

In re Sardo Infirri

Judgment 1729

The Administrative Tribunal,

Considering the complaint filed by Mrs. Jennifer Sardo Infirri against the World Health Organization (WHO) on 10 April 1997, the WHO's reply of 18 July, the complainant's rejoinder of 26 August and the Organization's surrejoinder of 20 October 1997;

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

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. The complainant, an Australian who was born in 1942, joined the staff of the WHO in March 1972 under a short-term appointment as a technical officer at grade P.2 in the Dental Health Unit. Six months later she got a fixed-term appointment for two years. In October 1975 the WHO promoted her to P.3. In September 1982 it upgraded her post and accordingly promoted her to P.4 with the title of scientist. On 1 November 1985 it assigned her at the same grade to post No. 1.2606, which it financed out of the regular budget. It gave her several extensions of appointment, the last of them, dated 24 November 1993, being to 31 December 1995.

In a memorandum to the Director of Personnel dated 28 September 1995 the complainant's second-level supervisor, the Director of the Division of Noncommunicable Diseases (NCD), proposed that she and her first-level supervisor should exchange posts so that her supervisor's could go on the regular budget and her own become extra-budgetary. By circular IC/95/46 the WHO announced a plan to reform the complainant's unit which meant abolishing her post at 1 January 1996. On 2 January she nevertheless got an offer, on form 80.1, of extension of her appointment by two years. Though the offer referred to post 1.2606, one section of the form contained a suggestion by the Director of the Division for putting her on an extra-budgetary post for one year or two. The Assistant Director-General in charge of the Division gave his approval "until 31.12.97" on the same form, which an officer of the Budget Unit also signed. By a letter of 3 January 1996 to the chief of Contract Administration and Information the complainant accepted the offer but reserved her right to appeal and observed that, failing the notice due under Staff Rule 1040, her contract had by implication been renewed in any event.

By a decision dated 22 February 1996 the Director of the Personnel Division extended her appointment by two years, from 1 January 1996 until 31 December 1997, on an extra-budgetary post with the same number - - 1.2606 -- as her previous regular budget post. On a form headed "Approval of post description" and dated 27 February 1996 the acting chief of Classification Administration said that the post had become one of "limited duration". On 22 April she appealed against both decisions to the headquarters Board of Appeal.

In its report of 16 November 1996 the Board found evidence of personal prejudice against her and recommended upholding the disputed decisions but safeguarding her "acquired right" to the application of the "reduction-in-force" procedure in case her post was abolished. In a letter of 22 January 1997 the Director-General upheld the two decisions but refused to "offer" her the right to the reduction-in-force exercise. That is the decision she impugns.

B. The complainant contends that the impugned decision is unlawful. In her submission it entails a unilateral change in a fundamental term of her contract since it takes away her right to application of the reduction-in-force procedure. There were no objective grounds for taking her post off the regular budget and putting her supervisor's on it: mere references to "the interests of the Organization" do not suffice. Besides, the Organization had other means of offering her supervisor security of employment. When she applied for post 1.2606 and took up her appointment in 1985 it was one of unlimited duration. It was sheer misuse of

authority for the Organization to go back on that so as to deny her the safeguards of the reduction-in-force procedure.

She asks the Tribunal to set aside the impugned decision and award her costs.

C. In its reply the WHO acknowledges that in line with recent rulings by the Tribunal her post is "presently" one of indefinite duration. It denies the charge of misuse of authority and disputes her account of the facts. It submits that the change in the source of funding was a proper exercise of discretion. Owing to budgetary restrictions it no longer had enough funds to finance both the complainant's post and her supervisor's. Because her supervisor's was of greater "programmatically importance" it had to choose between abolishing her post to fund his and using extra-budgetary funds to extend her appointment. In any event it was under no duty to fund a post from any particular budget. Nor was there any proof of personal prejudice, as the decision to extend her appointment by two years bears out.

