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

FIFTY-FIRST ORDINARY SESSION

In re BENYOUSSEF

Judgment No. 595

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the World Health Organization (WHO) by Mr. Amor Benyoussef on 29 January 1982 and brought into conformity with the Rules of Court on 6 April, the statement signed by the complainant on 4 June, the WHO's brief of 12 July and the complainant's observations thereon of 22 October 1982;

Considering the provisional order issued by the Tribunal on 3 November 1982;

Considering the WHO's reply of 10 December 1982, the complainant's rejoinder of 15 February 1983, the WHO's surrejoinder of 16 March, the complainant's further brief of 11 May and the WHO's observations thereon of 22 July, the complainant's communication dated 12 October and the WHO's comments thereon of 15 November 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 655.1, 740, 1030, 1220.1 and 2 and 1240.2 and Article 34 of the Rules of the United Nations Joint Staff Pension Fund;

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 Tunisian citizen, was employed by the WHO in Geneva from 3 January 1968 on fixed-term appointments. From August 1977 until January 1979 he was fully or semi-disabled for work. In February 1979 he resumed work. On 15 October 1980 the Chief of Personnel offered him a two-year assignment as a grade P.5 scientist in Khartoum, to start on 1 January 1981. In a letter of 30 December he asked for leave without pay and said he hoped soon to accept the offer. In the meantime his health had become worse and from 1 January 1981 he was again fully disabled. On 9 January the Chief of Personnel informed him that he was granted a one-month extension to 31 January on leave without pay; if he turned down Khartoum his appointment would end. On 30 January he wrote from hospital asking for further unpaid leave, and he was granted it up to 30 April and then to 31 July. By a letter of 9 June the Chief of Personnel told him that from 2 April he would be paid a disability benefit of 26,400 United States dollars a year from the United Nations Joint Staff Pension Fund; that his unpaid leave was retroactively replaced with paid sick leave from 1 January to 1 April and that his appointment was terminated under Staff Rule 1030[(1)] for reasons of health with effect from 1 April. On 28 July he appealed under Rule 1220.1 and the case was referred to a medical board of review under 1220.2. In its report of 2 October 1981 the board endorsed the decision and by a letter of 3 November 1981, which is the impugned decision, the Director-General informed the complainant's counsel that the appeal was rejected.

B. The complainant alleges breach of Rule 1030. It is not known whether the staff physician gave his advice on the case, as required by 1030.1, and if he did, what it was, the letter of 9 June 1981 says nothing of it. There is no reason to believe that "reassignment possibilities" were explored, as required by 1030.2.2. To make the termination retroactive to 1 April 1981 was in breach of the requirement of notice in 1030.3.1 and pointless besides, since the unpaid leave was to continue to 31 July. There was breach of 1220.1: "The ... Staff Physician will normally inform the staff member in writing of the medical conclusions upon which the decision was based..." What the medical board found was that on 2 April 1981 the complainant was incapable and that his condition was "of long duration or likely to recur". The material date should have been 9 June 1981, and the finding ought to have been that the condition would recur "frequently". The complainant was never given the reasons for the board's recommendation. It heard neither him nor any medical expert of his choosing. Only out of financial need did he accept the disability benefit. Several doctors certify that since July 1981 he has been fully capable, one that he was so even on 1 April 1981. He has been offered "contractual service agreements" with the WHO and two other organisations. His incapacity did not last long: he has recently done research work for the ILO, taken part in meetings and served

governments of African countries. Senior WHO officials who wish him ill sought to get rid of him. He has suffered personal and financial hardship. He seeks the quashing of the termination, reinstatement in a similar post on terms he agrees to, and an award of 42,000 United States dollars to cover damages for moral injury, loss of earnings and costs.

C. Before filing its reply the WHO wrote on 26 May 1982 asking the complainant to release the WHO staff physicians and the members of the medical board from their obligation of professional secrecy. By a declaration of 4 June he released the board's members in respect of the opinions expressed at the meeting referred to in its report of 2 October 1981. In a brief filed on 12 July 1982 the WHO invited the Tribunal to lift the obligation of professional secrecy so that the medical records might be disclosed and the Tribunal might determine whether to include them in the evidence to be communicated to the complainant. In a brief of 22 October 1982 the complainant stated his objections and withdrew his declaration of 4 June.

D. In a provisional order of 3 November 1982 the Tribunal held that only a patient might release his physician from the obligation of professional secrecy that an administrative tribunal might therefore merely note his wishes and not override them that since the complainant had declined to release the physicians the Tribunal might not do so by order; and that if his stand exposed him to the risk of having issues decided against him he alone bore the responsibility. The Tribunal rejected the WHO's application and invited it to file a reply on the merits.

