SEVENTY-SEVENTH SESSION

In re OZORIO (No. 4)

Judgment 1367

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Edmund Peter Ozorio against the World Health Organization (WHO) on 28 July 1993 and corrected on 30 July, the WHO's reply of 28 October, the complainant's rejoinder of 24 November 1993 and the Organization's surrejoinder of 28 January 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article VII of the WHO Staff Regulations, Staff Rules 860 and 1230 and paragraph 50 of the preface and paragraph VII.5.60 as in force up to 15 June 1992 of the WHO Manual;

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

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

A. Article VII of the WHO Staff Regulations reads:

"7.1 Subject to conditions and definitions prescribed by the Director-General, the Organization shall pay the travel expenses of staff members and, in appropriate cases, their dependants ... upon separation from the service.

7.2 Subject to conditions and definitions prescribed by the Director-General, the ... Organization shall pay removal costs for staff members ... upon separation from the service."

Staff Rule 860 says:

"In no case shall a staff member be given any cash payment in lieu of exercising any entitlement under this section. Any entitlement to repatriation travel or removal which is not exercised within one year of the date of termination of the appointment shall be forfeited except upon express approval by the Director-General of an extension".

Until 15 June 1992 the text of Manual paragraph VII.5.60 was as set out in 1 below: removal on repatriation must begin within one year of termination, though the Chief of Personnel might authorise exceptions.

The complainant, a citizen of the United States who was born in 1928, joined the Organization's Regional Office for the Americas at Washington in 1958. From 1972 to 1977 he served in its office in New York for liaison with the United Nations and from 1977 until 1988 he worked at headquarters in Geneva, where he held a post as information officer at grade P.4.

Having retired on 30 November 1988 he sent the Director of Contract Administration in the Division of Personnel a memorandum of 14 May 1990 asking for "a delay in the removal of my household goods".

By a memorandum of 28 May the Director extended to November 1990 the duration of his entitlement to payment of the costs of removal.

In a memorandum dated 12 December 1990 he applied for another extension of one to six years, the actual limit to be left open until his wife, a locally recruited employee of the Office of the United Nations High Commissioner for Refugees (UNHCR), also in Geneva, decided whether to retire early at the age of 55 or wait until she was 60.

By a memorandum of 9 January 1991 the acting Director of the Division of Personnel gave him a "final" extension of one year until 30 November 1991.

By a letter of 19 July 1991 he asked the Director of Personnel to work out a solution.

In a letter to him of 26 August the Director confirmed as "final" the decision not to grant any extension beyond 30 November 1991.

On 26 October 1991 he filed an appeal under Staff Rule 1230.1.2 on the grounds of incomplete consideration of the facts. In its report of 8 April 1993 the Board recommended that the Director-General should "reconsider" the matter. By a letter of 1 May 1993, which he impugns, the Director-General gave him until 1 May 1995 to claim any costs of removal.

B. The complainant submits that the decision of 1 May 1993 was an improper exercise of discretion. He puts forward three pleas.

The first is that the Director-General committed a mistake of law. His discretion under Staff Rule 860 and that of the Chief of Personnel under Manual paragraph VII.5.60 are unfettered. So the Administration was wrong to rely on an unpublished policy approved in 1972 which limited extension of the period for claiming the costs of removal to three years after separation. Inasmuch as the Manual, according to paragraph 50 of its preface, is "the single unified source of information on the policies established by the Director-General", a policy which the Administration fails to publish cannot extinguish a right conferred by the rules.

In any event the reason for the grant of wide discretion under Rule 860 and Manual paragraph VII.5.60 is that there is no foreseeing all the contingencies that may occur. Instead of relying on an unannounced "policy" the Director-General had a duty to weigh the relevant facts, foremost among them being his wife's employment situation.

His second plea is that the Director-General's failure to consider his wife's situation amounted to a mistake of fact.

He alleges, lastly, misuse of authority. The Director-General gives no reasons in the decision of 1 May 1993 for cutting the entitlement off two years later. It would not have cost the Organization a penny to defer his entitlement for another 19 months; yet the loss to him and his wife if she took early retirement or if he forfeited the entitlement might prove substantial. The Administration's position was, he says, at odds with current trends in the employment of women.

He invites the Tribunal to set aside the impugned decision and order a new one taking account of the actual date of his wife's retirement. He also claims 5,000 Swiss francs in costs.

C. In its reply the WHO submits that the complaint is irreceivable. The "final action" within the meaning of Rule 1230.8.1 was the one the acting Director of Personnel gave notice of on 9 January 1991. Although the complainant had sixty calendar days under 1230.8.3 to state his intent to appeal he did not do so until 26 October 1991, long after the time limit had expired.

In subsidiary argument the Organization seeks to refute his pleas on the merits. Under the rules a staff member's entitlement runs out one year after separation. For twenty years the Director-General's practice has been to grant extensions of up to three years after separation "only in the most unusual circumstances involving real hardship". Such a policy is a safeguard against misuse of authority: preferential treatment of the complainant would have impaired the equality that staff are entitled to.

The WHO observes that it let the complainant have the maximum allowable period in which to claim payments. Far from misusing authority the Director-General went far to meet his wishes by approving payment of the repatriation grant in 1988 and repatriation travel in 1989 even though he had not left his duty station.

D. In his rejoinder the complainant presses his pleas. On receivability he observes that his letter of 19 July 1991 was a request for reconsideration under Rule 1230.8.1 of the decision of 9 January. The Director of Personnel having refused in a letter of 26 August, which stated "this is a final decision", he filed notice of appeal on 26 October 1991, inside the sixty-day time limit.

As to the mistake of law he contends that a rule is enforceable only from the date at which it is brought to the notice of those it applies to. Even if others had borne the brunt of the WHO's omission to publish rules, that was no reason for him to put up with unlawful treatment: as the Tribunal held in Judgment 767 (in re Cachelin), "equality in the law does not embrace equality in the breach of it".

The reply does not explain, he points out, why the Director-General chose 1 May 1995 as the ultimate deadline: the lack of any "rational" connection between that date and the circumstances of the case shows that the exercise of discretion was "fanciful and arbitrary".

E. In its surrejoinder the WHO observes that although "dilatory correspondence" from the complainant caused it to reject his counter-proposals the final decision was plainly that of 9 January 1991. What he wants is preferential treatment in breach of an established policy that the WHO notifies to staff in its "preparation for retirement" programme.

CONSIDERATIONS:

Receivability

1. The complainant retired from the WHO on 30 November 1988. According to WHO Manual paragraph VII.5.60 as in force at the time:

"Removal on repatriation must begin within one year of the date of termination. Exceptions to these limits may be authorized by the Chief of Personnel on the basis of written justification and provided that the cost to the Organization is not increased."

The paragraph was amended as from June 1992 to allow "exceptions to this limit up to a maximum of two further years (one year at a time)".

2. On 14 May 1990 the complainant applied for postponement of the time limit allowed for the removal of his household goods on repatriation. On 28 May the Organization agreed to postpone the time limit until 30 November 1990. It added that its liability would "be limited to the cost in operation as at 30 November 1989".

3. On 12 December 1990 he applied for a further extension on the grounds of his wife's retirement from employment at the Office of the United Nations High Commissioner for Refugees in Geneva, where she held an indefinite contract. He made no mention of any date of retirement because if she retired early at the age of 55 it would be in 1991 whereas if she retired at 60 it would be in 1996. The complainant asked that the date be left open.

4. In his reply of 9 January 1991 the acting Director of the Division of Personnel agreed "to a final delay of one year until 30 November 1991".

5. On 19 July 1991 the complainant wrote to the Director of Personnel asking him to take a decision in the exercise of his discretion in the light of the fact that in the United Nations system cases like his were not unusual and would become more common. He pointed out that the Organization would incur no additional cost by consenting to extension.

6. The Director replied on 26 August 1991 that it was "incorrect and unacceptable that your spouse's working situation should intervene in the contractual relationship between you and the Organization" and although in one case an extension of time had been granted beyond what the current practice allowed no exception had been permitted since the Director-General had formulated the policy setting a time limit. The Director concluded:

"... you cannot be granted an extension for the removal of your household effects beyond the third year from the date of termination of your appointment. This is a final decision".

7. On 26 October 1991 the complainant appealed to the Board of Appeal against "the final decision of the Administration as contained in the letter of 26 August". The Organization argued before the Board that the final decision was dated 9 January 1991 and the appeal was therefore time-barred. But the Board held that, being based on the letter of 26 August 1991, the appeal was receivable.

8. The Organization argues that the internal appeal was submitted to the Board of Appeal long after the time limit of sixty days for appealing against a "final action" had expired, the "final action in the sense of staff rule 1230.8.1" being "embodied in the letter of the Director of Personnel dated 9 January 1991". The rule reads:

"No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

The complainant points out that the WHO's letter of 28 May 1990 alluded to the possibility of "further final

extension" and that the reference in its letter of 9 January 1991 "to the granting of a final delay of one year" was merely an indication of the last extension that the WHO was willing to grant, not a "final" action within the meaning of Rule 1230.8.1. The issue therefore is whether the letter of 9 January 1991 or the one of 26 August 1991 is to be taken as the "final action" by the Director of Personnel.

9. The letter of 9 January 1991 granted a "final delay" to the complainant for the removal of his household effects. What Rule 1230.8.1 requires is that the staff member try "all the existing administrative channels" and no time limit is set for doing so. The complainant's letter of 19 July asked for an exercise of discretion by the Director of Personnel and, if needed, "on the part of the Director-General". So it amounted to a request to try an "administrative channel". The reply of 26 August 1991 to that letter answers the complainant's argument about the retirement of his wife and concludes "this is a final decision".

10. Since the Organization states the letter of 26 August 1991 as "a final decision", the letter of 9 January 1991 cannot also have been such a decision and it is clear from the terms used that the Director-General himself took the view at the time that the letter of 9 January 1991 had not been the last word. The conclusion is that the letter of 26 August 1991 was the "final action" taken by the Organization, that the internal appeal complied with the time limit in Rule 1230.8.1, that the complainant has therefore exhausted the internal means of redress, as Article VII(1) of the Tribunal's Statute requires, and that his complaint is receivable.

The merits

11. The dispute is about the time in which a staff member of WHO may exercise his right to removal of his household effects at the Organization's expense upon retirement. Before the complainant retired on 30 November 1988 the Organization agreed that he was entitled to payment of the costs of removal of his household effects. It granted him two extensions of the time limit for removal, the first until 30 November 1990 and the second until 30 November 1991. After the first extension he asked that the time limit be left open until his wife retired. But the Organization refused to extend the time limit beyond 30 November 1991. After correspondence the Director of Personnel confirmed on 27 November 1991 the decision in his letter of 26 August 1991.

12. In its report of 8 April 1993 the Board of Appeal held that the Administration had narrowly interpreted the text of the Manual to the complainant's detriment and that the Director-General had not been well advised in the exercise of his discretion. It recommended that the Director-General reconsider the complainant's claim.

13. By a letter of 1 May 1993 the Director-General communicated his decision. Though he said he rejected the Board's interpretation of the Manual paragraph he went on:

"I have, however, accepted the recommendation of the Board and hereby allow you, exceptionally, to remove your personal household effects not later than two years from the date of this decision. You must note, however, that WHO's liability will be limited to the cost in operation as at 30 November 1989."

The Director-General has thus extended the time limit until 1 May 1995. That is the decision now impugned.

14. The Tribunal holds that it is the text of Manual paragraph VII.5.60 as in force when the complainant retired that must be applied. The impugned decision is therefore a discretionary one and the Tribunal may exercise only its limited power of review.

15. The complainant contends that the decision is flawed because it fails to state the reasons for the new time limit of 1 May 1995 and to meet his own and his wife's legitimate wishes. In his view the decision is self-contradictory because, while "the Director-General purported to accept the recommendation of the Board of Appeal, he expressed his disagreement with the Board's conclusions". The Organization rejects those arguments and states that the Director-General has "made proper use of his discretionary power".

16. The Director-General's decision is arbitrary, not just because it fails to state the reasons for choosing the date of 1 May 1995 as the new deadline for the refund of the costs of removal, but because it gives no consistent reply to the complainant's claim. It is a wrong exercise of discretion.

17. For the foregoing reasons the Director-General's decision of 1 May 1993 is set aside. The case is sent back for a new decision by the Director-General.

18. Since the complainant has succeeded he is entitled to costs, and the amount is set at 4,000 Swiss francs.

DECISION:

For the above reasons,

1. The Director-General's decision of 1 May 1993 is quashed.

2. The case is sent back to the Organization for a new decision on the time limit for the refund of the costs of removal of the complainant's household goods.

3. The Organization shall pay the complainant 4,000 Swiss francs in costs.

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

Delivered in public in Geneva on 13 July 1994.

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner

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