D. In her rejoinder the complainant rebuts arguments in the reply, enlarges on her earlier pleas and presses her claims. She sees evidence of "favouritism" in the WHO's treatment of her supervisor and in its putting someone with no university education on a post of dental officer at P.4. If the two-year extension she got was, as the WHO says, proof of its goodwill, what was she to make of the three months' notice it served her on 24 January 1997? She says that the Organization put her under "considerable pressure" to consent to the exchange of posts.

E. In its surrejoinder the Organization states that the complainant's post will be abolished after 31 December 1997. But her contract, which then expires, will be extended by three months so that a reduction-in-force procedure can take place. The defendant rejects her accusations of "favouritism" and personal prejudice and maintains that its interests are best served by funding the post more vital to the unit -- that of her supervisor -- from the regular budget, such funds being available to finance only one post. Its decision to change the funding of the complainant's post was therefore a proper exercise of its discretion and no abuse of its authority.

CONSIDERATIONS

1. As originally filed, this complaint raised two questions relating to decisions by the complainant's employer, the World Health Organization: (1) to change the source of the funding of the post held by the complainant, No. 1.2606 for a technical officer at grade P.4, from the regular budget to extra-budgetary sources; (2) to change the duration of the post from indefinite to limited.

2. The second of these questions has now been definitively settled in Judgments Nos. 1624 to 1632, which the Tribunal delivered on 10 July 1997. The WHO now admits that the test identified by the Tribunal in those cases establishes that the complainant's post is of indefinite duration. However, since the question had not been settled prior to the launching of the present proceedings, the complainant asks that the Tribunal at least grant her costs. The Tribunal will return to this question when discussing remedies.

3. The sole remaining question, therefore, is whether the WHO validly decided to move the complainant's post from budgetary to extra-budgetary funding. That decision was communicated to the complainant by a personnel action form which she received on 26 February 1996. The Director of the Division of Noncommunicable Diseases (NCD), who was her second-level supervisor, originally proposed that the change in funding should be effected by her switching posts with her first-level supervisor, Dr. G. Pakhomov, whose own post in Oral Health Services (ORH) had, as a result of reorganization, become extra-budgetary. The reasons for the proposed change are set out in a memorandum that the Director of NCD wrote to the Director of Personnel on 28 September 1995:

"Dr G. Pakhomov occupies NCD post no 9.0968, which is funded by extra-budgetary sources. Mrs J. Sardo-Infirri occupies NCD post no. 1.2606, which is a regular-budget post. Both of these posts are in the ORH Area (formerly unit) of NCD ... ORH has been so severely affected by post shifts to comply with budget cuts and restructuring, that it is necessary for programmatic reasons to have a professional dentist as the incumbent of post no. 1.2606. While Mrs Sardo-Infirri, the present incumbent of this post, is very experienced in the work of WHO, and specifically in the ORH programme, she is not a dentist. However, she does have the required background and experience to fill what will be the new duties of post no. 9.0968. Dr Pakhomov is a dentist, and has the required background and experience necessary to fulfil what will be the new duties of post no. 1.2606.

Accordingly, it is proposed that Dr G. Pakhomov be assigned to post no. 1.2606, and Mrs J. Sardo-Infirri to post no. 9.0968. Their current grade and step will remain unchanged.

It is recognized that this will result in Mrs Sardo-Infirri transferring from a regular budget post to one that is funded by extra-budgetary contributions. Extra-budgetary funds are available to cover the first year of her next contract extension (beginning 1 January 1996), and extra-budgetary funding is guaranteed for this post for the following year. The revised post descriptions will follow.

It is proposed that Mrs. Sardo-Infirri be moved to post no. 9.0968 and Dr G. Pakhomov to post no. 1.2606 immediately, although they will not be officially assigned to these posts until their current appointments expire on 31 December 1995."

4. It is not clear why it was thought necessary to undertake this elaborate stratagem of having the complainant and Dr. Pakhomov "switch" posts but otherwise continue to perform exactly the same duties as before. As matters turned out, it was never given effect and the personnel action form of February 1996, which is at issue in these proceedings, in fact related to the complainant's original post, No. 1.2606.

