

SEVENTIETH SESSION

In re QUERO

Judgment 1076

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yves René Paul Quéro against the World Health Organization (WHO) on 15 January 1990 and corrected on 23 January 1990, the WHO's reply of 29 March, the complainant's rejoinder of 23 May and the Organization's surrejoinder of 9 July 1990;

Considering Article II, paragraph 5 of the Statute of the Tribunal and WHO Staff Rules 360.1, 510.1, 555 and 565.2 as in force in 1988;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. In December 1968 the WHO appointed the complainant, a French citizen born in 1930, as a translator into French at grade P.3 and assigned him to its Regional Office for Africa (AFRO) in Brazzaville, in the People's Republic of the Congo. After a spell with the International Civil Aviation Organization in Senegal from 1972 to 1974, he went back to AFRO in July 1974. On 1 April 1976 he was promoted to grade P.4 as a reviser. On grounds of meritorious performance he was awarded under Staff Rule 555.2 a within-grade salary increment of two steps to step "E.2" in P.4 on completing twenty years' service, on 1 December 1988. He retired at 30 May 1990.

In a memorandum of 27 May 1988 to the head of AFRO, the Regional Director, he applied for transfer to a P.3 translator's post which had become vacant in the Sub-Regional Health Development Office at Bujumbura, in Burundi. In support of his application he cited his heavy workload in Brazzaville and pointed out that since 1981 he had been paid no assignment allowance (which he would get in Bujumbura). He wanted to live somewhere healthier than Brazzaville.

In a memorandum of 1 August 1988, however, the complainant's supervisor rejected his application on the grounds that the WHO's interests, which must always prevail over personal wishes, required him to stay on in Brazzaville; he was needed because of his experience and to train new staff.

On 28 September 1988 the complainant appealed to the regional Board of Appeal against the refusal, which he regarded as unfair and unreasonable, and sought payment of (1) the assignment allowance as from 1 July 1988 to 30 May 1990, the date at which he was to retire, (2) 100,000 United States dollars as compensation for injury to his physical and mental health and (3) two additional within-grade steps backdated to April 1986 as provided for in Staff Rule 555.1 for performance which was "especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member". In its report of 22 December 1988 the regional Board recommended rejecting his appeal but upgrading his post to P.5 and promoting him to that grade. By a letter of 23 February 1989 the Regional Director informed the complainant of his decision to reject both the appeal and the regional Board's recommendation for regrading and promotion.

On 23 March 1989 the complainant went to the headquarters Board of Appeal, raising to 150,000 dollars the amount he claimed in damages for injury to health. In its report of 23 August 1989 the Board described as "hazy" the reasons given for refusing him the transfer, confirmed the regional Board's findings and recommended granting him personal promotion to grade P.5 as from 1 July 1988. But the Director-General rejected his appeal and the Board's recommendation in a letter to him of 17 October 1989, the decision he now impugns.

B. The complainant contends that when an official puts in for transfer Staff Rules 510.1 and 565.2* (*Rule 510.1 reads: "... In determining the initial and any subsequent assignment, consideration shall be given, to the extent possible, to the staff member's particular abilities and interests." And 565.2: "A staff member may be reassigned whenever it is in the interest of the Organization to do so. A staff member may at any time request consideration for a reassignment in his own interest.") lay a duty on the Organization to take account of his interests as well as of

its own and that there were sound financial and health reasons for his own application.

He was financially worse off on two counts: in August 1981 he ceased to be entitled to the assignment allowance and by April 1986 he was at the top of his grade. By the time he asked for the transfer he had had no salary increments for two years. Transfer to Bujumbura would have entitled him to a new assignment allowance up to the date of retirement, a total amount he puts at \$13,800.

The climate of Brazzaville is notoriously bad for Europeans. Suffering as he does from malaria, he wanted to get away from the "unhealthy atmosphere" of Brazzaville.

To his mind the Organization is mistaken in maintaining that his experience and the need to train new staff made his presence in Brazzaville indispensable. Had those reasons been valid, how could he have been replaced by his deputy at an important regional meeting that took place in September 1989? Indeed his deputy was the only person he could have been expected to train, but as a former university lecturer he was a seasoned translator who needed only to have his new duties explained to him.

The complainant alleges that the Organization made no serious attempt to solve his personal difficulties. It was unwilling to consider awarding him personal promotion or even the additional step or two he might have expected under Staff Rule 555.1. Since the reasons stated by the Organization cannot rightfully be held to outweigh his personal interests the Regional Director must be personally prejudiced against him.

He invites the Tribunal to award him (1) a sum equal to the assignment allowance he would have received if he had been transferred to Bujumbura, namely \$13,800; (2) \$10,000 in compensation for moral injury and damage to his health; and (3) \$2,000 in costs.

C. The Organization, while concurring with the complainant that it must take account of the interests of the official as well as its own when deciding whether or not to satisfy a request for transfer, argues that the decision is a discretionary one. The Tribunal may intervene only on the limited grounds set out in its case law, and the impugned decision shows none of the flaws which would warrant setting it aside.

The complainant's method of weighing the interests of both sides is faulty. According to Staff Rule 360.1 as in force in 1988 the grant of an assignment allowance is intended not as a fringe benefit but as compensation for "the dislocation factors resulting from the nature of the assignment". So granting an allowance was no proper way of getting the complainant out of the financial stalemate he was in.

