EIGHTY-FIFTH SESSION

In re Reznikov (No. 2)

Judgment 1761

The Administrative Tribunal,

Considering the second complaint filed by Mr. Yuri Leonidovich Reznikov against the World Health Organization (WHO) on 6 June 1997, the WHO's reply of 10 September, the complainant's rejoinder of 16 December 1997 and the Organization's surrejoinder of 18 March 1998;

Considering Articles II, paragraph 5, and VII 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, a Russian who was born in 1940, joined the staff of the WHO in 1984 at its headquarters in Geneva. He was granted personal promotion to grade P.4 in 1987. Information about his career as a Russian translator is set out in Judgment 1249 of 10 February 1993 on his first complaint. In that judgment the Tribunal set aside a decision by the Director-General not to extend his appointment and ordered his reinstatement and a "proper decision" on his claim to renewal. His former post, which was at grade P.3, was already filled, but the WHO reinstated him in it as from 1 June 1991 under what it called "double incumbency". It also extended his appointment to 30 June 1995.

On 16 January 1995 the Division of Personnel sent his supervisor a form on which was to be entered a recommendation for extending or not extending his appointment. On 20 July the supervisor entered on the form a recommendation for extending it by six months to 31 December 1995. In signing the offer of that extension the complainant reserved his right to appeal against refusal of the "normal extension" he said he might "rightfully expect" in "due course".

In a memorandum of 10 August 1995 about the abolition of posts the acting chief of the Office of Language Services told the Director of the Division of Publishing, Language and Library Services that the Organization had put the case of Russian translators to the Permanent Mission of the Russian Federation in Geneva and was "awaiting a reaction".

By a memorandum of 27 September 1995 the Director of Personnel told the complainant that for budgetary reasons the Organization was abolishing his post as at 31 December 1995; it would be applying to him the "reduction-in-force" procedure provided for in Staff Rule 1050.2, but abolition would "not necessarily mean" ending his appointment. On 9 February 1996 he got notice of a five-month extension of appointment on a new post under the regular budget, but by a letter of 18 March the Director of Personnel told him that for want of any suitable post the reduction-in-force procedure would still be applied. In a reply dated 21 March he objected to the breach of conditions he said that the Director had agreed to at the time of his reinstatement and asked him to upgrade his post to P.4, the grade he had been granted on personal promotion, or else let him compete with the other Russian translators at that grade.

By a letter of 16 April 1996 the Director told him that the Reduction-in-Force Committee had considered him for P.3 posts but failed to find a suitable one; since the Administration was unable to offer him employment in his own "occupational group" - that of translators and revisers - he might name by 24 April any other group he felt qualified to work in. On 24 April he submitted a list of seven such groups.

By a registered letter of 29 April the Director of Personnel told him that the Committee had refused to let him compete for posts in any of those groups; the Director-General, having endorsed the Committee's report, was giving him three months' notice of termination as from 1 May 1996, thereby extending his contract until 31 July. He did not pick up the Director's letter at the post office until 2 or 3 May. By a

memorandum of 5 June the Administration informed him that the date of notice had been 30 April.

On 12 June he gave the headquarters Board of Appeal notice of appeal against the decision of 27 September 1995 to abolish his post, the one of 16 April 1996 not to let him compete for other posts in his occupational group and the one of 29 April 1996 not to let him compete for posts in other occupational groups and to give him notice of termination as at 31 July. On 13 June he appealed against the decision of 5 June declaring that it had given him notice on 30 April.

His appointment ended on 31 July 1996.

The Board joined his appeals. In a report dated 6 February 1997 it recommended upholding the abolition of his post; reversing the "decision" by the Reduction-in-Force Committee not to let him compete for P.4 posts in his occupational group; and putting him on a suitable post or paying him compensation; granting him 1,500 Swiss francs towards costs; and rejecting his other claims. By a letter of 25 April 1997, which he is impugning, the Director-General maintained the decision to abolish his post and rejected his appeals.

B. The complainant submits that the impugned decision shows several mistakes of law. He had no reason to appeal against the decision to abolish his post within the 60-day time limit in Staff Rule 1230.8.3, the Administration having promised not to end his appointment. Not until the time limit had expired and his rights under the reduction-in-force procedure had been denied did he have reason to appeal against abolition.