5. In her appeal to the headquarters Board of Appeal she alleged that undue and improper pressure had been put on her to accept the proposed change. The principal means employed was the threat of unfavourable performance appraisal reports for 1993-94 and 1994-95, which were overdue, and the consequent risk of non-renewal of her contract if she failed to accept renewal on the terms proposed by the Administration.

6. In its report to the Director-General the Board noted the apparent lack of communication between her and her supervisors as well as the fact that the Administration had put her and her first-level supervisor in direct conflict of interest since they were, in effect, competing with each other for regular budget funding. On the question of undue pressure and the improper use of appraisal reports, the Board made strong findings of fact in her favour:

"The Board noted the delays in completing the appraisal reports and reasoned that they had been used to exert pressure on the Appellant, and that it must therefore be assumed that they were not based on an objective assessment of the Appellant's performance. The Board concluded that this constituted evidence of personal prejudice against the Appellant under Staff Rule 1230.1.1 as well as of incomplete consideration of the facts under Staff Rule 1230.1.2 in the completion of the appraisal reports for the periods October 1993 to September 1994 and October 1994 to September 1995."

7. The Tribunal is satisfied that there was evidence to support these findings. The WHO does not argue that they were wrong or should be overturned.

8. In its conclusions, however, the Board did not give effect to the complainant's attack upon the decision to move her post from budgetary to extra-budgetary funding. It said:

"In the light of the reduced resources available to the Division and the stated needs of ORH which the Appellant did not dispute, the Board recommended that the decisions taking post no. 1.2606 4 off the Regular Budget and limiting its duration be maintained."

9. In the Tribunal's view the Board erred in law.

10. While the Tribunal will not review the substance of discretionary administrative decisions such as decisions on funding and reorganisation, it does have the power to review the process leading to such decisions and to look into questions such as abuse of authority, incomplete consideration of the facts or failure to respect elementary principles of justice: see Judgment 1131 (*in re* Louis) under 5.

11. It is a fundamental requirement of any decision to abolish a post that there be objective grounds for it: see Judgment 1231 (*in re* Richard) under 26.

12. The same principles apply to a decision to change the source of funding for a position. While such a decision may be less drastic in its immediate consequences than the decision to abolish a post, it nonetheless can have a serious impact upon the job security of the employee and in the long run produce the identical result.

13. While there may well have been, as the Board of Appeal found, perfectly valid reasons to change the source of funding of the complainant's post, the fact that those reasons were infected by extraneous considerations such as personal prejudice, improper pressure, conflict of interest and incomplete

consideration of the facts, serves to render the whole decision bad. It is clear to the Tribunal that the decisions to delay the complainant's appraisal reports and then to issue unfavourable reports were inextricably linked to the decision to transfer her post from a funded to an unfunded source and to get her to accept that decision.

14. The Tribunal concludes that the complaint must be accepted and the Director-General's decision endorsing the Board's recommendation for upholding the decision to take the complainant's post off the regular budget must be set aside.

15. On the question of remedy, however, the Tribunal is not persuaded that this is a case where it would be appropriate to quash the impugned decision. While, for the reasons stated, the decision is unquestionably open to attack, the fact remains that the same decision could and very likely would have been reached even if there had been no grave errors of the type identified. In those circumstances, the quashing of the decision would most likely simply result in the WHO's going back to the beginning and, by following a proper process, coming to the same decision and thus leaving the complainant in no better position than she is in today. Instead the Tribunal believes that the more appropriate remedy both for the complainant and for the WHO would be to order the payment of damages and that the amount of 25,000 Swiss francs would afford proper compensation to the complainant in the circumstances.

16. Even if the complainant had not succeeded on the principal question she would be entitled to some of her costs in respect of the secondary one. As it is, and in view of her success on both questions, the Tribunal will order the payment of her costs in the amount of 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Tribunal declares the complainant's post (No. 1.2606) to be one of indefinite duration.
2. It orders the WHO to pay her 25,000 Swiss francs in damages.
3. It awards her 5,000 Swiss francs in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner