

NINETY-NINTH SESSION

Judgment No. 2475

The Administrative Tribunal,

Considering the complaint filed by Mr A.K.T.B. against the World Health Organization (WHO) on 11 May 2004 and corrected on 4 August, the WHO's reply of 5 November 2004, the complainant's rejoinder of 25 January 2005 and the Organization's surrejoinder of 21 March 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Turkish national born in 1947, joined the WHO's South-East Asia Regional Office (SEARO) in 1985 as a Sanitary Engineer at grade P.5. In August 1989 he was reassigned to the WHO's Western Pacific Regional Office (WPRO) in Manila, Philippines, as Regional Adviser on Environmental Health. He also served as a Staff Representative on the WPRO Staff Association from 1995 to 2002, including two years as its Chairman from 1998 to 2000. In February 2002 he was elected President of the Federation of International Civil Servants' Associations (FICSA). After discussion between the WHO, FICSA and the complainant it was decided that the complainant would be released from the WPRO for the two-year term of his presidency and would relocate to New York; he moved there in July 2002.

In a memorandum of 19 August 2002, the WPRO Acting Director of Administration and Finance informed the complainant that, as a result of discrepancies which had appeared in the course of clearance procedures, an investigation was being carried out into the rental advances he had obtained for 2000, 2001 and 2002 and the rental subsidy he had claimed for 2002, concerning accommodation which he had allegedly been renting in South Forbes Park, Makati city, Manila. Initial enquiries revealed that he had been living in cheaper accommodation in another place, Ecoville, since 1999. In a memorandum of 27 August 2002, the complainant offered explanations and attached documents with a view to proving that he had lived in SouthForbesPark until July 2002.

During visits to both properties in August and September 2002, WPRO staff collected information indicating that the complainant had not been living in South Forbes Park for some time but had resided at the Ecoville property from 1999 to 2002. On 2 September the complainant submitted three receipts for rent he had paid for the South Forbes Park property. On 13 September the owner of the South Forbes Park property met with the Acting Director of Administration and Finance, the Acting Personnel Officer and a Personnel Assistant. During that meeting she stated that the complainant had not resided at South Forbes Park after 1999 and that she had not received the rental monies appearing on his receipts. However, on 16 September she wrote to the Acting Personnel Officer retracting her statements of 13 September and declaring that the receipts were authentic.

By a memorandum of 24 September 2002, the Acting Director of Administration and Finance transmitted copies of the documents collected in the course of the investigation to the complainant and requested his comments by 26 September. In a memorandum of 25 September the complainant expressed his concern at inconsistencies in this documentation. By a memorandum of 1 October from the Director of Administration and Finance the complainant was informed that the Regional Director had decided to dismiss him on the grounds of misconduct. On 10 October the owner of the SouthForbesPark property issued an "Affidavit" in which she confirmed the accuracy of the three receipts and objected to the authenticity of her statement of 13 September.

On 13 November 2002 the complainant filed a notification of intention to appeal with the Regional Board of Appeal, followed on 9 January 2003 by his full statement of appeal. In its report dated 15 April 2003, the Board concluded that the complainant had failed to prove that grounds for appeal existed. The Regional Director rejected his appeal on 1 May. The complainant appealed to the Headquarters Board of Appeal, which recommended on 19 December 2003 that the appeal be rejected on the grounds that there was "sufficient concurring evidence provided by the Administration to warrant the Regional Director's decision to terminate [the complainant's] contract for

misconduct". The Director-General dismissed the appeal on 16 February 2004. That is the impugned decision.

B. The complainant contends that he was denied due process during the setting up and the conducting of the internal investigation. He submits that the officials involved in the investigation were not independent and that the WHO never honestly disclosed to those interviewed that the investigation concerned allegations of misconduct. He invites the Tribunal to establish a precedent governing such investigations. He also submits that it was only after the investigation was completed that he was given detailed information about the evidence gathered against him; he was then given only two days to respond to it, when he should have been given time to present his defence. He was denied the possibility of being present when the most important witnesses were questioned and the WHO ignored the evidence favourable to him. The termination letter contained elements which the complainant claims had not been disclosed previously. He claims that his double residency situation had been known by the WHO for a long time and that the true motive for the investigation and his dismissal was to release the WHO from the financial obligations resulting from his election as President of FICSA. This demonstrates, in his view, a lack of good faith on the part of the Organization.