He puts forward three main pleas on the merits. First, he alleges breach of the WHO's duty not to take instructions from a member State and its corollary duty to appoint staff that meet "the highest standards of efficiency, competence and integrity". It was under pressure from the Permanent Mission of the Russian Federation that the Organization kept him on a post at grade P.3 and it consulted the Mission about which posts to abolish.

Secondly, he pleads breach of promise. When his counsel was negotiating about the reinstatement ordered in Judgment 1249, the Director of Personnel gave him an assurance - which his counsel confirmed in writing - that his contracts would be renewed up to the date of his retirement. In the internal proceedings the Administration did not deny that assurance but made out that the reduction-in-force procedure prevented compliance. It promised in July 1995 that he would get a five-year extension, as he pointed out when he accepted with reservations the extension by only six months; it also told him that abolition did not necessarily mean the end of his appointment. But what else could abolition mean? The Administration gave the Reduction-in-Force Committee confidential guidelines banning a staff member from competing for any post at the grade he actually held if it was higher than the grade of the post to be abolished.

Lastly, he says that the reduction-in-force procedure was riddled with mistakes. There were no "justifiable" reasons for abolishing his post. The decision was taken after improper consultation with the Russian Government and was intended, among other things, to spare the WHO the cost and embarrassment of "double incumbency". There were two other posts the complainant might have filled, but the WHO appointed other candidates barely a fortnight before telling him it had nothing to offer. Even though he had held grade P.4 since 1987 it refused to let him compete for posts at that grade and kept his post at a lower one. Its refusal to let him compete in other occupational groups was arbitrary and unexplained.

The WHO still needed his services: that is why it gave him short-term contracts after termination. So it should put him on the regular budget post he held from January to July 1995. It is not of limited duration and has not been abolished.

He claims the quashing of the decisions of 27 September 1995 and 16 and 29 April 1996 and reinstatement as from 1 August 1996 or, subsidiarily, the quashing of the decision of 5 June 1996 and payment of one month's salary and allowances. He claims "equitable" awards of moral damages and costs.

C. The WHO replies that the abolition of his post and the decision not to extend his appointment after going through the reduction-in-force procedure were proper exercises of its discretion. It "questions" the receivability of his challenge to abolition, which turns on an alleged promise of continued employment. It observes that his objections rest mainly on issues that have nothing to do with any such promise.

On the merits it dismisses as "insinuation and supposition" the evidence he offers of interference by a member State. Abolition was in the WHO's interests and prompted neither by pressure from outside nor by personal prejudice. When money is short the Organization is free to decide which posts to abolish. Double incumbency on a post did not mean that there were no objective reasons for doing away with it.

As to the reduction-in-force procedure, the WHO submits that it took the complainant's candidature seriously and abided by the rules. That the Committee gave no reasons for its decisions is in keeping with a "long-established policy" of confidentiality. In any event Staff Rule 1050.2.1 limits competition for "retention" to staff holding posts "at the same grade as the post to be abolished, or one grade lower". So it would have been unlawful for him to compete for P.4 posts. He has no challengeable decision refusing the upgrading of his post: on that score his complaint is irreceivable.

He had no right to continued employment. Neither the affidavit he produces from his counsel nor the reservations he stated on accepting the six-month extension constitute evidence of any "firm commitment" from an official competent to enter into one. The rules on abolition call for application of the reduction-in-force procedure, which carries an "unavoidable risk". Besides, a fixed-term appointment confers no right to renewal.

He must be presumed to have got notice of termination on the day the postal services left at his address an announcement of delivery of the WHO's registered letter. That he took some time to pick up the letter at the post office affords no grounds for extending the period of notice.