E. In its reply the WHO observes that out of respect for professional secrecy it cannot prove that the staff physician advised that the complainant was "incapable of performing his current duties" and unfit for reassignment. That he did is clear, however, from the Chief of Personnel's letter of 9 June 1981. The WHO Staff Pension Committee took advice from the staff physician before awarding the disability benefit. The plea based on absence of notice is irreceivable because, not being a medical matter, it ought to have been put to the Board of Inquiry and Appeal. Besides, it is unsound since the complainant was on unpaid leave and the three months' notice would have been covered by the period of such leave. During that period no disability benefit could have been paid since it is not payable to someone who is still an official. The fairer solution was to treat the first three months of 1981 as paid sick leave. The procedure in Rule 1220 was correct and was correctly followed. As to the medical aspects, the complainant appointed his own doctor to the board. Any points of law he might have put to the Board of Inquiry and Appeal. The WHO cannot, without reliance on the medical records, show that he was incapable of performing his duties. But that was the finding both of the staff physician and of the medical board, the members of which were perfectly qualified. The certificates appended to the complaint reveal that the complainant underwent psychiatric treatment in hospital in May and June 1981 for a condition known to recur.

F. In his rejoinder the complainant questions whether the staff physician, presumably a general practitioner, was competent to give the required advice. The letter of 9 June 1981 does not suggest any was ever given or that, if it was, it was based on a specialist's findings. The Pension Fund stopped paying the disability benefit on 1 September 1982, and this shows that the complainant's condition did not last long and that he is again fully capable indeed two of the medical certificates predicted that he would in time be able to resume work. The board did not find that his condition was "of long duration or likely to recur frequently". The plea based on the absence of notice is receivable: there were no other means of redress since according to Rule 1220.2 "none of the other appeal procedures described in this section shall apply". The reply on this point is also unsound. Under Rule 740 he was entitled to a maximum of six months' sick leave on full pay, and that period should have begun on 1 July 1981. The period of notice in 1030.3.1 would then have been respected. Instead he was retroactively put on sick leave for only three months, and from 1 January 1981. The Rule 1220 procedure is in several respects unsatisfactory.

G. In its surrejoinder the WHO reaffirms that the staff physician did give his opinion. The Administration can hardly have itself declared that the complainant was unfit. Even if no opinion had been given, the omission would have been made good by the board's findings. The complainant was put on unpaid leave from 1 January 1981 at his own request pending his decision on the Khartoum offer, even though he may not have qualified for such leave under Rule 655.1. Sick leave may not exceed a total of nine months over four years; thereafter only unpaid leave may be granted. By April 1981 the complainant had used up his full portion of sick leave and was therefore not entitled to any more under 740. Though the board did not state that his condition was likely to recur frequently it stressed the risks inherent in its own findings and felt unable to rule out a relapse. It is sometimes inadvisable to tell someone that his condition may recur frequently.

CONSIDERATIONS:

The principal claims

1. By a decision of 9 June 1981 the Chief of Personnel informed the complainant that his appointment was terminated for reasons of health with retroactive effect from 1 April 1981.

The main question in this case is whether the conditions set in Staff Rule 1030.2 for termination for reasons of health were fulfilled. The first of the conditions appears in 1030.2.1: "the medical condition must be assessed as of long duration or likely to recur frequently".

The complainant submits that the condition is not fulfilled and he applies for an expert inquiry to ascertain the state of his health at 1 April 1981 and at present.

2. Although his plea is that the decision he challenges was based on factual errors, he expressly declined to allow disclosure to the Tribunal of the medical file in the hands of the WHO staff physician. The complainant was entitled to take such a position. Only the patient may release his doctor from professional secrecy. This is his basic right and one which the Tribunal recognised in its Order dated 3 November 1982.

By a letter received at the Registry of the Tribunal on 14 October 1983 the complainant's counsel informed the Tribunal that his client agreed to waive "professional secrecy in respect of all medical files with the United Nations Joint Medical Service which are at the WHO's disposal, provided that the report made in April 1983 by Dr. Silvain Mutrux at the request of the United Nations Joint Staff Pension Fund should form part of the evidence submitted" to the Tribunal.

The application must as a matter of principle be disallowed, and there is no need to consider whether the condition is admissible.

