EIGHTY-NINTH SESSION

***In re* O'Reilly** **Judgment No. 1981**

The Administrative Tribunal,

Considering the complaint filed by Miss Eithne O'Reilly against the World Health Organization (WHO) on 7 July 1999, the WHO's reply of 11 October, the complainant's rejoinder of 26 October 1999 and the Organization's surrejoinder of 25 January 2000;

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, who is of Irish nationality, joined the staff of the WHO in 1983. In August 1988 the Organization assigned her to a post of secretary at grade G.4 in its Global Programme on AIDS (GPA) and she held several fixed-term appointments. In November 1994 her appointment was extended for two years. The Organization informed her in September 1995 that her appointment would end on 31 December 1995 due to the abolition of her post. She opted to go on leave without pay and on 12 December the Administration sent her a letter setting out the conditions governing such leave. She signed the letter and was placed on leave from 1 January 1996. Since January 1997 she has held short-term contracts.

In Judgments 1624 to 1631 of 10 July 1997, the Tribunal allowed complaints filed by former employees of the GPA against decisions to end their appointments because of the abolition of their posts at the end of 1995. In a letter of 20 October 1997 the Director of the Division of Personnel informed the complainant that prior to the issuing of those judgments the Administration had decided that any ruling made by the Tribunal with respect to one former GPA staff member would apply to other former GPA staff members "with the same claim and fact situation". She therefore submitted a claim on 18 November 1997 and the reduction-in-force procedure was applied to her.

By the terms of paragraph 24 of Judgments 1624 to 1631 each complainant was "entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure". Paragraph 25 offered the Organization the alternative option of paying each complainant "damages equal to the amounts payable under [paragraph] 24" - without reinstating the complainant - and of carrying out the same reduction-in-force exercise.

The Director of Personnel informed the complainant in a letter of 27 April 1998 that the Organization had not found a post for her and that it would pay her damages in accordance with the ruling in the above-mentioned judgments. In a letter of 1 October 1998 the Administration sent her the calculation of the amount she would receive in damages for the period from 1 January 1996 to 27 July 1998. The sum was composed of salary and interest, less any occupational earnings received during that period.

By a memorandum of 9 October 1998 the complainant asked that the termination indemnity for abolition of post paid to her under Staff Rule 1050.4 be recalculated to take account of her longer length of service, as she was assuming her appointment had "subsisted up to the date of its termination following the reduction-in-force procedure". She asked to be paid the additional amount due to her. The Organization rejected her request saying that as it had not reinstated her, no service time had continued to accrue.

On 23 November 1998 she appealed to the Headquarters Board of Appeal against that decision. In its report of 23 March 1999 the Board was of the opinion that terminal benefits should be included in the sum payable under

paragraph 24 of the GPA judgments, and that the complainant should have been allowed to accrue service time up to 27 July 1998, as the period in question was regarded as service time for staff who were reinstated. By denying the complainant that opportunity the Administration was introducing bias in the way it executed the Tribunal's judgments, to the disadvantage of staff who were not reinstated. It recommended paying her additional compensation "to cover the loss of terminal indemnity for the period 1 January 1996 to 27 July 1998". The Director-General did not concur with the Board's reasoning and on 7 June 1999 rejected her appeal, which is the decision the complainant is now impugning.

B. The complainant contends that the period from 1 January 1996 to 27 July 1998 should count as service time for her. The indemnity for abolition of post which she received under Staff Rule 1050.4 was calculated on her length of service up to the end of 1995 and should be recalculated accordingly. The redress listed in paragraph 24 of the above-mentioned judgments of the Tribunal included "benefits due under [a complainant's] contract". As was agreed by the Headquarters Board of Appeal, the termination indemnity constituted such a benefit. By not paying her the additional amount due, the Organization has disregarded the terms of the said judgments.

