

THIRTY-FIRST ORDINARY SESSION

In re OZORIO (No. 3)

Judgment No. 221

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the World Health Organization (WHO) drawn up by Mr. Peter Ozorio on 26 January 1973 and brought into conformity with the Rules of Court on 7 February 1973, the Organization's reply of 13 April 1973, the complainant's rejoinder of 17 July 1973 and the Organization's surrejoinder of 8 August 1973;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Regulations 1.2 and 4.5, WHO Staff Rules 110, 120, 320, 330, 340, 350.2, 410.1, 430.2, 430.3, 465.1, 540.1, 940, 970, 1030.1(a), (b), (c), 1030.3 1030.7 and 1210 and WHO Manual provisions II.1.20, 30 and 50, II.5.50, 190, 195, 260, 310-345, 480, 510 and 520, II.9.350 and VII.1.210;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Ozorio was originally appointed to the staff of the Pan-American Sanitary Bureau on 1 April 1958 on a two-year contract, including a probation period of one year. On 1 November 1958 he was made information assistant. On 31 December 1961 he was transferred from the Pan-American Sanitary Bureau to the WHO, promoted to grade P.1 and given a five-year appointment as information officer. On 1 January 1966 he was promoted to grade P.2 with similar duties and granted a further five-year appointment to expire on 31 December 1971. From 1 May 1964 he was assigned to Washington on post No. 4.0015. On 21 October 1971 he was notified of a decision to transfer him to the WHO Office for Liaison with the United Nations in New York and informed that his appointment was extended by one year and would expire on 31 December 1972. On 26 October 1971 he was told that his former contract of appointment would terminate on 31 December 1971. On 9 November 1971 for personal reasons he asked the Director-General to reconsider the decision to transfer him to New York and contested the decision to terminate his appointment in Washington. He also appealed against the latter decision to the Regional Board of Appeal on 24 November 1971. On 26 November 1971 he received confirmation that his appointment in Washington would expire on 31 December. On 1 December the Director-General told him that he confirmed the decision to transfer him, but that his new appointment would be for two years and not one as had originally been stated. On 16 December he informed the Director-General that he accepted the two-year appointment in New York but pressed his appeal against the decision to terminate his tenure of the post in Washington.

B. While expressing some reservations, the Regional Board of Appeal, in its report of 4 May 1972, held that in the circumstances of the case and at the time in question it would not be desirable for Mr. Ozorio to resume work in Washington. The Regional Director informed the complainant of the dismissal of his appeal on 7 June 1972. The case having been referred to the Headquarters Board of Inquiry and Appeal, that Board held that the Regional Director's impugned decision to terminate Mr. Ozorio's appointment in Washington had not had the effect of separating him from service since he had been given a new appointment in New York. The Board therefore recommended dismissing the appeal. It nevertheless also recommended giving him an appointment for five instead of two years. The Director-General accepted the Board's recommendations to dismiss the appeal and to grant Mr. Ozorio a five-year appointment, and so informed him by letter of 6 November 1972. On 22 December 1972 the complainant agreed to the replacement of his two-year appointment with a five-year appointment, but reserved his right to appeal against the decision of 6 November 1972 insofar as it related to the termination of his appointment in Washington. It is this part of the decision of 6 November 1972 which he impugns before the Tribunal.

C. In the complainant's opinion the administrative decisions taken regarding him (termination of his appointment in Washington and his transfer to New York) were inspired by the Regional Director's declared hostility towards him due to his trade union activities and racial origin (he has Chinese forbears). He considers that the reasons given by the WHO to justify the decisions are ill-founded and maintains, as indeed he maintained before the Regional Board and the Headquarters Board of Inquiry and Appeal, that several provisions of the Staff Regulations and Staff Rules have been infringed or misapplied.

D. In his complaint he asks the Tribunal: (a) to declare the complaint receivable; (b) to declare that he is entitled to permanent tenure with the WHO; (c) to declare that his reassignment is in violation of the Staff Regulations and Staff Rules; (d) to direct the WHO to pay the legal fees and expenses incident to his complaint; (e) to order the WHO to pay full damages for the prejudice suffered by him because of his transfer from Washington to New York; and (f) to order the WHO to pay such other compensation as the Tribunal may deem fit.

E. The Organization admits that relations between the complainant and his superiors in Washington had become more and more strained and states that from the beginning of 1971 it was looking at the possibility of transferring him from Washington to New York. It points out that the Director-General has discretionary authority to transfer a staff member from one post to another and may take account of such questions as whether working relations between a staff member and his colleagues may impair efficiency. In the present case the decision to transfer him was quite proper and, moreover, accepted by the complainant. The question of the termination of his appointment in Washington therefore does not arise since he received a new appointment in New York. As regards his alleged "right" to permanent tenure, the Organization points out that under Staff Regulation 4.5 and Staff Rule 320 the grant of permanent appointments is left to the Director-General's discretion and is not a right. The Organization therefore asks that the complaint be dismissed.

CONSIDERATIONS:

1. It is clear from Articles VII and VIII of the Statute of the Tribunal that the competence of the Tribunal extends, and extends only, to the review of final decisions that are impugned. In the course of proceedings that lead to a final decision various claims and arguments may be put forward and resisted; except in so far as they form part of the final decision the Tribunal has no power to adjudicate upon them. It may be that at the end of the proceedings a complainant, while satisfied with the decision itself, will be dissatisfied with the reasoning or some of the reasoning by which it is sustained; unless the decision itself is impugned, the Tribunal has no power to review the reasoning or to comment thereon. Likewise, the Tribunal has no power to grant relief except that which flows from the successful impugning of a final decision.
2. The present proceedings began with an appeal by the complainant to the Regional Board of Appeal in Washington, D.C., against a decision of the Regional Director made on 26 November 1971 to terminate his contract on 31 December 1971. The object of the termination was apparently so that the complainant might be transferred from Washington where he then was to a post in New York; and in the course of the argument questions arose as to the validity and propriety of such a transfer and of the reasons given for it. It was also contended on behalf of the complainant that under the Staff Regulations he was entitled to a permanent appointment. Various other breaches of Regulations were alleged and there was also an allegation of personal prejudice. The Regional Board duly reported and on 7 June 1972 the Regional Director confirmed his original decision.
3. The complainant appealed to the Headquarters Board of Inquiry and Appeal. In the course of its report, made on 12 October 1972, the Headquarters Board criticised the handling of the case at regional level and noted that "considerable emotion had been attached to it". The Board found that the termination notice was given on grounds that were not sufficiently substantiated. The Board made three recommendations. The first was that the appeal should be rejected on the ground that the complainant's services had in fact been retained. The second was that the Director-General should consider granting to the complainant a five-year contract from 1 January 1972 "as a conciliatory measure aiming at ending a contestation which affects adversely the image of the Organization". The third recommendation was that the Organization should participate in meeting the costs incurred by the complainant in relation to the appeal.
4. The decision impugned is contained in the letter of the Director-General of 6 November 1972 in which he accepted the first and second recommendations of the Board, and rejected the third as not in accordance with Staff Rules. Thus the decision impugned is in two parts. The first part of the decision, which the Tribunal will consider first, is in substance and effect a single decision to reverse the termination and to grant an extension of five years, a decision reached not on the ground that the complainant was entitled to it as of right but because it was in the interests of the Organization.
5. The complainant replied to the letter of 6 November by accepting the five-year appointment, "it being understood that such acceptance does not preclude me from appealing your decision of November 6 1972 relating

to the circumstances of the non-renewal of my appointment". By this reservation the complainant is seeking to say one of two things:

(a) that while accepting the renewal of his contract, he is appealing against the non-renewal; or

(b) that while accepting the renewal, he still wishes to complain about an earlier non-renewal and of the circumstances in which a decision, now superseded, was reached.

The first is self-contradictory; and the second would involve an investigation into the history of a decision which is not impugned and which, being superseded, is not impugnable. The Tribunal cannot give effect to a reservation in such terms.

6. Nor does it matter that the Organization has stated in its reply that it will not "formally submit that part of the complaint is irreceivable". A decision impugned is the foundation of the Tribunal's competence under its Statute; and if none is impugned, it has no competence. For the reasons already given it cannot pronounce upon matters which, though they may still be in dispute between the parties, are not the subject of a decision impugned. Consequently the Tribunal cannot consider the relief claimed in paragraph 11(a), (b), (c) and (e) of the complaint (see paragraph D above).

7. The relief claimed under paragraph 11(d) requests the Tribunal to order payment to the complainant by the Organization of the legal fees and expenses incident to his appeal; and the Director-General's refusal to do so is the second decision in the letter of 6 November 1972. Under Article II of its Statute the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations. The complainant does not allege that an obligation to pay the fees and expenses incident to an appeal is one of the terms of his appointment or the subject of any provision in the Staff Regulations. Staff Rules 1030.3 and 1030.7 require the Organization to pay costs in certain special situations which do not arise in this case; and from this it is to be inferred that there is not in the Staff Rules any general or implied obligation to pay costs. For this reason, the Tribunal is not competent to order the relief requested.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 22 October 1973.

M. Letourneur
André Grisel
Devlin

Roland Morellet