The purpose of the procedural rules the Tribunal applies is to enable the parties not only to submit full pleadings but also to hold an exchange of briefs in which they enjoy complete freedom of speech.

The existence of rules of this liberal kind is necessary if justice is to function properly. Yet there are constraints, and one is that the parties must not be allowed to delay the judgment by resorting to dilatory tactics. That is one reason why a complainant may not alter the substance of his original claims after filing his complaint.

As a rule the Tribunal allows each side to file no more than two briefs and closes the written proceedings after the defendant has filed the surrejoinder. Only in exceptional cases does it admit further material.

In this instance the complainant consistently declined throughout the written proceedings to allow discovery of his medical file. As it says above, the Tribunal took note of his position and the proceedings went ahead. The Tribunal even allowed him, after the filing of the surrejoinder, to put in a further brief which the WHO answered on 22 July 1983. On that date the written proceedings must be deemed to have closed.

Under the circumstances the complainant may not now alter the basis of his case. Furthermore, nine months elapsed from the date of his first refusal to release the doctors from secrecy -- 22 October 1982 -- and the date on which the WHO filed its last brief -- 22 July 1983. He therefore had ample time to ponder the consequences of his position.

The Tribunal can but take note, therefore, of his refusal and proceed accordingly.

3. The complainant's stand precludes study of the report of the WHO physician and of the reasons for his diagnosis. Someone who wants a decision to be set aside must produce the evidence which will enable the Tribunal to form an opinion.

The complainant's case is that his illness is only temporary, and in support of this he says that he has carried out research and missions since leaving the WHO. But this need not mean that one condition in Staff Rule 1030.2 was not fulfilled.

He also produces several certificates from doctors who have treated him. While not questioning their professional competence, the Tribunal will observe that the certificates have no value as evidence since the complainant refuses to let the WHO physician state his opinion.

The complainant's position has destroyed the parity there should be between the parties, and the Tribunal can restore it only by discounting the medical certificates he has produced.

Lastly, he invites the Tribunal to order an expert inquiry. This claim also fails. The Tribunal is never bound to order such an inquiry and will do so only when necessary to ascertain the truth. In this instance the Tribunal does not believe it necessary. In coming to that view it is not making an appraisal of fact which is outside the competence of its members; this is no more than the consequence in law of the fact of the complainant's refusal to allow disclosure of the medical file.

The Tribunal concludes from the foregoing that he should be deemed incapable for reasons of health of performing his former duties in the WHO.

4. Rule 1030.2.2 says that when the WHO terminates an appointment for reasons of health reassignment possibilities shall be explored and an offer made if this is feasible.

The evidence does not reveal whether the WHO complied with this requirement. Only the employer may provide such evidence. If the WHO did not comply then the complainant would be right to contend that the impugned decision was in breach of 1030.2.2.

But the reason why the point remains obscure is that the complainant will not allow the Tribunal access to the whole file. The original decision of 9 June 1981 merely stated that his appointment was terminated: no special reasons were given and none were required. The complainant's internal appeal of 28 July 1981 did not include the plea, and so neither the board nor the Director-General was required to deal with the point. There is no formal defect, and for the reasons given above the claim is rejected on the merits.

5. The complainant further submits that the impugned decision is unlawful because it was in breach of Rule 1030.3, in particular because it was retroactive in effect.

Rule 1030.3.1 says that a staff member whose appointment is terminated for reasons of health "shall be given three months' notice" and 1030.3.4 that he shall receive a termination payment.

When the complainant got the letter of 9 June 1981 he was on unpaid leave and had been since 1 January 1981. The leave was to expire on 1 July. The termination was retroactive to 1 April and so unpaid leave was meaningless from that date. Moreover, by the same decision the WHO converted the unpaid leave into sick leave on full pay for the period from 1 January to 31 March 1981. The disability benefit was paid from 2 April 1981.

The complainant disagrees with this. His objections are receivable because he lodged an internal appeal seeking the quashing of the termination. Although he did not at the time plead breach of 1030.3, that does not prevent him from doing so for the first time before the Tribunal. What Rule 1240.2 means is that a complainant may not submit to the Tribunal a claim he has not previously submitted to the WHO. But the complainant is not doing so. His plea of breach of 1030.3 falls within the scope of his claims, which remain the same. The question therefore arises whether the plea is sound.

6. The plea is not only receivable but sound. For the purpose of applying 1030.3.1 and 1030.3.4 the material date was that on which the complainant received the letter of termination of 9 June 1981. The period of notice should have begun on that date and the termination payment prescribed in 1030.3.4 and the benefit prescribed in 1030.3.2 should have been calculated and paid accordingly. Any other conclusion would offend against the rule that a decision must not be retroactive in effect. The arrangement has no basis in any provision of the Staff Rules. No organisation may retroactively alter at will the position of its staff. The effect of the WHO's arrangement might be to do away with one of the benefits prescribed in Rule 1030.3. The amount paid for the period from 1 January to 31 March 1981 does not necessarily account for both the three months' period of notice during which salary must continue and the termination benefit, even supposing that financial circumstances and the salary and benefit scales did not change in 1981. The impugned decision must therefore be set aside on this point and the WHO must review the complainant's administrative position.

7. The complainant may not, however, plead the rule against retroactivity in support of his contention that the WHO was wrong to take 2 April 1981 as the material date for determining his medical condition. The rule does not preclude making the finding of fact at a date prior to that of the decision. Once it was correctly decided that the

complainant's medical condition came within 1030.2.1, it is irrelevant that the board took 2 April as the material date. To hold any other view would obviously make it impossible to terminate an appointment for reasons of health.

The remaining claims

8. The complainant's other claims, apart from that dealt with in 9 below, are clearly irreceivable. So too are the claims relating to the leave granted to the complainant from 2 April 1981, since there was no prior internal appeal.

The attitude several senior officials allegedly showed towards the complainant has no bearing on the lawfulness of the impugned decision, and his application for an inquiry is rejected.

9. The claim for lump-sum damages also fails. The injury he has suffered will be adequately made good by the correction of his administrative position. But any sums he may be paid over and above those he has already received should bear interest at 10 per cent a year from the date on which they were due.

He is also entitled to 2,000 Swiss francs as costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed in so far as it was in breach of Rules 1030.3.1 and 1030.3.4. The complainant is referred back to the WHO for correction of his administrative position prior to termination.

2. The sums payable to the complainant shall bear interest at 10 per cent a year from the date on which they were due.

3. He is awarded 2,000 Swiss francs as costs.

4. His remaining claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

PROVISIONAL ORDER

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

In re BENYOUSSEF

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed on 29 January 1982 by Mr. Amor Benyoussef, represented by Mr. Rolf Bracher, of the Bar of Geneva, against the World Health Organization (WHO) and seeking the complainant's reinstatement and an award to him of compensation;

Considering the letter of 26 May 1982 whereby the WHO, represented by Mr. Blaise Knapp, Professor of the Faculty of Law, University of Geneva, invited the complainant to sign a statement "releasing the WHO physicians and the members of the medical board from professional secrecy with regard to Mr. Benyoussef's case";

Considering the complainant's statement of 4 June 1982 releasing "from professional secrecy only Dr. C. Horneffer, Dr. D. Rerat and Dr. J. Deme, the members of the board set up by the WHO and exclusively with regard to the opinions they gave specifically at the meeting on which the board reported on 2 October 1981";

Considering the WHO's brief of 12 July 1982 applying to the Tribunal for orders that:

"1) professional secrecy be lifted with regard to Mr. Benyoussef's case so that all the medical evidence with the WHO may be disclosed to the Tribunal and that

2) the medical evidence be submitted to the Tribunal, and to the Tribunal alone, for a decision on whether to include it in the papers forwarded to the complainant";

Considering the complainant's reply of 22 October 1982 objecting to such measures, withdrawing his statement of 4 June 1982 and thereby declining to release from professional secrecy any of the physicians who gave an opinion on his case,

CONSIDERING:

that only the patient may release his physician from the obligation of professional secrecy,

that an administrative tribunal may therefore do no more than take note of the patient's wishes and is not competent to act on his behalf,

that since the complainant has declined to release any of the physicians from professional secrecy the Tribunal may not do so by provisional order, and

that if his stand exposes him to the risk of having issues decided against him he alone bears the responsibility for any injury he may thereby suffer.

For the above reasons,

1. Rejects the application in the WHO's brief of 12 July 1982.

2. Invites the WHO to file a reply on the merits by 10 December 1982.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Geneva, 3 November 1982.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

1. 1030.1 When, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member

is incapable of performing his current duties, his appointment shall be terminated.

1030.2 Prior to such termination the following conditions must he fulfilled:

1030.2.1 the medical condition must be assessed as of long duration or likely to recur frequently;

1030.2.2 reassignment possibilities shall be explored and an offer made if this is feasible;

. . .

1030.3 A staff member whose appointment is terminated under this Rule:

1030.3.1 shall be given three months' notice."

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