

SEVENTY-FOURTH SESSION

In re REZNIKOV

Judgment 1249

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yuri Reznikov against the World Health Organization (WHO) on 2 March 1992 and corrected on 10 April, the WHO's reply of 24 June, the complainant's rejoinder of 11 September and the Organization's surrejoinder of 5 October 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 37 of the Organization's Constitution, WHO Staff Regulations 1.10 and 1.11 and WHO Staff Rules 530.3, 1040 and 1230.1.3;

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, a Russian citizen, was born in 1940 in the former Union of Soviet Socialist Republics (USSR). From 1974 to 1980 UNESCO employed him as a translator and reviser. The Government of the Soviet Union having ordered him home, he worked in Moscow from 1980 until 1984 as a senior editor with the publisher of the Russian edition of a UNESCO publication known as the Courier. After a short stint as a temporary Russian translator with the World Health Organization early in 1984 he obtained a two-year appointment with it from November 1984 as a translator at grade P.3 in the Office of Language Services (TRA). He got two two-year extensions of appointment, to 30 November 1990. In June 1987 the WHO promoted him to P.4.

On 5 June 1990 the Personnel Division sent the Chief of TRA a standard form headed "Extension/termination of contract" asking him to make "proposals relating to the extension or termination" of the complainant's contract. It was to be filled up by the complainant and his first-level supervisor, the head of the Russian translation section (RTR). In a box marked "Expiry and duration of present appointment" was the entry "30 Nov 90 02 yrs". Beside it was an asterisk. The asterisk was explained in the fifth paragraph of a text reproduced on the back of the form as meaning that "... the staff member has been seconded by another employer or by his Government and an extension cannot be confirmed before the approval of the seconding party has been received".

In a letter of 10 August 1990 to the Director of the Personnel Division the head of the External Relations Board at the Soviet Ministry of Health recommended replacing the complainant with another translator, whose name he gave, upon the expiry of the complainant's appointment at 30 November 1990.

On 21 August the complainant's supervisor returned the form to the Personnel Division with the recommendation that his appointment come to an end at 30 November 1990 "as requested by the Soviet authorities" in their letter of 10 August. Being on leave at the time the complainant was not sent the form. Instead the Chief of TRA told him by a memorandum dated 22 August that he had asked the Personnel Division "to initiate whatever action they deem appropriate".

By a letter of 29 August the Chief of Personnel Contract Administration informed the complainant that his appointment would end at 30 November 1990 "in accordance with Staff Rule 1040". That rule requires notice of non-renewal of a fixed-term appointment at least three months before it expires. In a memorandum of 11 September to the Acting Director of the Personnel Division he protested on the grounds that a "request" from the Soviet authorities was an unacceptable reason for non-renewal, that he and the Soviet health ministry had "neither written nor oral contractual or other obligations" towards one another, and that the decision offended against "the fundamental principles of international civil service". He had, he said, had every reason to expect a five-year renewal in keeping with WHO practice.

In a memorandum of 30 November 1990 the Acting Director of the Personnel Division answered: "After extensive discussions with the Soviet Mission, the Ministry of Health of the USSR has agreed to extend your secondment to the Organization for a final period of six months", i.e. to 31 May 1991.

On 27 December 1990 the complainant initialled, instead of signing, the WHO's offer of the six months' extension and appended a statement that he saw it as a "transitional measure and not in lieu of a normal extension under Staff Rules and Regulations". His concurrence, he declared -

"... in no case implies any acceptance of the 'secondment status', the asterisk and the fifth paragraph on the reverse side [of the form headed 'Extension/termination of contract']."

By a letter of 27 February 1991 the Director of the Personnel Division gave him notice under Rule 1040 that his appointment would end at 31 May 1991. He explained:

"Following consultations with the Permanent Mission of the USSR in Geneva, I regret to inform you that the Mission has confirmed to me that there would be no extension of your release beyond the expiry date of your present appointment on 31 May 1991. From discussions I had with [the Mission] it appears that any national of the USSR seconded to work with the World Health Organization or any other international organization should request the USSR authorities to abrogate his secondment status before the Organization can extend his appointment without obtaining further Government release."

By a letter of 22 April 1991 the Director confirmed that decision.

On 24 April the complainant filed an appeal against the non-renewal with the headquarters Board of Appeal under Staff Rule 1230.1.3.

