facts alleged by the Organization as showing unsuitability for international service, and so justifying under Staff Rule 1060 the termination of his appointment, are first the complainant's written complaints about his working conditions and home accommodation and second his failure to establish satisfactory working relations.

2. As to the first, some of the complaints must be regarded as justified inasmuch as they were remedied. The briefing information about home accommodation was evidently wrong in some respects. Transport was difficult; and it cannot show an unsuitability for international service to call attention to the difficulties. Undoubtedly the complainant was gravely mistaken in his direct approach to the Burmese Government, but it was a single mistake. His complaints were not persistent and his explanation that these were problems which he encountered as a new arrival and which had thereafter been resolved was ignored by the Regional Director.

3. As to the second, it is alleged that numerous communications which he made to the Regional Office or addressed to the national staff in Burma showed that his relations with his colleagues and with the national staff were unsatisfactory. The communications exhibited in the dossier consist entirely of letters passing between the complainant and his supervisors. It is on their style rather than on their content that the Organization must rely. They are argumentative sometimes truculent, querulous, often sarcastic and always of inordinate length. No one reading them will find any difficulty in seeing that the recipients of the letters would be unlikely to preserve a satisfactory relationship with the writer. This covers the complainant's colleagues and immediate supervisors. There is no evidence of any unsatisfactory relations with the complainant's Burmese counterparts, and he has produced two testimonials from the Burmese doctors with whom he worked.

4. The Director-General's decision was based upon two adverse appraisals made by the complainant's first and second-level supervisors in accordance with the requirement under Staff Rule 540 for a performance evaluation report made before the end of the normal probationary period. On reading the first of these appraisals the complainant recorded his reaction as one of "utter astonishment". There is no reason to doubt this. The complainant's technical competence has never been put in doubt and apart from an indirect reference to the need for patience and tact, he had not previously been given any hint that he might be unsuitable for international service. The Organization submits that there is no provision in the rules which requires a probationer to be warned or to be given an opportunity of amending his conduct. It is correct that there is no express provision. But Staff Rule 530 requires that all staff members shall receive instruction and guidance including "specific suggestions for improvement in any aspects of performance which are not entirely satisfactory". In the opinion of the Tribunal it is only in a very exceptional case that an appointment can be terminated under Staff Rule 1060 when the probationer's faults have not been pointed out to him and when he has been given no opportunity of amendment.

5. What may make this case exceptional may be that the complainant's faults are faults of manner which at his age (he was in his thirties) it might be unlikely that he could succeed in correcting. Nevertheless, the fact that no warning was given makes it necessary for the Director-General to be satisfied that a warning would have been of no avail. The complainant's supervisor for most of the relevant period was Dr. Kim; he was succeeded for a short period by Dr. Wijeyaratne, Dr. Kim remaining as the second-level supervisor. At the conclusion of his adverse appraisal Dr. Wijeyaratne recommended that the complainant's probationary period should be extended; this would, read with the content of the appraisal, have served as a salutary warning. Dr. Kim, however, while endorsing the adverse appraisal took the view that there were "fundamental problems of adjustment" which would not be improved or corrected in any period of extension, and so he recommended termination. The Regional Director accepted Dr. Kim's view and there is no doubt that Dr. Kim had had the closer and longer connection with the complainant.

6. From all the above it will be seen that the grounds upon which the Organization supports the Director-General's decision are not in the opinion of the Tribunal above criticism. When the criticism has been absorbed, is there enough left to sustain the decision? In the opinion of the Tribunal there is certainly enough to show that the complainant was a man whom it was difficult, and perhaps impossible, to work with. Was there a reasonable likelihood that this defect might have been cured by remonstrance and warning? The Director-General, following the Regional Director and Dr. Kim, concluded that there was not. The complainant's last letter to the Director-General certainly did not offer much hope of reformation: it contained unpleasant remarks about his two supervisors coupled with unsupported criticism of their behaviour; "I feel insulted" the complainant wrote "that my

dismissal is due to these two". It is not the duty of the Tribunal to form its own judgment and substitute it for that of the Director-General. It is therefore sufficient to say that the Tribunal is not persuaded that the Director-General's conclusion that the complainant was unsuited for international service was clearly mistaken.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this Judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

André Grisel
Devlin
H. Armbruster

A.B. Gardner