Citing the Tribunal's case law the complainant says that the Organization showed inconsistency in what it allowed as service time. It refuses to regard the period between her original illegal termination and her termination after the end of the reduction-in-force procedure as service time for her, but considered it as such for other GPA complainants; it calculated the damages due to them on the remuneration they would have received had their appointments continued for that period, even allowing them within-grade increments and increases due under revisions of the salary scale.

The complainant puts forward arguments to show that her employment relationship with the Organization continued up to 1998. According to the applicable rules, notice of termination may be given only on the completion of a reduction-in-force procedure, and so in her case it was the letter dated 27 April 1998 from the Director of Personnel which must have constituted such notice.

She asks the Tribunal to order the WHO to recalculate the indemnity due under Staff Rule 1050.4 in order to take into account her additional service time from 1 January 1996 to 27 July 1998 and to pay her the extra amount due. She also claims 4,000 Swiss francs in costs.

C. In its reply the Organization says that it correctly implemented its undertaking to allow the complainant the benefit of the previous GPA judgments. It was under no obligation to adjust the complainant's terminal indemnities. They were correctly calculated for a period of service ending on 31 December 1995. After that date the complainant was on leave without pay, in lieu of termination, and service time had ceased to accrue. She was aware of that fact. By signing the letter of 12 December 1995 she had accepted the conditions governing her leave without pay. One of the conditions specified that separation payments would be calculated in accordance with service credits accumulated "on the day before the effective date of leave ... without pay".

Point 2 of the Tribunal's ruling in Judgments 1624 to 1631 allowed the Organization the option of reinstating each complainant or paying damages. In applying that ruling to the present complainant it elected to pay her damages instead of reinstating her, and in so doing assumed that service time had ceased to accrue from 1 January 1996. The Organization calculated the damages due to the complainant in accordance with paragraph 24 which did not require a recalculation of terminal indemnities. It paid the complainant an amount equal to the salary, allowances and benefits she would have received had she been under a contract through to the unsuccessful outcome of the reduction-in-force procedure. That payment included a sum equivalent to three months' notice, but that did not imply that she had remained a staff member.

The complainant was not right in thinking that her employment relationship subsisted until the end of the reduction-in-force procedure. It was not necessary to have staff member status to participate in that process.

The Organization refutes the allegation that it showed inconsistency in determining what amounts to include when paying damages. It made the payments that were relevant and implemented the judgments in good faith.

D. In her rejoinder the complainant presses her pleas. She notes that while the Organization does not contest that termination benefit is "due under her contract" it seeks to show that it made payments to her pursuant to paragraph 25 rather than 24. She claims there is no basis in the GPA judgments for drawing a distinction between the two and it is paragraph 24 which determined what damages should be paid to her.

She reiterates her view that the Organization has shown inconsistency in treating the contested period as one of service time for some purposes, but not for others. There are no grounds in the judgments for "picking and choosing" which entitlements are due under a staff member's contract.

The complainant maintains that by virtue of the notification she was sent on 27 April 1998, at the close of the reduction-in-force exercise, her appointment came to an end on 27 July 1998. Citing the case law she refutes the Organization's view that participation in such an exercise did not indicate the subsistence of the employment relationship and maintains that because her initial notice of termination was invalid her contract was renewed by implication.

In her submissions to the Headquarters Board of Appeal she argued that the leave-without-pay agreements applying to other GPA complainants were superseded by the Tribunal's ruling setting aside their notices of termination. In its report on her case, the Board held the view that when the complainant had signed the leave-without-pay agreement contained in the letter of 12 December 1995, she could not have foreseen the Tribunal's judgments; the Board concluded that the agreement she had signed had become without effect.

E. In its surrejoinder the Organization observes that in the complainant's case, effective separation took place at the end of her leave without pay on 1 January 1997. From 31 December 1995 her service time - and hence her separation payments - ceased to accrue, in accordance with the terms of the leave-without-pay agreement that she had signed. There is no foundation for the complainant's assumption that it showed inconsistency with regard to service time. In calculating damages, the Organization did - when relevant - include amounts corresponding to normal within-grade increases, salary revisions and allowances.

It holds that there is a distinction to be drawn between paragraphs 24 and 25 of the GPA judgments inasmuch as paragraph 24 dealt with sums payable to staff on reinstatement. Payments were made to them as though separation had not occurred, and separation payments had to be returned. Under paragraph 25 the Organization could elect to pay damages instead of reinstating a staff member. It was assumed that separation had taken place, and, as was the case for the complainant, termination indemnity did not have to be returned.

CONSIDERATIONS

1. The complainant, who was assigned to the Global Programme on Aids (GPA) in 1988, was informed in 1995 that the post she was occupying would be abolished and that her appointment would come to an end on 31 December 1995 unless she was reassigned before that date. She was not redeployed. She neither appealed against termination nor applied to intervene in any of the complaints filed with the Tribunal by former GPA staff members, and which led to Judgments 1624 to 1631. She was nevertheless given the benefit of those judgments and was included in the reduction-in-force procedure which ensued, but was not successful.

2. The Organization opted to pay the complainant damages under paragraph 25 of Judgments 1624 to 1631. It paid her 69,787.14 Swiss francs equivalent to the sum she would have received under a contract (less occupational earnings) for the period from 1 January 1996 to 27 July 1998 plus interest until November 1998. She claims that in addition to those payments she is entitled to recalculation of the termination indemnity which she received at the time of her separation pursuant to Staff Rule 1050.4 as the period from 1 January 1996 to 27 July 1998 should be treated as service time.

3. Following her separation from service on 31 December 1995 the complainant was, at her request, placed on leave without pay for six months; it was later extended to 31 December 1996. Since her separation she has been offered short-term appointments.

4. In its report of 23 March 1999 the Headquarters Board of Appeal recommended the payment of additional compensation to cover loss of termination indemnity for the period from 1 January 1996 to 27 July 1998, plus a sum for costs.

5. The Director-General stated in a letter dated 7 June 1999, which is the decision impugned, that she did not agree with the Board's recommendation. She held that the payment of damages referred to in paragraph 25 of the GPA judgments was made in lieu of reinstatement on the assumption that separation had taken place; accordingly, the payment of damages did not include compensation for the additional termination indemnity the complainant was seeking and which depended on service time. The Director-General indicated that this position was consistent with

the ruling of the Tribunal in Judgment 1797 (*in re* Weiss No. 2).

6. The complainant argues that there is no basis in the GPA judgments for the Organization in reckoning service time to differentiate between the rights of former GPA staff members who were reinstated and those who were not. She says that in calculating damages for GPA staff members, the Organization has in fact treated the period from the original "illegal" termination up to termination following the reduction-in-force procedure as service time. For staff who were not reinstated at the end of it, the Organization included the whole period as service time in allowing them the benefit of within-grade salary increases, changes in salary scales, education grants etc. She claims that Judgment 1797 is of no direct relevance since the complainant in that case sought reinstatement in the pension fund and the staff health insurance scheme, which she does not.

7. The Organization says that in the present case it exercised the option of paying the complainant damages in lieu of reinstatement. She was separated from service as from 1 January 1997 - at the end of her leave without pay. However, the date that matters for the calculation of termination indemnities is 31 December 1995 because after that date service time ceased to accrue, including for the purpose of calculating separation payments. This was explained to the complainant in a letter dated 12 December 1995: she gave her agreement thereto by signing that letter on 18 December 1995. When the WHO opted to pay damages this was in lieu of reinstatement on the assumption that separation had already taken place; service time would only have accrued if she had actually been reinstated.

8. The Tribunal ruled in Judgment 1797 that the complainant in that case was not reinstated in employment. He too was included in the reduction-in-force exercise and was not successful. Since she was not reinstated the complainant is in a similar position.

9. The issue is therefore whether service time continued to accrue. The answer is that it did not accrue, since the Organization opted to pay damages in lieu of reinstatement. As there was no reinstatement, service time did not occur. Participation in the reduction-in-force exercise or payment of an amount equal to a sum equivalent to three months' notice does not mean that reinstatement occurred. The claims therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.