In its report of 6 November 1991 the Board regretted that the Organization was still treating Soviet citizens as seconded when other United Nations organisations were already following a different policy. It recommended setting out the rules clearly on the grounds that a mere asterisk was not enough to warn a staff member that he did not come under "the normal Staff Rules" but was subject to "special conditions". It held that the complainant had a reasonable expectancy of renewal. It recommended granting him an amount equivalent to salary for two years to enable him to apply for vacancies in the WHO or elsewhere in the United Nations and putting him on leave without pay or, failing that, approach the Swiss authorities so as to let him stay in Switzerland for at least another twelve months. He should also be paid costs.

The Director-General informed him by a letter of 2 December 1991 that though "in general" he endorsed the Board's findings and conclusions he could not agree to letting him have two years' salary when there had been no breach of the Organization's Constitution or of the rules. He granted him 1,000 United States dollars in costs and offered to put his case to the Swiss authorities. He added that "if a decision is taken to recruit Russian translators on a competitive basis" the complainant might compete. That is the decision he is impugning.

B. The complainant submits that the decision was unlawful. He has two main pleas.

The first is that the refusal to extend his appointment was in breach of the WHO's Constitution and Staff Regulations. Article 37 of the Constitution forbids the Director-General and staff to "seek or receive instructions from any government or from any authority external to the Organization". Staff Regulations 1.10 and 1.11 require staff members and the Director-General to subscribe to an oath that they will not accept such instructions. Yet in his letter of 27 February 1991 to the complainant the Director of the Personnel Division said that the reason why his appointment would end at 31 May was that the Government of the USSR regarded all Soviet citizens in the WHO's employ as seconded from government service and would not release him beyond that date.

He submits that by accepting the WHO's offer of appointment of 18 September 1984 he acquired the status of international civil servant and entered into a contract with the Organization that comprised the rights and duties set out in the offer of appointment, the WHO Constitution and the Staff Regulations and Rules. There was no mention of "secondment" until he himself prompted it by saying in his memorandum of 11 September 1990 that he had no obligations towards the Soviet health ministry and that the WHO was his sole employer. By acting on instructions from the Soviet Government the Director-General misused his authority.

His second main plea is that the Organization failed to give any valid reason for the decision. He had seventeen years' unbroken international service and related employment and the reports on his performance were consistently more than satisfactory. That being so, the burden of proof shifted to the Organization to show that extending his appointment was not in its interests. The Director-General said nothing in his letter of 2 December 1991 of the Board of Appeal's finding that he had a reasonable expectancy of renewal nor for that matter of its view that in the

absence of a written agreement explicitly defining his contractual status he should get the benefit of the doubt.

He objects to a remark by the Chief of RTR in his last performance appraisal report that "lately his efficiency has reduced". That, he believes, was a belated attempt by a fellow citizen to abet the Soviet Mission's plot to oust him by diverting attention from the matter of secondment.

He claims reinstatement in his previous post under a five-year appointment as from 1 June 1991 with the within-grade step increment he would have been entitled to at that date or, alternatively, material and moral damages in an amount equivalent to three years' net base salary. He asks that his supervisor's comment that "lately his efficiency has reduced" be struck from his performance report. He wants to be put on special leave without pay for at least twelve months if the Swiss authorities refuse him and his family permission to stay in Switzerland. He seeks an award of costs and payment of interest thereon at the rate of 8 per cent a year as from 1 June 1991.

C. In its reply the WHO submits that though it failed to bring out the fact of the complainant's secondment in his contract of employment it did constantly refer to the "secondment expiry date" in the notices of personnel action it sent him from 15 December 1984 on. He knew full well that on joining the WHO he was taking over, without having to win a competition, from another Russian translator whose work had not been below par. Having been relieved of passing through "the usual hoops", he is estopped from challenging the lawfulness of the special conditions he himself drew benefit from.

Secondment was the only way the WHO had to get competent staff from countries where it was hard to advertise posts and find candidates outside official channels.

A letter of 21 September 1990 from the deputy health minister of the Soviet Union told the Organization of his country's need for specialists with international experience in health care. Since the deputy minister pledged that the complainant would get suitable employment on return home, and since there was "no overriding need" to keep him in his post, it was proper for the Director-General to comply with the Government's wishes. He thereby made no mistake of law inasmuch as the Soviet authorities were not empowered to "order" the complainant back. The decision was at the Director-General's discretion and in taking it he gave due weight to the interests both of the Organization and of the complainant and to what the Soviet Government had told him.