D. In his rejoinder the complainant seeks to refute the WHO's arguments in the reply and enlarges on his pleas. He points to differences in treatment between Russian and other translators and maintains that the Reduction- in-Force Committee acted on "confidential guidelines". He describes seven examples of mistreatment which to his mind only personal prejudice can account for. In his submission the rules omit to provide against cases where on personal promotion the holder of an abolished post has a grade higher than that of the post itself: in such cases the rules should be read in the staff member's favour. Since the Administration failed to advertise a P.4 vacancy in his former unit and preferred to put an ill-qualified "seconded" official on it, he asks the Tribunal, in entertaining his claim to moral damages, to take account of the WHO's further denial of a proper competition.

E. In its surrejoinder the defendant presses its pleas and comments on issues raised in the complainant's rejoinder. It denies his charge of prejudice, corrects his account of the facts and denies breach of due process.

CONSIDERATIONS

1. The complainant's earlier career with the WHO is summed up in Judgment 1249 of 10 February 1993, which ruled on his first complaint. In execution of that judgment the Organization reinstated him in the P.3 post he had formerly held and extended his appointment to 30 June 1995.

2. It later extended his contract to 31 December 1995. In a memorandum of 27 September 1995 it informed him that it was to abolish his post and apply to him what is known as the "reduction-in-force" procedure. It gave him an extension to 31 May 1996 and put him on a post created and funded for just the duration of that extension.

3. The Director of the Division of Personnel told him in a letter of 18 March 1996 that the Organization had failed to find any post to which it might make him a "reasonable offer" of "immediately possible" reassignment within the meaning of Staff Rule 1050.2.5 and Manual paragraph II.9.290; but he would be covered by the reduction-in-force exercise that was to begin "in due course".

4. The Reduction-in-Force Committee considered a request from him for leave to compete for posts at P.4, the grade to which he had been granted personal promotion in 1987, instead of P.3, the grade of the post he had been holding; but it took the view that Staff Rule 1050 allowed him to compete only for posts at the same grade as the one that was being abolished, namely P.3. There being no suitable P.3 post in his own occupational group, he then applied for leave to be considered for posts in other groups. The upshot was that the Director-General decided on the Committee's recommendation to offer him no other post. The Director

of Personnel so informed him in a letter dated 29 April 1996 and said that his last day in service would be 31 July, his appointment being extended to that date. He did not get that letter until 3 May.

5. On 12 June he appealed to the headquarters Board of Appeal challenging:

(1) the application of the reduction-in-force procedure on the grounds that he had been barred from competing for P.4 posts in his own occupational group;

(2) the decision in the Director of Personnel's letter of 29 April 1996 not to let him compete for posts in any of the other occupational groups he had asked to be considered for; and

(3) the notice of termination in the same letter.

In that appeal he also challenged the decision, notified to him on 27 September 1995, to abolish his post.

6. In a memorandum dated 5 June 1996 the WHO told him that he had been served notice on 30 April, not, as he said, on 3 May. On 13 June he lodged a second appeal challenging that contention, and the Board joined it to his first one.

7. In its report of 6 February 1997 the Board declared his appeal against the abolition of his post to be receivable "in the light of the assurances of continued employment he had received from the Administration". It held that the length of his contract "did not affect his situation in the event of the abolition of his post"; that abolition was a management decision within the Director-General's prerogative; and that there was "no evidence of prejudice" against him. It found some ambiguity in Manual paragraphs II.9.330 and 330.1 in that 330 referred to "the candidate's grade, experience and qualifications" whereas 330.1 required a list of all posts that were "of the same grade and in the same occupational group as the post of the candidate". It held that, where they were ambiguous, rules should "consistently be interpreted in favour of a staff member". It went on: "While this would have enabled [the complainant] to compete for P.4 posts ... there was no guarantee that the outcome would have been different". It declined to recommend a new reduction-in-force procedure that "could lead to injustice for other staff members". It observed that though the complainant's supervisors recognised he had been doing P.4 work "over an extended period of time" he had not sought the reclassification of his post "until after notification of abolition" and, according to the Administration, it had been up to him or his supervisors to make the first move. As for notice of termination, the Board took the view that the Administration had "made every effort" to give it in due time and had met its obligations on that score. The Board found a failure of management in "the absence of any attempt ... to normalise the constellation of posts" in the Russian translation section between July 1993 and July 1995, when the decision had been taken to reduce staff, but it found the complainant too to blame for not seeking reclassification; although the Reduction-in-Force Committee's refusal to let him compete for P.4 posts was flawed, starting a new procedure would be inadvisable.

8. The Board recommended:

(1) upholding the decision to abolish the complainant's post;

(2) reversing the Committee's refusal to let him compete for P.4 posts in his own occupational group and granting him redress in the form of financial compensation or redeployment;

(3) paying him a sum towards costs; and

(4) rejecting all his other claims.

9. The Director-General accepted (1) and (4) but rejected (2) on the grounds that the Committee's decision was in accordance with the Staff Regulations and Rules and (3) on the grounds that the complainant had not succeeded in his claims. The complainant is challenging (1) the decision of 27 September 1995 to abolish his post; (2) the refusal to let him compete for P.4 posts; (3) the decision of 29 April 1996 giving him notice of termination; and (4) the decision of 5 June 1996 about the date of such notice. He claims reinstatement as from 1 August 1996 or, failing that, one month's salary and allowances, and moral damages and costs.

Abolition of the complainant's post

10. The abolition of the complainant's post was a discretionary decision by the Director-General and as such may be reviewed only on the customary limited grounds. The complainant contends that after Judgment 1249 his counsel obtained the Organization's consent to keeping him on until the normal age of retirement and, to begin with, granting him a five-year extension of appointment. At the time, however, there was no need for any reduction in force. The need arose in January 1995 when the Organization's Executive Board asked the Director-General to review the budget proposals for 1996-97 and shift at least 5 per cent of the budget credits from areas of lesser urgency to areas of priority. In May 1995 the World Health Assembly did not approve cost increases under the budget. So 167 posts at headquarters had to be abolished. The decision to get rid of the complainant's post came on 24 July 1995 and he was told of it orally the same day and in a memorandum from the Director of Personnel on 27 September.

11. In the Office of Language Services four P.3 posts for translators were abolished and a P.4 one, of which the holder was to retire early in 1996 anyway. The purpose of abolishing the P.3 posts was, says the Organization, to maintain "the high quality of translation services and supervision of temporary or free-lance staff" even after reduction of staff. There is no evidence of personal prejudice against the complainant. In particular, the Tribunal does not accept his allegation that the Organization deferred to the Russian Permanent Mission in Geneva instead of making a decision in its own interests. The allegation rests on an inference he draws from the memorandum of 10 August 1995 from the acting chief of the Office of Language Services to the Director of the Division of Publishing, Language and Library Services which referred to the Russian translators and said that a letter had gone to the Russian mission and the Organization was awaiting a reply. By 10 August 1995 the decision to abolish the complainant's post had already been made; so the inference is mistaken.

12. The complainant argues that the abolition of a P.4 post would have been more economical. His view is irrelevant. It is the Director-General's prerogative to decide on the Organization's programme and on the level of staff. He took the decision to abolish the P.3 posts rather than any more senior ones and, where possible, vacant rather than filled posts. There is no evidence to support the complainant's contention that the abolition of his post was intended to bar him from the reduction-in-force procedure. He was entitled to partake in the procedure in accordance with the Rules and Regulations and he did so.

13. He alleges that his post was abolished because there was "double incumbency" of it. On the evidence the allegation is not borne out. If there had been two P.3 posts in the Russian translation section, both would still have been abolished according to the general criteria that the Director-General was applying.

14. The conclusion is that the decision to abolish the post was a proper exercise of discretion by the Director-General and shows no flaw. Since on that score the complaint fails on the merits, there is no need to entertain the Organization's objection to the receivability of the challenge to abolition.

Refusal to let the complainant compete for a P.4 post

15. The complainant challenges the decision not to let him compete for a post at grade P.4, to which he had been granted personal promotion, instead of P.3, the grade of the post he held.

16. Staff Rule 1050.2 provides:

"When a post of indefinite duration - or any post held by a staff member with a career-service appointment comes to an end - a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General based upon the following principles:

1050.2.1 Competition for retention shall be limited to other staff holding relevant posts at the same grade as the posts to be abolished or one grade lower."

Manual paragraph II.9.330 reads:

"Each candidate for retention competes, in accordance with the procedure described below, either for all posts in the Organization as a whole (if the post abolished was subject to international recruitment) or for those posts in the relevant commuting area (if the post abolished was subject to local recruitment) that match the candidate's grade, experience and qualifications."

and Manual paragraph II.9.330.1:

"a list is first drawn up of all posts of indefinite duration in the Organization as a whole or at the local level that are of the same grade and in the same occupational group as the post of a candidate."

The headquarters Board found inconsistency between 330 and 330.1. But the primary text, 1050.2.1, is clear enough: it confines competition to "other staff holding relevant posts at the same grade as the posts to be abolished or one grade lower". The Manual paragraphs may not run counter, or be read to run counter, to what the Rules say.

17. The complainant argues that it was arbitrary of the Reduction-in-Force Committee not to waive 1050.2.1 in his favour and let him compete for P.4 posts. The plea cannot be sustained. The Committee would have been wrong to disregard the express language of 1050.2.1, and the conclusion is that the Director-General was not in error in endorsing the Committee's refusal to let the complainant compete for P.4 posts.

18. The complainant raises the question of the reclassification of his post, which he did not seek until 21 March 1996, when the post had ceased to exist. The Board of Appeal did not take up that issue, the Director-General took no decision on it, and his claim under this head is irreceivable because he has failed to exhaust his internal remedies.

19. He submits that the Committee incorrectly applied the reduction-in-force procedure in that it would not let him compete for posts in the other occupational groups he had asked to be considered for. Again he is mistaken. Manual paragraph II.9.360.1 reads:

"if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. ..."

The complainant spent most of his career, including his ten years with the Organization, on translation into Russian. The Reduction-in-Force Committee came to the conclusion, on the strength of his qualifications and experience, that he was "not obviously well-suited" for work in any of the other groups he had suggested.

20. Since he was unsuccessful in the reduction-in-force competition, he was not offered a post. The Organization took all the steps required of it under the Staff Rules and the Director-General's decision again shows no flaw.

Termination of appointment

21. The complainant contends that the Organization promised to keep him on until he reached the age of retirement, in 2000, and in particular that one of the other posts for a Russian translator would be made available for him.

22. The termination of his appointment was the direct consequence of abolishing his post and the unsuccessful outcome of the reduction-in-force procedure. Even if he was told on reinstatement that he would be kept on until retirement - though Judgment 1249 did not so require and the Organization has not admitted to saying any such thing - there can have been no question of departing from the Staff Regulations and Rules. So he was, like anyone else, vulnerable to abolition of his post and, in that event, entitled to proper application of the reduction-in-force procedure. That is exactly what he got. The reason why he could not compete for surviving posts for Russian translators was that they bore a higher grade than did his own post. So the termination of his appointment was a decision taken in keeping with the rules and within the scope of the Director-General's discretion.

Notice of termination

23. His subsidiary plea is that he did not get the letter giving him notice until 3 May 1996, when he says he picked it up at the post office. The Organization says that since the postal service tried to deliver the letter to

him at his address on 30 April, that is the date it was entitled to take; and since actual receipt of its letter was delayed it should be deemed to have observed "in essence" the period of three months it intended to give by way of notice. In any event - it adds - it had no need to give him three months' notice: Rule 1050.3 states:

"Termination under this Rule shall require the giving of at least three months' notice to a staff member holding a career-service appointment or a confirmed fixed-term appointment of one year or more and at least one month's notice to any other staff member."

and he held an appointment of less than a year.

24. If on reinstatement the complainant had been given a five-year appointment - and the Board accepted his argument on that score - that would not have saved his post from abolition; but he would have been entitled to three months' notice under 1050.3. The Organization itself apparently believed at the time that it had to give him three months' notice.

25. In the circumstances the Tribunal holds that the Organization was correct in its original view that three months' notice was necessary and in attempting to serve three months' notice. It did not succeed in doing so since he did not get its letter until 3 May. So his claim to another month's salary and allowances must succeed. He is also entitled to a sum towards costs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant a further month's salary and allowances.

2. It shall pay him 500 United States dollars towards costs.

3. All his other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner

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