NINETY-NINTH SESSION

Judgment No. 2464

The Administrative Tribunal,

Considering the complaint filed by Mr R.P. against the World Health Organization (WHO) on 22 March 2004, the WHO's reply of 24 June, the complainant's rejoinder of 14 July, and the Organization's surrejoinder of 14 October 2004;

Considering the applications to intervene filed by Mr V.P.R. and Mrs M.R. – on behalf of her late husband, Mr R.C.R.– on 31 May 2004 and 22 August 2004 respectively, and the Organization's comments thereon of 24 June and 28 September 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By a memorandum of 4 October 1995 the Organization's Regional Office for South-East Asia (SEARO) informed General Service staff in New Delhi that a salary increase of 18.4 per cent for the period 1 November 1993 to 30 June 1994, resulting from a mini salary-survey initiated in August 1994 and completed in March 1995, would be paid in the form of a non-pensionable one-time lump-sum bonus equivalent to 147.2 per cent of a month's salary as at 1 November 1993; the payment of the lump sum was reflected in pay slips of October 1995.

The complainant was one of 29 appellants that ultimately appealed against that decision to the Headquarters Board of Appeal (HBA) in 1996. In its report of 19 May 1999, the HBA found that of the 29 appellants only the complainant and one other person – Mr K.C.R. – had suffered any real loss. It recommended paying both of them compensation. The Director-General did not accept that recommendation and rejected the appeal. That decision was notified to the appellants on 27 September 1999.

Only Mr K.C.R., who had meanwhile retired, pursued the matter before the Tribunal, contending that he had lost out in pension benefits. The Tribunal ruled on his case in Judgment 2030, delivered on 31 January 2001. It found that the payment of a lump sum in lieu of a revision of the salary scale was not permissible under the relevant regulations governing the implementation of salary survey results.It set aside the impugned decision and ordered the Organization to pay Mr K.C.R. compensation for loss of pension benefits that resulted from his receiving a lump sum rather than an increase in salary.

The complainant in the present case is a former staff member. He joined SEARO on 1 December 1975 at grade ND.01.07. He took early retirement with effect from 31 May 1998, at which time he held grade ND.02. After learning of the Tribunal's ruling in Judgment 2030, on 30 April 2001 he wrote to the Regional Director, stating that his case was "congruent" to that of the complainant in Judgment 2030; he sought payment of compensation for loss of pension benefits, calculated on the same basis as in that judgment. In a letter of 11 February 2002 to the complainant, the Regional Director set out reasons why the matter could not be revisited.

On 18 March 2002 the complainant wrote to the Director-General, through the Regional Director, pressing his claim for compensation because of the "special circumstances". On 28 March he was informed that the matter was under consideration. In April 2002 the complainant appealed to the Regional Board of Appeal (RBA). In its report of 25 September 2002, the RBA found that, as the matter was still under consideration with the Administration, the appeal was not receivable. On 30 April 2003 the Regional Director dismissed the appeal on grounds of irreceivability, given that a final reply to the complainant's letter of 18 March 2002 had not yet been issued. The Regional Director replied to the complainant's letter on 6 June 2003, reaffirming what was said in the letter of 11 February 2002.

On 27 April 2003 the complainant had filed a notification of intention to appeal to the Headquarters Board of

Appeal. The HBA issued a report on 2 December 2003. It noted that, based on information received from the Administration, the complainant had suffered a 5 per cent loss in pension rights. It recommended that the appeal be dismissed, but it also recommended that an exceptional award be made to the complainant "to compensate for his pension loss, on humanitarian grounds". The Director-General considered that as the complainant's internal appeal was effectively against a decision made in 1995, it was time-barred and irreceivable. He rejected the complainant's claim for compensation. The complainant impugns that decision, which was notified to him by letter of 16 February 2004.

B. The complainant contends that the internal appeals he filed subsequent to learning of the Tribunal's ruling in Judgment 2030 were receivable, as is his complaint to the Tribunal. Citing the case law, he believes he may seek review of a decision where some "new and unforeseeable fact of decisive importance has occurred since the decision was taken". The Tribunal's ruling in Judgment 2030 was a "fact of decisive importance", as it became clear from that judgment that it was "not permissible" for the Organization to pay staff the lump-sum bonus following the mini-survey. He submits that the Regional Director's letter of 11 February 2002 triggered new time limits for fresh internal proceedings, and he thereafter respected those time limits.

On the merits, he says the Administration has admitted that he suffered a loss in his pensionary benefits as a result of the Organization's illegal action in paying a lump-sum bonus, instead of revising the salary scales with effect from 1 November 1993. In his case, its action led to a reduction in his final average remuneration (FAR) and hence of his pension benefits. It also negatively affected his pay and allowances between November 1993 and the date of his retirement in 1998.

The complainant alleges dilatory action on the part of the Organization in dealing with his internal appeals, arguing that, by its failure to respect time limits, he was denied timely relief.

The complainant seeks the quashing of the Director-General's decision of 16 February 2004. He claims compensation (1) for loss of pension benefits and (2) for loss experienced in terms of salary and allowances over the period 1 November 1993 to 1 June 1998. He claims interest at 12 per cent on both those amounts. He also seeks damages for material and moral injury for undue delay, and claims 2,000 United States dollars in costs.

C. In its reply the Organization argues that the complainant has no standing to claim the benefit of Judgment 2030, as he was neither a party nor an intervener in the case that led to that judgment. The complainant was free to appeal to the Tribunal against the Director-General's decision of 27 September 1999, or to intervene in the case filed by Mr K.C.R., but he chose neither course of action. He cannot now seek to remedy his previous inaction by an after-the-fact request for the benefit of Judgment 2030.

Furthermore, to the extent that he is contesting the decision of 4 October 1995 to implement the results of the mini-survey by payment of a lump sum, the internal appeal he filed in 2002 was filed out of time, as was his complaint to the Tribunal. The Organization thus argues that his complaint is irreceivable. It does not accept that the Regional Director's letter of 11 February 2002 set new time limits for appeals against the decision to implement the results of the mini-survey by payment of a lump sum. That letter constituted no more than a reply to a request for reconsideration of the decision of 4 October 1995, which had ceased to be open to challenge. By filing an appeal in 2002 the complainant was attempting to circumvent the rules on time limits. Citing the case law, it argues that time limits are "an objective matter of fact". It rebuts the complainant's argument that Judgment 2030 created a new legal situation which could lead to new time limits for appeals.

On the merits, it points out that if the results of the mini-survey had been implemented by way of an adjustment of the salary scale, the percentage of increase in pension benefits at the grade level of the complainant would have been significantly lower than the 18.4 per cent that he received as a lump sum. If that 18.4 per cent had been implemented across the board the complainant might have had an increase of no more than 1 per cent of his final average remuneration.

The Organization argues that the complainant is asking the Tribunal to order remedies that go beyond the relief granted to Mr K.C.R. in Judgment 2030. It points out that in Judgment 2030 the Tribunal did not ask it to rework the salary scales. The complainant's request that he be granted compensation for loss in salary and allowances is therefore unsustainable. In any event, it constitutes a new claim as it was not made in his appeal to the RBA and for that reason is deemed irreceivable. It rejects his claim for alleged "material and moral injury for undue delay", arguing that there is no basis for such a claim. The complainant had sought review of a decision taken by the

Administration several years previously. His request had to be considered in a particular context and not in isolation. There was no ill will on the part of the Organization. A certain amount of time was necessary to deal with his request and the Organization acted in good faith.

D. In his rejoinder the complainant enlarges on his pleas and presses his claims. He maintains his argument that his complaint is receivable, contending that he is not claiming the benefit of Judgment 2030. Rather, his complaint has arisen from the refusal to grant him compensation on the same principle as in that judgment. He reiterates his opinion that the Regional Director's decision of 11 February 2002 was a new decision setting off new time limits.

With regard to the amount he has lost out by, he points out that according to the HBA's report in 1999 he stood to lose 5 per cent of his final average remuneration. He believes that by quoting the figure of 1 per cent the Organization is attempting to whittle down his losses.

E. In its surrejoinder the Organization asserts that the complainant's claims for relief amount to a claim for the benefit of Judgment 2030. It maintains its earlier arguments. It adds that the 5 per cent figure was an approximate percentage that had been indicated to the HBA in 1999, and that upon further verification it appeared to be incorrect. It appears to the Organization that the complainant is seeking to be paid an amount in excess of any loss he might have incurred.

CONSIDERATIONS

1. The complainant is a former staff member of the WHO's Regional Office for South-East Asia (SEARO). He retired in 1998 after having served therein for 23 years. In April 2001 he asked the Regional Director for payment of "compensation for loss of pensionary benefits, calculated on the same principle, as laid down in [Judgment 2030]".

2. Some time in March and April 1995, a comprehensive salary survey was carried out by the Organization resulting in an announcement on 15 May 1995 of a new salary scale which was to take effect from 1 July 1994 (Revision 37). Simultaneously, in March 1995, a mini-survey initiated in SEARO in August 1994, was completed, and the results were sent to WHO headquarters along with the recommendations of the Local Salary Survey Committee (LSSC) to revise the salary scale with effect from 1 November 1993 and from 1 May 1994.

3. Since the new salary scale (Revision 37) had been promulgated before the results of the mini-survey were reviewed, it was decided to implement the results of the mini-survey in the form of a non-pensionable lump-sum payment equal to 147.2 per cent of one month's salary as at 1 November 1993. This was equal to a salary increase of 18.4 per cent per month from 1 November 1993 to 30 June 1994, after which Revision 37 became effective. This decision was announced to General Service staff in New Delhi on 4 October 1995.

4. A certain number of staff appealed against that decision to the Regional Board of Appeal (RBA) and then to the Headquarters Board of Appeal (HBA). The latter found that the Administration had not acted in violation of the relevant rules in "implementing a benefit other than one which the LSSC had recommended". According to the HBA, however, only two staff members – Mr K.C.R. and the complainant in the present case, Mr R.P. – had suffered any real loss in their pension rights. It recommended that they should be compensated based on the life expectancy table used by the United Nations Joint Staff Pension Fund for calculation purposes.

5. By letter of 27 September 1999 the Director-General's final decision was notified to those who had appealed. In that letter the Director-General said she considered that there was no basis to implement the part of the HBA's recommendation concerning the present complainant since the Administration had not violated either the provisions of the Manual of the United Nations' Consultative Committee on Administrative Questions (CCAQ) or the methodology on local salary surveys. All the appeals were dismissed.

6. On 19 January 2000 Mr K.C.R. alone filed a complaint with the Tribunal which, in Judgment 2030 delivered on 31 January 2001, quashed the Director-General's decision and ordered the WHO to pay Mr K.C.R. compensation for loss of pension benefits resulting from the payment of a lump sum rather than an increase in salary, which affected his pensionable remuneration. Moreover, the Tribunal declared that the payment of a lump sum, not being equivalent to the approval of a salary scale as required under the CCAQ Manual, was not permissible.

7. Upon learning of Judgment 2030, the complainant, without having been a party or an intervener in the case ruled on, wrote to the Regional Director at SEARO on 30 April 2001 requesting compensation for loss of pensionary benefits, calculated on the same principle as laid down in said judgment. That request was denied.

8. In his reply of 11 February 2002, the Regional Director stated: first, that in Judgment 2030 the Tribunal did not impose upon the Organization an obligation to rework the salary scales effective 1 November 1993; secondly, that the Organization was under no legal obligation to pay compensation to those who were neither complainants nor interveners in the case that led to that judgment, like Mr R.P.; and lastly, that the decision to implement the results of the mini-survey by way of a non-pensionable lump-sum payment dated back to 4 October 1995; therefore any appeal that he might file on the issue would now be outside the time limits for appeal prescribed by the Staff Rules.

9. As a result of the negative reply of the Regional Director, the complainant wrote to the Director-General on 18 March 2002 asking that he be granted "due compensation", on the same lines as for Mr K.C.R. "taking a benevolent view as a fair employer". Not having received a response from the Director-General, he lodged an appeal before the RBA, and eventually to the HBA.

10. The Director-General, by a decision of 16 February 2004, upheld the HBA's conclusion that since the Organization had no legal obligation to apply the decision in Judgment 2030 to the complainant, who was neither a party nor an intervener in the case ruled on, his appeal should be dismissed.

11. The complainant asks the Tribunal to quash the Director-General's decision of 16 February 2004. He wants to be paid compensation for loss of pension benefits, salary and allowances, resulting from "a lump sum payment rather than an increase in salary"; he also claims interest, compensation for material and moral injury, and costs.

12. The Tribunal notes that, in seeking the quashing of the Director-General's decision, the complainant is essentially asking that Judgment 2030 be applied similarly to him. Although in his rejoinder he asserts that he is contesting the decision contained in the Regional Director's letter of 11 February 2002, it amounts to the same thing.

13. Without having to deal at length with the issue of receivability raised by the Organization, the Tribunal finds that, indeed, the complainant filed an internal appeal with the HBA against the 4 October 1995 decision to implement the mini-survey by way of a lump-sum payment. However, even though he received the Director-General's decision of 27 September 1999 to dismiss his appeal and not award him compensation for loss of pension benefits as recommended by the HBA, he decided not to act further on the matter. Unlike Mr K.C.R., he did not file a complaint with the Tribunal; nor did he intervene in the complaint filed by Mr K.C.R. The passage of time has obviously worked against him and the Organization's decision can no longer be questioned. In no way can Judgment 2030 be viewed as a "new and unforeseeable fact of decisive importance" that has arisen since the Director-General's decision of 27 September l999, nor could it justify the complainant's request for a review of the matter.

14. Not being a party nor an intervener in the case that resulted in Judgment 2030, the complainant had no legal standing to claim the benefit of said judgment. Precedent has it that the judgments of the Tribunal operate only *in personam* and not *in rem*. Therefore, these take effect only as between the parties involved, even when the judgments are couched in general terms. (See Judgment 2220, under 5.) Moreover, "[s]ound judicial policy requires that the Tribunal encourage parties to settle their disputes after as well as before judgment. That cannot happen if persons, like the complainant, who did not participate in a case, even though he might have done so, can interfere after the fact and prevent such settlement."

15. For the foregoing reasons, the complaint must be dismissed.

16. Since the Tribunal has dismissed the complaint on the ground that the complainant has no legal standing to invoke the principle in Judgment 2030 in his favour, the applications to intervene submitted by Mr V.P.R. and Mrs M.R. similarly fail.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.