In subsidiary pleas, the complainant asserts that the impugned decision was based on incomplete facts as the Administration intentionally ignored explanations and evidence provided by him. He contends that his dismissal showed bias against him and that the decision is out of proportion with the alleged misconduct.

The complainant requests an oral hearing. He seeks the quashing of the impugned decision and of the termination decision. He also seeks reinstatement and restoration of all rights and benefits with effect from 4 October 2002. Additionally, he claims moral damages and compensation "for physical and mental suffering" as well as legal costs, together with interest on all sums awarded.

C. In its reply the WHO submits that the weight of the evidence supports its factual findings; there exists, in its view, a set of precise and concurring presumptions that the complainant committed the acts of which he was accused.

After reviewing the elements supporting the conclusion that the complainant resided at Ecoville and not at South Forbes Park, the WHO contends that evidence relied on by the complainant does not demonstrate that he was residing at South Forbes Park. He provided false documentation in support of his claims for rental advances and a rental subsidy that wrongly purported to confirm that he had been renting a property at South Forbes Park from 2000 to 2002.

The WHO argues that the complainant was notified of the charge of misconduct in the memorandum of 19 August 2002. He replied in detail in the memorandum of 27 August, and participated in the ongoing investigation, including by providing additional documentation in support of his case. The Organization considers that the complainant had the benefit of all the existing formal and procedural safeguards. He was invited to attend an interview but declined that invitation and the real purpose of the inquiries was not disclosed to third parties in order to avoid damage to his reputation. The complainant's evidence was carefully considered but was not found by the WHO to be credible. It submits that he had been notified in precise detail of his alleged misconduct almost a month before his reply of 25 September 2002 and given opportunities to state his case. The evidence relied on by the Organization in the termination letter is only a confirmation of the allegations set out in the 19 August 2002 memorandum. All aspects of the disciplinary proceedings were carried out in accordance with the Staff Rules, principles of due process and the Tribunal's case law.

The WHO also submits that the officials involved in the investigation were performing their official duties in a regular manner. The decision to dismiss the complainant was taken in the proper exercise of discretionary authority, following a thorough consideration of the evidence in which personal prejudice against him played no part. There was no hidden motive and his double residency situation only came to light as a result of the clearance procedures associated with his relocation to New York which, for administrative purposes was treated as a transfer. The WHO contends that his dismissal was a proportionate disciplinary sanction.

D. In his rejoinder the complainant considers that the WHO did not address his fundamental legal ground of appeal but rather focused on the disputed facts. He reiterates that the investigation violated his right to due process. In his view, no organisation should condone intentional lying on the part of its representatives while performing official duties. It is the right of the persons interviewed and of the complainant that the real purpose for an interview be disclosed.

He insists that fundamental rights of staff members must be respected in each case, whatever the perceived facts of the case may be. In his opinion, the WHO's factual arguments also violate his right to fair treatment. He submits additional evidence in rebuttal to the documentation submitted in the WHO's reply, in particular bank documents and statements from the household staff.

E. In its surrejoinder the WHO maintains that the evidence establishing the complainant's misconduct is compelling. It considers that, by giving third parties neutral explanations while gathering information throughout the investigation, it respected the duty of care it owes the complainant, and he had unfettered access to all information relied on by the Organization to dismiss him. It asserts that the complainant should have submitted the documents justifying his rental arrangements before the decision to dismiss him was taken and expresses doubts about their accuracy and probative value.

CONSIDERATIONS

1. On 1 October 2002 the complainant was dismissed from his post as Regional Adviser on Environmental Health, P.5, at the WHO's Western Pacific Regional Office (WPRO), located in Manila. He was dismissed for misconduct. At the time of his dismissal, the complainant was "on loan" to the Federation of International Civil Servants' Associations (FICSA) of which he was the elected President. In July 2002 he had moved from the Philippines to New York to take up his duties with FICSA.

2. The decision to dismiss the complainant was taken by the Regional Director of the WPRO. The complainant appealed unsuccessfully to the Regional Board of Appeal and thereafter, in June 2003, to the Headquarters Board of Appeal. On 16 February 2004 the Director-General of the WHO informed the complainant that he had accepted the recommendation of the Headquarters Board of Appeal to reject his appeal. That decision is the subject of the complaint. It is not disputed that the complaint is receivable.

3. It is contended in the complaint that the decision to dismiss the complainant involved a denial of due process and, also, showed bad faith. As alternative arguments, it is put that the decision involved a breach of the Staff Rules, was based on incomplete facts and resulted from bias. It is also put that dismissal is disproportionate to the alleged misconduct.

4. By way of relief, the complainant seeks to have the decision rejecting his appeal and the earlier decision to dismiss him set aside. He also seeks reinstatement and restoration of all rights and benefits with effect from 4 October 2002. Additionally, he claims moral damages and compensation "for physical and mental suffering" in the sum of 200,000 United States dollars and 40,000 Swiss francs in respect of legal costs incurred in these and the earlier proceedings, together with interest on all sums awarded. He requests an oral hearing in which to call witnesses.

The misconduct alleged against the complainant

5. The misconduct alleged against the complainant was the failure "to observe the standards of conduct for staff members set out in Article 1 of the Staff Regulations and Staff Rule 110". The misconduct was said to consist of providing false information to the effect that he rented and resided in SouthForbesPark, so as to obtain yearly rental advances for that property for 2000, 2001 and 2002 as well as a rental subsidy for 2002.

6. It was never in issue that the complainant provided information to the effect that he rented and resided in the South Forbes Park property in order to obtain – and did, in fact, obtain – rental advances and rental subsidy for the periods set out above. Nor was it ever in issue that during those periods he rented another residential property in Ecoville. What was in issue is whether, as claimed by the complainant, he rented the Ecoville property for the use of relatives and friends who visited Manila and occasionally stayed there himself, but continued to rent and reside in the South Forbes Park property until shortly before he left for New York.

Investigation and disciplinary procedures

7. The relevant provisions do not provide for formal investigatory or disciplinary procedures. This

notwithstanding, the obligations of an employer to act in good faith and to respect the dignity of its employees determine what is permissible. In particular, these considerations require that an investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made.

8. The investigation of the present matter began after the complainant had left for New York. It was noted that he had not provided information as to when he terminated the lease of the SouthForbesPark property. That information was needed to calculate the correct period for payment of the rental subsidy. A Personnel Assistant then telephoned the number shown on the rental documents which, according to a recorded message, was no longer in service. It would seem that the process of investigation then began, in the sense that the Personnel Assistant made enquiries of the complainant's secretary and the owner of the Ecoville property, and the results of those enquiries were used as a basis for further enquiries or as part of the case against the complainant.

9. Following the initial telephone enquiries, the Acting Personnel Officer and the Personnel Assistant visited the SouthForbesPark and Ecoville properties and spoke to two members of the household staff at the former and to a security guard at the latter. They also made enquiries of a WPRO Administrative Services Officer as to the complainant's travel and contact arrangements. The complainant was not aware of these enquiries and, being in New York, was not present when any of the persons concerned were interviewed. On 20 August 2002, the day after he returned to Manila to attend to outstanding matters, he was effectively charged with misconduct when presented with a memorandum, dated 19 August, setting out the results of the investigation and also containing the assertion that the SouthForbesPark property had been rendered uninhabitable as a result of a fire in 2000.

10. As well as setting out the results of the investigation, the memorandum of 19 August informed the complainant that those matters could lead to a finding of misconduct in relation to his applications for rental advances and rental subsidy and, also, to disciplinary action. He was asked to provide his written comments and response within eight days.

11. The complainant submitted his written response on 27 August 2002. He said that, as the memorandum did not indicate the "sources" of information, he could not comment on or ascertain their accuracy or credibility. He offered explanations for the various matters raised against him and maintained that the fire at the SouthForbesPark property had resulted in damage mainly to the staff quarters, and that he and the owner's family had continued to live there. He also said that he had served notice of pre-termination of the lease indicating that he would be vacating the premises by the end of June 2000 and that he had obtained a clearance note when he vacated the premises. The note, which was signed Ms U., was attached to his response.

12. Following the complainant's response, the Acting Personnel Officer and the Personnel Assistant returned to the SouthForbesPark property on 29 August 2002 and again spoke to the household staff to whom they had previously spoken. Again, the complainant was neither present at nor aware of these conversations. Later the same day, they met with the complainant and put various questions to him. In particular, he was asked if he had receipts for the rent he had paid for the SouthForbesPark property and he replied that they had been packed and would be provided if he could find them. He added that they would be similar to the clearance note. On 2 September the complainant provided three hand-written rent receipts dated 2 January 2000, 2 January 2001 and 2 January 2002 and numbered, respectively 189, 194 and 200. The receipts carried the name of J.R.L. of Malate, Manila.

13. Without informing the complainant or inviting him to be present, the Acting Personnel Officer and the Personnel Assistant visited the address shown on the receipts provided by the complainant and there met Ms U. and had a conversation with her. They later made a note of that conversation. Again without informing the complainant or inviting him to be present, they made enquiries of the General Manager of the Forbes Park Association and of the owner of the Ecoville property.

14. On 5 September 2002 the Regional Personnel Officer wrote to the complainant stating that they were making further enquiries, requesting certain further information and inviting him to attend a meeting on 9 September with Ms U. and Mr S. who had witnessed the clearance note. The complainant replied in writing declining to attend the meeting which, as it happened, did not take place. He provided the information sought, save for producing a copy of the Ecoville lease which he said he could not find and was, in any event, irrelevant.

15. The Regional Personnel Officer and the Acting Personnel Officer met with the complainant again on 10 September and asked various questions arising out of the further enquiries they had made. They also asked whether

he could provide proof of cash withdrawals from his bank account for the amounts shown on the receipts he had provided on 2 September as payment had been made in cash. He said that he could not as he often carried large amounts of money in travellers' cheques and they could have been cashed to make the payments. He was also asked whether he had claimed reimbursement of the rent for the remaining part of 2002. He said it would come in due course. Later, on 23 May 2003, the complainant sought assistance from the WHO to cash and convert the proceeds of a bank draft for what was said to be a refund of the rent for the rest of the year 2002. A receipt for the cheque, bearing the date 16 April 2003 and issued in the name of the owner, Ms M.T.L., is attached to the complainant's rejoinder.

16. There was a further meeting between the Regional Personnel Officer, the Acting Personnel Officer, and the complainant on 11 September 2002 during which the complainant expressed the view that he was not getting any return information and asked to be informed as to the sources of information. He was provided with a copy of the notes of the meeting of 10 September and stated that some of his remarks could be taken out of context. He asked for a right of reply and, on 17 September, submitted a lengthy response to the matters that had been raised in the meeting of 10 September. On the same day the complainant submitted a second document setting out the details of the conversation that took place on 11 September and complained that he had not been provided with the documents that were referred to during that meeting.

17. In the meantime, Ms L., the owner of the SouthForbesPark property, telephoned the Personnel Assistant on 13 September and was asked and answered questions relating directly to the matters raised against the complainant. She agreed to meet with WPRO representatives later that day. The complainant was neither invited to attend that meeting nor informed of it. Ms L. answered various questions at that meeting and provided written answers to specific written questions. The effect of her answers was that the complainant had not rented her premises after 1999. However, on 16 September she wrote to WPRO retracting those statements and confirming various matters set out in the complainant's written responses of 17 September.

18. On 24 September a further memorandum was given to the complainant setting out the substance of the further enquiries and attaching all notes and correspondence relating to them. Additionally, it was stated in that memorandum that an Administrative Services Officer had arranged for a removal company to move all the complainant's personal effects from the South Forbes Park property to the Ecoville property in 1999. The complainant was asked to provide his comments by the close of business on 26 September. As it happened, he submitted a lengthy reply on 25 September. In that reply, he pointed to contradictions and inconsistencies in the documents provided and complained of the approach taken to the gathering of information. In particular, he complained that the persons approached for information had not been told the reason for the enquiries but, instead, had been told, for example, that the persons making those enquiries were checking security, wanted to look at premises where staff resided or were conducting clearance procedures as a result of the complainant's reassignment. He also denied having had any dealings with the removal company referred to by the WPRO. He asked for a speedy conclusion and requested a reply by 27 September.

19. The complainant was informed on 1 October 2002 that it had been decided that he had committed serious offences and that he would be dismissed. The memorandum informing him of the decision stated that his explanations were "incompatible with the evidence, taken as a whole, and [were] not credible". Attached to the memorandum was a statement from an Administrative Services Officer relating to the moving of the complainant's personal possessions from the SouthForbesPark property to the Ecoville property in 1999. That statement had not previously been provided to the complainant and it contained critical comments based on recollections of statements made some years earlier by a person involved in the removal and was, thus, of little probative value.

Due process

20. It has been consistently held by the Tribunal that an employee of an international organisation has a right to be heard in disciplinary proceedings and, as said in Judgment 203, that "right includes *inter alia* the opportunity to participate in the examination of the evidence". As that judgment makes clear, that is so even "in the absence of any explicit text". See also Judgment 2014 in which it was said that "[i]t is contrary to due process to require an accused staff member to answer unsubstantiated allegations made by unknown persons" and that "[t]he staff member is entitled to confront his or her accusers".

21. The requirements of due process, as they affect the defendant Organization, were considered in Judgments 999 and 1133. In the former, it was said that "[t]here can be no certainty that justice will be done if evidence is

taken in the absence of one of the parties”. So, too, it was said in the latter that “[t]he failure by the WHO to afford the complainant an opportunity to be present at the Personnel Department’s taking of statements and to put questions to the witnesses amounts to breach of due process”.

22. The procedure adopted in this case was clearly flawed in that the complainant was denied the opportunity to question any of the persons whose statements were used against him, evidence of little probative value was relied upon and, at least to some extent, he was required to prove his innocence instead of having the matters alleged proven against him. The Regional Board of Appeal and the Headquarters Board of Appeal should have so held. It follows that the Director-General’s decision to reject his appeal and the earlier decision of the Regional Director to dismiss the complainant must be set aside. The complainant shall be reinstated with effect from 1 October 2002 and shall receive all arrears of salaries and other benefits; he must account for any earnings from other employment.

Other matters

23. It is necessary to deal with the other matters raised in the complaint only for the purposes of the claim for damages. In this regard, it is sufficient to note that there is nothing in the complainant’s pleadings that could lead to a finding that the action taken against him was motivated by bad faith or improper purpose. In particular, the matters advanced by the complainant cannot support a finding that the action was taken because of the complainant’s union activities or the expense involved in his relocation to New York.

Oral hearing

24. As the matters raised in the pleadings do not support the arguments as to bad faith and improper purpose but inevitably lead to the conclusion that there was a denial of due process, there is no need for an oral hearing on those issues. Of course, the conclusion that the decision to dismiss the complainant must be set aside does not entail the consequence that he is innocent of the misconduct alleged. It is for the defendant Organization to decide what, if any, further action it takes in that regard. It is not for the Tribunal to embark upon an enquiry as to whether there was misconduct and that is the only matter upon which the evidence of witnesses might now be relevant. Accordingly, the application for an oral hearing is rejected.

Moral damages and costs

25. Although the material in the pleadings does not support a finding of bad faith or improper purpose, the complainant has been subjected to a lengthy process which was clearly flawed and which, given the matters to which it has been a party in the Tribunal, the WHO should have known were flawed. Moreover, the complainant’s good name and professional reputation were inevitably seriously compromised by those proceedings and the finding made against him. In the circumstances, there should be an award of 30,000 United States dollars for moral damages. And given that the complainant has had to conduct two internal appeals – in which he asked for costs and for which he had to travel from the United States to Manila and Geneva respectively – as well as the proceedings in the Tribunal, there should be an award of costs in the sum of 25,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General’s decision of 16 February 2004 and the earlier decision of the Regional Director of 1 October 2002 are set aside.
2. The complainant is reinstated with effect from 1 October 2002.
3. The WHO shall pay to the complainant the full balance of salary and other benefits he would have received but for his dismissal, together with interest at 8 per cent per annum from due dates.
4. The matter is remitted to the Director-General for him to determine what, if any, further action should be taken.
5. The WHO shall pay the complainant 30,000 United States dollars in moral damages.

6. It shall also pay the complainant's legal costs in the sum of 25,000 Swiss francs.

In witness of this judgment, adopted on 6 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet