NINETIETH SESSION

***In re* Reis-Ekelund (No. 2)** **Judgment No. 2021**
(Application for review)

The Administrative Tribunal,

Considering the application for review of Judgment 1907 filed by Mr Patrick Reis-Ekelund on 10 April 2000, the reply of 5 May from the International Office of Epizootics (OIE), the complainant's rejoinder of 19 September and the OIE's surrejoinder of 5 October 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;

CONSIDERATIONS

1. The complainant seeks review of Judgment 1907 delivered on 3 February 2000. In that judgment the Tribunal dismissed his complaint against the OIE in which he sought the quashing of the Director General's decision of 26 February 1999 to dismiss him on the grounds that his services were no longer satisfactory. Prior to his dismissal he had erroneously reported accounting anomalies in one of the OIE's regional offices.

2. The complainant claims that the Tribunal, as constituted to rule on his case, was not impartial; that it did not take into account or mention the contents of the replies and notes that he sent his employer in response to the latter's criticisms; that it did not consider the fact that the accounts of the OIE's regional office for the Americas had been examined and approved by the auditors after the complainant's dismissal and not before; that it failed to rule on his claim that the OIE had made false accusations against him in regard to an "OIE-Thailand agreement"; and that it did not sufficiently describe the reasons for its decision.

3. As a rule, the Tribunal only seldom reviews its own judgments. Judgments are final and no appeal mechanism exists for the unsuccessful complainant. Furthermore, a review procedure is not expressly provided for in the Statute and Rules of the Tribunal. The general principles pertaining to the review of decisions have been laid out in Judgment 442 (*in re* Villegas No. 4) delivered on 14 May 1981, in the following terms:

"2. *Inadmissible grounds for review*

The Tribunal's judgments carry the authority of *res judicata* from the date on which it delivers them. Though subject to review thereafter, they will be reviewed only in exceptional cases. That is the rule under all judicial systems which allow review. It must therefore be made clear at the outset that several pleas in favour of review will not be allowed.

One is an alleged mistake of law. To allow an application for review on the grounds of the Tribunal's legal reasoning would be to permit anyone who was dissatisfied with a decision to question it indefinitely in disregard of the principle of *res judicata*.

Likewise the Tribunal will not allow review on the grounds of an alleged mistake in appraisal of the facts, i.e. the interpretation which the Tribunal has put on the facts.

Failure to admit evidence is no valid reason for review; otherwise an unsuccessful party might challenge indefinitely the facts on which the judgment is founded.

Lastly, the Tribunal will not allow review on the grounds that it has omitted to comment on pleas submitted by the

parties. Otherwise it would have to pass express judgment on all such pleas, even if they are plainly immaterial. The purpose of an application for review is not to compel the Tribunal to pass judgment on irrelevancies.

3. *Admissible pleas in favour of review*

Other pleas in favour of review may be allowed if they are such as to affect the Tribunal's decision. They include an omission to take account of particular facts; a material error, i.e. a mistaken finding of fact which, unlike a mistake in appraisal of the facts, involves no exercise of judgment; an omission to pass judgment on a claim; and the discovery of a so-called 'new' fact, i.e. a fact which the complainant discovered too late to cite in the original proceedings.

...

5. *Review and correction*

Where a plea is not such as to affect its decision, the Tribunal will decline not only to reconsider its judgment but also to correct the summary of facts and its legal reasoning. It would lay an undue burden on a tribunal to require it to correct any flaws which had no effect on its decision."

4. These general principles have been followed by the Tribunal throughout the years. In Judgment 1825 (*in re* Belser No. 2 and others) delivered on 28 January 1999, the Tribunal declared:

"The Tribunal's judgments are final and binding. They are not subject to appeal. The Tribunal will not entertain applications for revision or review except in the most unusual circumstances such as fraud or the discovery of conclusive new evidence which could not have been brought forward before. The stability of judicial procedures and the need to bring an end to litigation require that parties must accept the result they obtain even when they are unsatisfied with it. Where both parties have had a full opportunity to present their case and where no new and previously undiscoverable factual element is brought forward the principle of *res judicata* prevents the reopening and rearguing of cases already decided."

5. The issues raised by the complainant are divided into five categories: he contends that the Tribunal (1) disregarded some facts; (2) made a material error; (3) failed to rule on a claim; (4) failed to give reasons for its decision, therefore breaching Article VI of the Tribunal's Statute; and (5) was not impartial.

Disregard of certain facts

6. The complainant contends that the Tribunal should have mentioned the contents of the replies or notes addressed by him to his supervisors. The Tribunal was under no such obligation. The replies and notes were provided to the Tribunal and it had ample opportunity to appraise this evidence and in fact did so. Whether the contents were crucial was left to the Tribunal to decide. The complainant apparently believes that the Tribunal made a mistake in appraising the importance of this evidence. As has been shown above, this is not a plea that gives rise to review.

Error of fact

7. Judgment 1907 contains the following passage under 4:

"At the initiative of the Director General, the complainant was accorded an interview with the President of the International Committee of the OIE, who also presides over the Administrative Commission, on two successive days, 18 and 19 February 1999. At those meetings the complainant continued to insist, as he had on a number of previous occasions, that he had discovered irregularities in the accounts of the Office's regional office for the Americas, notwithstanding the fact that those accounts had been examined by both the internal and external auditors of the OIE and had specifically been found to be in order."

8. In fact, the audit reports in question were not delivered to the Director General of the OIE until April 1999 - that is after the complainant had met with the President of the International Committee of the OIE and had been dismissed by the Director General. Thus, the Tribunal's statement as quoted is erroneous.

9. But the Tribunal's case law does not merely require that an error be found in order to justify reviewing its decision. The error must be material and be "such as to affect the Tribunal's decision". This is clearly not the case

here as, whatever the date of the auditors' reports, the complainant's allegations of accounting irregularities were incorrect and were conclusively found to have been so.

Failure to rule on a claim

10. In his pleadings for his first case the complainant alleged that the OIE had made false accusations regarding an "OIE-Thailand agreement". Judgment 1907 did not deal with or mention this allegation since it was thought not to be relevant to the impugned decision. The complainant consequently alleges that the Tribunal failed to address one of his claims. It is noteworthy that no reference to the allegations concerning this agreement is made in the claim for relief either in the brief or in the complaint form completed by the complainant. The allegation was merely a plea and not a claim. The Tribunal did not need to address that plea if it felt it was unnecessary to do so.

Breach of Article VI of the Tribunal's Statute

11. The complainant has not demonstrated that the Tribunal failed to give its reasons. As submitted by the OIE the reasons for rejecting the complainant's claim in this regard clearly appear from the judgment. That the complainant does not agree with them is of course of no consequence.

Lack of impartiality

12. Lack of impartiality in a tribunal is a serious matter and an allegation of this sort should be neither made nor taken lightly. It is, like any other breach of the principles of natural justice, a proper ground for seeking review of a judgment. Impartiality can be evaluated either subjectively or objectively.

13. The complainant does not assert elements necessary to support a subjective test. He does not prove any of the personal convictions of the judges. A subjective test cannot apply in the present case, in view of the circumstances, for there is no evidence that one of the judges actually has a bias. In fact, the arguments brought forth could only serve, if successful, to establish an objectively reasonable apprehension of bias, i.e. the objective test.

14. The determining element in that test is whether the apprehensions of the interested party can be considered as being objectively justified. The complainant alleges that the following facts create a reasonable apprehension of bias on the part of the Tribunal.

15. The President of the Tribunal, Mr Michel Gentot, was one of the judges who adopted Judgment 1907. He is a very senior public official in France and was formerly President of the Litigation Section of the French *Conseil d'Etat*, the ultimate and highest appellate administrative tribunal in that country. He is also President of the French national committee for the protection of personal data (*Commission nationale de l'informatique et des Libertés, CNIL*). He was the Secretary General, later Director, of the Paris Political Studies Institute (*Institut d'Etudes politiques*) more than thirteen years ago, from 1978 to 1987.

16. The OIE's legal advisor, a French civil servant, was a lecturer at the Paris Political Studies Institute from 1975 to 1984.

17. The OIE's auditor, along with Mr Gentot, were both alumni of the French *Ecole nationale d'administration*.

18. The OIE's Director General and the Head of the Administrative and Financial Department are both French nationals, as of course is Mr Gentot.

19. Mr Justice Hugessen, who also signed Judgment 1907, is a Canadian national and a judge of the Federal Court of Canada. The President of the International Committee of the OIE was a Canadian senior civil servant. The Deputy Head of the Office's Administrative and Financial Department is also Canadian.

20. The complainant's subjective opinion that the judges were not impartial is not decisive. The question is whether a reasonably informed

person, viewing the matter realistically and having thought the matter through, would apprehend any bias. It is clear that such a person would not do so in the present case.

21. The complainant's first argument is that because Mr Gentot is of French nationality, along with a few of the

OIE's senior officers, its auditor, its Director General and one of the officers of the Department to which the complainant belonged, there are grounds for a reasonable apprehension of bias. This is simply unacceptable. International organisations by definition have no nationality and their officers and employees are drawn from citizens of many countries; it is the organisations and not their officers who appear as defendants in cases before the Tribunal and the nationality of the judges who hear those cases is wholly irrelevant.

22. The foregoing considerations effectively dispose of the allegations against Mr Justice Hugessen, as common nationality was the only element alleged by the complainant with regard to that judge. Consequently he has agreed to sit on the present matter. There is an important principle at stake here: applications for review are normally heard by the same panel which rendered the original decision; a complainant cannot, by making wholly frivolous and unsubstantiated allegations force one or more members of the panel to recuse themselves.

23. The concerns expressed by the complainant with regard to the fact that Mr Gentot and the OIE's auditor both attended the same school and that Mr Gentot was Director of an institute at which the Office's legal advisor taught are equally without merit. The first part of the complainant's concern does not appear to be reasonable. If his opinion were to be followed, students having attended an institution should be prevented from judging cases in which the names of other students of the same institution appear. Furthermore, one need only point out the fact that these two persons were not graduates of the institution from the same academic year to make any reasonable apprehension of bias disappear. As for the purported link between Mr Gentot and a former lecturer who is now legal advisor for the OIE, the latter was not directly implicated in the litigation. The complainant has failed to adduce any evidence that would lead a well-informed third party to reasonably apprehend bias on the part of Mr Gentot.

24. The other arguments deal with matters that are wholly unrelated to the complainant's claim and cannot possibly lead someone to suspect bias. The complainant objects to the fact that there is no appeal available to him beyond the Tribunal. There is nothing unusual about that, especially when one bears in mind that the Tribunal is itself an appellate body.

25. The application for review must in consequence be dismissed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 16 November 2000, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Mella Carroll

James K. Hugessen

Flerida Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.