In support of its position the WHO cites judgments delivered on the matter of secondment by this Tribunal and by the Administrative Tribunal of the United Nations.

As to the performance appraisal report the complainant objects to, the WHO observes that his comments were appended in accordance with Staff Rule 530.3. His second-level supervisor declared his performance to be satisfactory and the report had no influence on the impugned decision anyway.

The WHO submits that it is neither possible nor advisable to reinstate him in his post: it had to do away with one post in the Russian translation unit and the other two are filled. Since the Soviet Government offered him another job any award of damages should not exceed the equivalent of two years' salary. The WHO has no duty to help him by subterfuge to stay on in Switzerland. Nor is there any reason to award him costs, let alone interest thereon from the date of his separation.

D. In his rejoinder the complainant rebuts the pleas in the reply. He contends that, as the WHO does not even try to deny, its reason for separating him was that "the USSR authorities would not agree to any extension" and the Director-General therefore acted on an unwritten understanding with a member State. Instead of exercising his discretion the Director-General simply gave in to the Soviet Government and followed its instructions.

As for the benefit the complainant allegedly derived from that understanding, he would rather have gone through the WHO "hoops" in the ordinary way. In any event there is no estoppel in the proper sense of the term: he never made any statement to the Organization that induced it to act to its own detriment. What did cause it detriment was the frequent turnover of Russian translators.

The impugned decision being neither in the Organization's interest nor in his own, and in breach of the rules besides, the Director-General did not properly exercise his discretion.

E. In its surrejoinder the WHO enlarges on its pleas. It concedes that the complainant was not on "true secondment" as defined in the case law of the United Nations Tribunal. But it maintains that what matters is not the term used

but the nature of relations between the Organization, the Government and the staff member. The complainant got the job with the WHO because the Government of his country named him for it. The doctrine of estoppel does apply: if he is to deny the lawfulness of the appointment process on the grounds that the usual conditions of appointment ought to have applied "the Organization is placed in the position where it acted to its detriment by not having held a true selection".

If there was breach of the Constitution it was with the complicity of a member State party to it and in full knowledge of the complainant. It was reasonable in the circumstances for the Director-General to consult that member State. As the Board of Appeal found, he made no mistake of law.

CONSIDERATIONS:

1. By a letter of 27 February 1991 the Director of the Personnel Division of the World Health Organization confirmed that the complainant's appointment as a Russian translator was to end on 31 May 1991 and told him that the letter was "notification of non-renewal of appointment as required under Staff Rule 1040". On 24 April 1991 the complainant appealed to the headquarters Board of Appeal against that decision.

The Board submitted its report on 6 November 1991 and its conclusions are summed up in A above. Although it did not recommend extending the complainant's appointment, it did recommend granting him compensation in an amount equivalent to two years' salary and enabling him "to remain in Switzerland for at least 12 months while seeking a position". It also suggested that in future the Organization lay down clear rules and procedures for dealing with cases of secondment and recruit Russian translators by competition.

The Director-General conveyed his final decision to the complainant in a letter of 2 December 1991. He said that "in general" he endorsed the Board's findings. He agreed to look into its suggestions for laying down clear rules and procedures about secondment and for recruiting Russian translators. But he refused compensation equivalent to two years' salary on the grounds that there had been no breach of the Organization's Constitution or Staff Rules. Lastly, as to the recommendation for letting the complainant stay on in Switzerland for another twelve months, he merely said he was willing to put the matter to the Swiss authorities.

The Director-General's letter of 2 December 1991 is the final decision the complainant is impugning. He pleads that it rests on several mistakes of law and of fact, and his pleas and claims are summed up in B and D above.

2. What then were the reasons that prompted the Director-General not to extend the complainant's appointment?

The letter of 27 February 1991 from the Director of the Personnel Division to the complainant - the decision he challenged in his internal appeal - alludes more than once to his "secondment". In the first paragraph the Director reminds the complainant that "the Ministry of Health of the USSR had agreed to extend your secondment to the Organization for a final period of six months". The Director uses rather different language in the second paragraph: "Following consultations with the Permanent Mission of the USSR in Geneva", he says, "I regret to inform you that the Mission has confirmed to me that there would be no extension of your release beyond the expiry date of your present appointment on 31 May 1991". He goes on to say that after discussions with the Mission -

"... it appears that any national of the USSR seconded to work with the World Health Organization or any other international organization should request the USSR authorities to abrogate his secondment status before the Organization can extend his appointment without obtaining further Government release."

In the third and fourth paragraphs the Director explains:

"All the data available in your file indicates that the Organization cannot revise your status of a staff member seconded by his Government to serve the Organization for specific periods of time.

I am therefore obliged to confirm to you that your appointment will come to an end on 31 May 1991. Please consider this letter as a notification of non-renewal of appointment as required under Staff Rule 1040."

The flaws in the impugned decision

3. The Tribunal ruled on a similar case in Judgment 431 (in re Rosescu). It held in 5:

"Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the facts."

It held too, in Judgment 15 (in re Leff), under 24, that an international organisation -

"must enjoy the full sovereignty of its authority and must not be to any extent subject to external influence emanating from any one of its States Members; that in this respect most strict and clear provisions guarantee its complete independence and that of its officials."

4. It is plain from the Director's letter of 27 February 1991 and the one of 22 April 1991 that confirmed it that the Director-General took himself to be bound by the attitude of the Government of the Soviet Union. In doing so he mistook the limits of his own discretion. As was held in Judgment 15 quoted above, among others, he must in exercising that discretion observe the general principles that govern the international civil service and safeguard the independence of organisation and official alike. The Director-General has committed a mistake of law.

5. What is more, besides that mistake of law he has in the peculiar circumstances of this case committed a mistake of fact by wrongly taking the complainant to be on secondment from the Government of the Soviet Union. The Organization actually concedes the point in its surrejoinder: his appointment "could not", it admits, "be described as a true secondment" from a legal point of view.

6. The impugned decision was warranted neither by the WHO's concern for the purported interests of the country of the complainant's nationality nor by its desire to keep on good terms and work effectively with its membership. Relations with a member State may be good without the Organization's allowing any of its member States the right to interfere in the area of personnel management.

7. The Organization makes out that, having derived from his status as a "seconded" official the privilege of being relieved of going through the usual competitive process, the complainant may not, according to the doctrine of estoppel, "take advantage of a special situation in his favour and then later deny the validity of this in order to obtain some further advantage".

The simple answer to that is that the Organization bypassed the usual procedure because of an understanding it had with the Soviet Government. So it may not properly expect the complainant to suffer for its own failure to follow the usual procedure as laid down in its rules.

The Tribunal's ruling

8. The complainant's main claims are to reinstatement in his post as from 1 June 1991 and to the grant of a five-year appointment as from the same date.

Because of the flaws referred to in 4 and 5 above the decision he impugns cannot stand. He is entitled to reinstatement as from 1 June 1991. The Tribunal will not, however, replace the Director-General's discretion with its own so as to determine whether he is to be granted a renewal of appointment. He is therefore sent back to the WHO for a proper decision on his claim to renewal.

9. The complainant asks the Tribunal to order that a remark by a fellow-citizen who, as head of the Russian translation service, was his first-level supervisor, should be expunged from his performance appraisal report. The remark, written on 15 May 1991, was that "lately his efficiency has reduced". The complainant sees it as an attempt "to switch the alleged reason for terminating [him] from end-of-secondment to inefficiency".

For one thing, the complainant's second-level supervisor, the Chief of the Office of Language Services (TRA), did not endorse the remark but commented in the same report on 4 June 1991 that the complainant "has kept up his positive input". For another, the complainant appended to the report detailed comments of his own in accordance with the reporting procedure prescribed in the Staff Rules. Since he exercised his right to reply there are no grounds for ordering that the remark be struck out. In any event it appears to have had no influence on the impugned decision.

10. Since the complainant has obtained satisfaction of his main claim the Tribunal will not grant his alternative

claim to an award of material and moral damages.

11. The complainant is entitled to a lump-sum award of costs, without interest, and the amount is set at 10,000 Swiss francs.

DECISION:

For the above reasons,

1. The decision of 2 December 1991 by the Director-General of the WHO is set aside.
2. The complainant is reinstated as from 1 June 1991.
3. He is sent back to the Organization for a proper decision on his claim to renewal.
4. The WHO shall pay him 10,000 Swiss francs in costs.
5. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner