

**SEVENTY-EIGHTH SESSION**

***In re* SIMON**

**Judgment 1406**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Françoise Danielle Simon against the World Health Organization (WHO) on 30 March 1994 and corrected on 8 April, and the WHO's reply of 29 June 1994;

Considering the letter of 8 July 1994 from the complainant's counsel to the Registrar of the Tribunal and the Organization's letter of 26 July 1994;

Considering the complainant's rejoinder of 5 August 1994 and the Organization's surrejoinder of 25 October 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a French citizen who was born in 1949, joined the WHO as a consultant in 1989 and got several short-term appointments. On 20 April 1990 the WHO and the French Ministry of Solidarity, Health and Social Welfare (hereafter the Ministry of Health) signed an agreement on cooperation in health legislation. Under the agreement the complainant's services were to be "at the disposal" of the WHO for a period of two years with retroactive effect as from 1 January 1990. The period might be extended. She was assigned to the Health and Biomedical Information Programme as a technical officer at grade P.4.

Clause 5 of the agreement stated that confirmation of the appointment was "subject to payment by the French Government of a contribution to cover the costs of the staff" concerned. By a letter of 15 June 1990 the Ministry of Health informed the WHO that an initial instalment of 619,000 French francs had been paid in accordance with clause 5.1 of the agreement.

By a letter of 5 August 1991 to the French ambassador to the United Nations and the specialised agencies at Geneva the Director of the Personnel Division proposed renewing the complainant's appointment for two years on the same terms, as clause 3 of the agreement allowed. He wrote again on 21 October 1991 giving an estimate of the cost of the renewal and pointing out that France had not fully covered the cost of the complainant's post up to 31 December 1991.

By a letter of 19 November 1991 the French ambassador informed the Director of Personnel that his Government had agreed to extending the complainant's appointment by only one year and hoped that thereafter she would be "recruited by the WHO". Her appointment was extended by one year to 31 December 1992.

By a letter of 22 September 1992 the Chief of Contract Administration told her that her appointment would end on 31 December 1992 in accordance with Staff Rule 1040.

But apparently because of oral assurances from the French Permanent Mission in Geneva that the cost of her post would be met for 1993 the Organization offered her on 4 January 1993 another one-year extension. By a letter of 6 January the ambassador informed the Director of Personnel that his Government had decided to fund her post in 1993. But her salary for January 1993, though paid into her bank account, was later debited from it. Thereafter she received no further pay.

By a letter of 10 February 1993 the Director of Personnel informed the ambassador of the status of funding of the complainant's post and gave details of the amounts owed to the WHO. He pointed out that "the payments received

from the French Government and temporarily earmarked for Mrs. Simon's post in 1992 ... have been used for other purposes on instructions" from a member of the French Permanent Mission. He said that the WHO was suspending all payments to the complainant. The ambassador replied in a letter of 23 February that the Mission had never given instructions to stop funding the complainant's post and he asked that "payment of her emoluments" be resumed.

By a memorandum of 21 June 1993 the Director of Personnel told the complainant that, her appointment having expired on 31 December 1992, she was no longer a WHO staff member and should not go to the office. By a letter of 22 June the ambassador informed the Director-General that on his Government's instructions "the funding of the post stopped ... on 1 January 1993".

By a registered letter of 13 July 1993 the Director of Personnel reminded the complainant that her appointment had ended on 31 December 1992 but that the Organization could make her an "exceptional offer of a six-month extension of appointment" to cover the work she had done from January to June 1993. By a letter of 3 August the Chief of Contract Administration confirmed that decision.

On 7 September the complainant lodged an appeal with the headquarters Board of Appeal against the decision of 13 July. In its report of 21 December 1993 the Board held that, even though the complainant could not expect to be reinstated since her post was no longer funded by the French Government, she could "properly expect to have her appointment extended until the end of 1993"; she had therefore suffered financial and moral injury. It recommended granting her "compensation corresponding to her expectation of an extension of appointment until the end of 1993" and "fair compensation" for moral injury.

By a letter of 4 February 1994 - the impugned decision - the Director-General granted her three months' pay and benefits in compensation and 1,000 United States dollars in moral damages.

B. The complainant submits that the internal procedure was flawed on the grounds that the WHO denied her access to the evidence produced before the Board of Appeal and thereby "failed to respect the principle of adversarial proceedings".

Citing Judgment 803 (in re Grover), which says that a contract is concluded if "all the essential terms have been worked out and agreed on, and all that may remain is a formality of a kind requiring no further agreement", she contends that she had a contract with the WHO which was valid until the end of 1993. She held the same post throughout her time with the Organization, and the only matter outstanding - the funding - was settled by the letter of 6 January 1993 from the French ambassador stating that his Government would provide it.

During the first few months of 1993, although she got no pay, she was treated like any other staff member: the Staff Health Insurance met her medical costs, the computer file indicated that she was still under contract and she continued to represent the Organization in its dealings with others.

She contends that the WHO was to recruit her on its own account if her work proved satisfactory. But it made no attempt to do so, and that would explain the French Government's reluctance to provide the funds.

She asks the Tribunal to order the Organization to produce all the evidence submitted to the Board of Appeal during the internal proceedings; to order the WHO to pay the salary and emoluments owed to her up to 31 December 1993, plus interest at 10 per cent a year; to order her reinstatement in a suitable post or, failing that, payment of two years' salary in damages; and to award her "a large amount in moral damages", and costs.

C. In its reply the Organization denies that the appeal procedure was flawed and that it failed to observe the principle of adversarial proceedings. It states that it is nonetheless ready to produce the documents requested by the complainant if the Tribunal deems it necessary.

Turning to the matter of the complainant's status, it submits that Judgment 803 is immaterial and that she was no longer under contract to the Organization after 31 December 1992, as is plain from the letter it sent her on 22 September 1992. Its offer of January 1993 was not a firm commitment since the extension of her appointment was subject to France's payment of its contribution. The ambassador reneged on the commitment made in the letter of 6 January 1993 and the "apparently inconsistent behaviour of the French Government put both the WHO and the complainant in an ambiguous position".

The Organization considers that it fully discharged its duties to the complainant by keeping her on at its own expense when it had "no obligation to do so under the Regulations". She has no grounds for seeking reinstatement. It denies that her secondment was to lead to recruitment: the purpose of the 1990 agreement was merely to step up cooperation between the parties. The Organization did nothing unlawful in turning down her applications for a number of vacant posts. A decision not to appoint, or to "freeze" or abolish a post, insofar as it does not affect any acquired right, may not be challenged.

As the Board of Appeal acknowledged, the WHO could not reinstate her in a post that the French Government had stopped funding. Since she has acquired no right to recruitment she may not claim compensation. The impugned decision shows no flaw warranting such compensation. As for her claim to moral damages, for one thing she does not put a figure on it, and for another the claim has no merit for want of evidence of actual injury.

D. Under cover of a letter of 26 July 1994 to the Registrar the Organization submitted evidence of which the complainant had sought disclosure.

E. In her rejoinder the complainant submits that her original allegations are borne out by the Organization's reply and by that evidence. She maintains that her appointment was extended until the end of 1993 and that any ambiguity in the matter was "created deliberately by the WHO". Lastly, she submits that the Organization "frustrated" her legitimate expectations by systematically refusing to give her a post and that her claim to damages is not excessive.

F. In its surrejoinder the defendant again affirms that the amount due to fund the complainant's post in 1992 was not paid, since the sum originally received was later diverted to other posts. It maintains that the complainant's appointment came to an end on 31 December 1992 and that it was the complainant herself who made her position ambiguous by continuing without leave to perform work. Reinstatement may be contemplated only in exceptional circumstances.

#### CONSIDERATIONS:

1. From February 1989 until June 1990 the complainant held several short-term appointments with the WHO as a consultant under its Global Programme on AIDS. The French Government released her for service under an agreement which it concluded with the Organization on 20 April 1990 and which was to run for two years from 1 January 1990. The Government thereby agreed to make available to the WHO the services of staff who for the duration of their appointment would be subject to the Organization's own Staff Regulations and Staff Rules and on its payroll and would enjoy the privileges and immunities of international civil servants. The Government undertook to make a contribution that matched the cost of the staff it put at the Organization's disposal. The officials concerned were to be placed "under the authority of the Director-General of the WHO and the technical and administrative supervision of the chief of the Health Legislation Unit".

2. In accordance with that agreement the complainant was appointed to the WHO for two years, with retroactive effect from 1 January 1990, as a technical officer at grade P.4. In August 1991 the Organization sought to determine whether the French Government was willing to extend by two years the arrangements under which she had been serving. At the same time it had her sign a proposal to extend her appointment until 31 December 1993. The text of the proposal bore a handwritten note saying that funding was expected from the French Government. The Government took some time to respond. After a reminder from the Organization the French ambassador to the United Nations at Geneva and the specialised agencies in Switzerland informed it on 19 November 1991 that his Government was willing to extend the arrangements by one year, until 31 December 1992 but hoped that the WHO would see fit to recruit her thereafter. On 28 November 1991 she accepted an offer of a new contract for only one year. This contract was understood to replace the one for two years drawn up in August. In 1992 the WHO came to suspect that the French Government might no longer fund her post. On 22 September the Personnel Division reminded the complainant that her appointment was to end on 31 December 1992 and gave her information about preparing for separation from service. After 31 December she continued all the same to carry out her duties as before and received from the Personnel Division a form in which the chief of the Health Legislation Unit offered to extend her appointment to 31 December 1993. She signed the form, which stipulated that the offer implied no commitment whatever on the Organization's part.

3. At the same time the French ambassador gave oral assurances, confirmed in a letter of 6 January 1993, that his Government had decided to "bear the cost of putting Mrs. Françoise Simon's services at the WHO's disposal for

1993". But since the Budget Unit took the view that France had not paid its contribution for 1992 the Organization suspended payment of her salary and even managed to recover from her bank the sums it had already paid her for January 1993.