He offers no objective evidence to suggest that the climate of Bujumbura would have been better for him.

The post he held at AFRO was graded P.4 whereas the one at Bujumbura was only P.3.

According to the Organization the complainant has not properly understood why his application for transfer was rejected. Though his presence in Brazzaville was not indispensable, he was a highly experienced and capable official and could serve the WHO better there than in Bujumbura. His remarks about staff training are unconvincing. There was no question of leaving his heavy workload in Brazzaville in the hands of a team of junior translators. His supervisory duties included guiding his deputy, however well-qualified he might have been.

The Organization points out that in the lengthy discussions it held with the complainant on the matter of his transfer he turned down his supervisor's offers to consider granting him personal promotion.

D. In his rejoinder the complainant presses his contention that his personal interests had never been given "a moment's thought". As to the assignment allowance, he submits that what mattered to him was the increase in income which the allowance would have entailed - some \$600 a month - not whether he was to get it in the form of compensation or of a fringe benefit. He continues to maintain that the French translation unit he belonged to could have done quite well without him and that the alleged interests did not warrant rejecting his request. He denies that "lengthy discussions" were held to sort out his problems: he would never have spurned a proposal for looking at the prospects for personal promotion. He presses his claims.

E. In its surrejoinder the Organization enlarges on its pleas concerning its discretionary authority and maintains that the complainant has failed to show any fatal flaw in the impugned decision. Though it took account of his interests, its decision was the right one. His supervisor had talked things over with him beforehand at least five or six times,

each time for about an hour, and several offers to upgrade his post were made to him.

CONSIDERATIONS:

1. The complainant was appointed to the staff of the Regional Office for Africa (AFRO) at Brazzaville in December 1968 as a translator at grade P.3. Apart from two years in Senegal with another international organisation he spent all his period of service in Brazzaville. He was promoted to P.4 in April 1976. On 27 May 1988 he applied for transfer to Bujumbura, in Burundi, on a P.3 post for a translator. His application was refused on the grounds that in view of his experience and the need to train new staff in his field before his retirement it would not be in the best interests of the Organization to transfer him away from AFRO.
2. On appeal, the regional Board of Appeal found, in its report of 22 December 1988, that his transfer had been refused because his services were indispensable, but it recommended revising his post description and promoting him to P.5 because of the outstanding quality of his performance. The Regional Director rejected that recommendation. On further appeal the headquarters Board of Appeal held, in its report of 23 August 1989, that the refusal of transfer had not been fully explained; that the decision ought to have been preceded by detailed discussion, which might have helped to find a solution to satisfy both the complainant's legitimate request and the WHO's interests; and that the regional Board's conclusions had been correct. The headquarters Board, too, recommended granting the complainant personal promotion to P.5. The Director-General rejected its recommendation by the final decision of 17 October 1989 that is now under challenge.
3. The issue is whether the complainant's application for transfer was properly refused. If it was, his claims to relief will fail.

Being discretionary, the decision may be set aside only if it was taken without authority or in breach of a rule of form or procedure, or if it was based on an error of fact or of law, or if some essential fact was overlooked, or if there was misuse of authority, or if a mistaken conclusion was drawn from the facts. The complainant contends, and the Organization accepts, that in considering an application for transfer it must, in keeping with Staff Rules 510.1 and 565.2, take into account not only its own interests but also the applicant's.

4. The personal reasons the complainant gave for seeking the transfer were an increase in his workload, in particular the training of three other staff members and last-minute translation work required for meetings, the loss of assignment allowance in 1981, the lack of promotion since 1986 and his wish to live in a healthier climate. He challenges the validity of the reasons his supervisor gave for refusing the transfer. He argues that his presence in Brazzaville was not indispensable: he was, for example, not sent to a regional meeting at Niamey. Neither did he have to train anyone: there was no-one to train. His deputy was a university graduate with long experience. In his view the refusal to consider his legitimate interests showed partiality on the part of the Regional Director, particularly since a colleague who had served at Brazzaville for only two years asked for and was granted transfer to Harare.

5. The Organization answers that what it said was, not that he was indispensable, but merely that it needed his services and experience at Brazzaville. That is an acceptable reason, and indeed it is only understandable since AFRO is the hub of WHO activity in Africa whereas the post at Bujumbura was of lesser importance, carries a lower grade, and indeed has not yet been filled. It may be that, as it happened, the complainant did not have to train new staff; but that did not make it any less necessary for the WHO to have his services and experience at its disposal at AFRO. As for the matter of his health, he adduced medical evidence in support of his case neither when he applied for the transfer nor on appeal.

6. His allegations of partiality are unsubstantiated. That others were granted transfer does not mean the Organization was not free at its discretion to turn down his own application: each case must be looked at on its merits.

7. In the circumstances the complainant has shown none of the flaws that warrant setting a discretionary decision aside: in particular he has not established that the WHO failed to take relevant facts into consideration, or that it drew mistaken conclusions from the evidence, or that it was guilty of any error of fact or misused its authority. The Tribunal will not quash a decision simply because the parties' respective interests might have been differently assessed.

8. The Organization fully acknowledges that the complainant gave it devoted service of the highest quality and indeed in December 1988 it granted him a double salary increment in recognition of his merit. So even if he was refused an easier assignment he was not denied additional reward in his last two years of service.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice- President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Mohamed Suffian
Mella Carroll
William Douglas
A.B. Gardner