4. This state of affairs, though odd to say the least, did not deter her from continuing to work as usual and even carrying out a mission for the Organization. On 23 February 1993 the French ambassador said in answer to a letter dated 10 February from the WHO that the permanent mission had never given instructions to stop the funding of her post, and he asked it to resume paying the emoluments due to her. On 22 June 1993, however, he made an about-turn: he signed a letter on the subject of the breakdown of France's voluntary contribution in which he said that there would be "no funding of Mrs. Françoise Simon's post as from 1 January 1993", in other words from a date almost six months earlier. On 21 June the WHO had given the complainant further "confirmation" that her appointment had expired on 31 December 1992 and that she should stop reporting for work. By a letter of 13 July 1993 the Director of Personnel confirmed that decision but said that since she had continued to serve from January to June 1993 he would recommend that the Director-General make her an exceptional offer of a six-month extension of contract and payment of her emoluments during that period and of a repatriation allowance. That was confirmed on 3 August 1993.

5. The complainant then put her case to the Board of Appeal. On 21 December 1993 the Board reported that she had legitimate expectations of extension of appointment to the end of 1993 but not of automatic reinstatement in a post which the French Government was not funding; she had, however, suffered material and moral injury for which she bore no responsibility. The Board recommended that the Director-General should pay her compensation to match her expectation of an extension to the end of 1993 and grant her a fair amount in moral damages.

6. The Director-General followed the recommendation in part by granting her another three months' salary - the very amount she was seeking in lieu of notice in her internal appeal - and 1,000 dollars for "moral injury caused by the French Government's ceasing to fund [her] post". That decision, taken on 4 February 1994, is the one she is impugning.

7. She invites the Tribunal to hold hearings and call witnesses if it needs proof of any facts. Since the WHO has produced further evidence there is no need for such hearings. Moreover, the disclosure of that evidence satisfies the Tribunal that there has been due process.

8. The complainant submits that she should be deemed to have held an appointment up to 31 December 1993, that the Organization should in any event have appointed her to a post of legal officer she had applied for and that its frustrating her legitimate expectations has caused her injury warranting damages.

9. As to the first issue, she may not validly argue that her appointment was extended until 31 December 1993. Although she and various officers of the WHO did sign a proposal to extend her contract, it was conditional on funding from the French Government and, as was said in 4 above, the Director of Personnel had given her "confirmation" on 21 June 1993 that her appointment had ended on 31 December 1992. The proposal of 4 January 1993 to extend her appointment until 31 December 1993, though the complainant and her supervisor signed it, was never approved by the competent officers; besides, it did not purport to be a decision and was not binding upon the WHO. So there is no valid basis in law for the rights she is claiming from the Organization.

10. That is true of her second point too. The French Government's representatives were obviously keen to see her get a permanent appointment from the WHO so that the Government would be relieved of funding her post. But the WHO was under no duty to appoint her and she had no right whatever save the right to have her applications for any suitable vacancies properly considered. So the Organization may not be held liable for any improper act or breach of commitment.

11. Yet the Tribunal is quite satisfied on the evidence that the complainant was not treated as she ought to have been. It is true that the French Government was to blame for the shilly-shallying and shifts of attitude she had to put up with: its accredited representatives gave assurances in January and February 1993 that it would fund her post and then, in June, said quite the opposite in writing without offering any explanation of the switch. But the Organization's fault, though limited, is beyond dispute. It let her go on working for six months though it stopped her pay; her first-level supervisor sent her on official business to an international meeting as his representative; and in May 1993 he resisted the efforts by the administrative services to recover office equipment from her on the grounds that action was under way to sort out her position. In sum the chief of the Health Legislation Unit, who

was her administrative and technical superior by virtue of clause 5 of France's agreement with the Organization, went on treating her as a staff member. Though understandable enough, his attitude gave her a legitimate expectation that the proposal of 4 January 1993 would go through. As the Board of Appeal put it, "not just the complainant but the Health Legislation Unit and the Personnel Division as well expected the funding and the extension of Mrs. Simon's appointment to the end of 1993". The Director-General took account of that in part by granting her three months' pay - corresponding to July, August and September 1993 - and 1,000 dollars in moral damages. In the particular circumstances of this case it will be fair to award her another three months' pay in damages for all forms of injury she has sustained, over and above the sums already granted to her by the Director-General. But the Tribunal dismisses her claims to reinstatement or payment of two years' salary and to further moral damages to cover the injury to her future financial prospects since there was nothing unlawful in the WHO's refusal to reinstate her or extend her appointment.

12. The complainant is entitled to 7,500 Swiss francs in costs.

#### DECISION:

For the above reasons,

1. The World Health Organization shall pay the complainant, over and above the amounts already granted to her by the Director-General, damages in the amount of three months' pay to be reckoned on the basis of the emoluments she would have got from 1 October to 31 December 1993, plus interest at the rate of 10 per cent a year from the date at which each monthly payment would have fallen due.
2. The impugned decision by the Director-General is upheld in all other respects, including the grant of compensation for moral injury.
3. The WHO shall pay the complainant 7,500 Swiss francs in costs.
4. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas  
Michel Gentot  
P. Pescatore  
A.B. Gardner