Registry's translation, the French text alone being authoritative.

FORTY-SIXTH ORDINARY SESSION

In re BARBERIS

Judgment No. 456

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Tourism Organization (WTO) by Mrs. Maria Angela Barberis on 13 March 1980 and brought into conformity with the Rules of Court on 12 April, the WTO's reply of 24 June, the complainant's rejoinder of 24 July and the WTO's surrejoinder of 1 September 1980;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 15, 53, 55 and 66 of the WTO Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant was appointed in 1971 to the staff of the International Union of Official Travel Organizations as a librarian in its International Centre for Advanced Tourism Studies (CIEST) in Turin. From 1 January 1976 the WTO took over her appointment. In 1977 the WTO decided to move the CIEST to Mexico City, and its staff as well. On 15 December 1977 the complainant said that she was willing to go to Mexico City, provided that her post there took fuller account of her education and qualifications than her post in Turin. On 3 March 1978 the Chief of Personnel of the WTO informed her that her appointment would end on 31 March. On 15 March the complainant expressed surprise and pointed out that she had not resigned. The Secretary General, taking the view that there had been a misunderstanding, wrote to her on 5 April cancelling the dismissal and again offering her the post in Mexico City. On 11 May she accepted the offer and asked for details of the family allowances to which she would be entitled. On 27 June she asked for fuller information on the subject and on the travel expenses of her children. The Chief of Personnel answered that she was deemed to be an official without dependants. Having taken sick leave, on 11 August she sent a medical certificate to the WTO and appended to her letter a certificate from her husband's employer to the effect that her children had not been her husband's dependants since 1 July. On 30 August she sent a second certificate to justify a further 30 days' sick leave. The WTO asked her to undergo a medical cheek-up, and she did so on 29 September. On 24 October the Chief of Personnel informed her of the medical adviser's opinion that her health was not such that she could work at the altitude of Mexico City and that there was therefore no choice but to end her appointment on 31 October. On 3 November she protested that the decision did not comply with the Staff Regulations. On 14 November the Chief of Personnel explained that her case did not come under Article 55 of the Staff Regulations, that she was mistaken in relying on that Article and that her dismissal was therefore confirmed. A lawyer she had consulted wrote on her behalf to the Secretary General on 9 December 1978 asking that the decision be set aside and that she be reinstated. On 25 January 1979 the Secretary General replied by merely sending a photocopy of the letter of 14 November 1978 from the Chief of Personnel. On 5 March 1979 the complainant's lawyer filed an appeal stating, in Italian, that in her own doctor's view she was fit to work in Mexico City. At the WTO's request he supplied a translation of the letter in French on 3 April 1979 and appended an invitation to the Secretary General to convene a joint committee to hear the case. He repeated his request on 25 May, 3 July and 22 October 1979. On 16 October the complainant received a letter from the Deputy Chief of Personnel containing a copy of a letter which the Chief of Personnel had written to her lawyer on 3 July and which her lawyer maintains that he never received. According to that letter the Secretary General was confirming the decision to dismiss her. On 11 February 1980 the complainant's lawyer objected to the sending of the letter by ordinary mail, which explained why it had gone astray, and informed the Secretary General that he was appealing to the Tribunal against the decision of 3 July 1979.

B. The complainant contends that when the CIEST was transferred to Mexico City she ought ordinarily to have been transferred with it by virtue of her permanent appointment. Her assignment to Mexico City was therefore a transfer which, under Article 15 of the Staff Regulations, requires the official's "consent". The provisions governing

termination (for unsatisfactory services, upon reduction of staff or for reasons of health) were not applicable to her case. There was no reduction of staff or of her workload. As for reasons of health, the medical examination was quite improper and the medical adviser found, not that she was unfit for work, but that it was dangerous for her to work at a high altitude. Moreover, according to a document on the transfer of the rights and obligations of the International Union of Official Travel Organizations - of which, when she joined its staff in 1971, the CIEST formed part - the regrading of staff members in the WTO was to take account of their qualifications, experience and length of service with the Union. That rule was not respected in the complainant's case despite her formal applications to the Secretary General drawing attention to her language and university qualifications. This was particularly unfair because she had always performed many tasks well above her grade. Lastly, the letter of 3 July 1979 was preceded by procedural irregularities. It was communicated by a letter dated 12 December, sent by the ordinary mail on 14 December, which did not arrive until 22 January 1980.

C. The complainant's claims for relief may be summed up as follows: (1) the quashing of the impugned decision; (2) her reinstatement and transfer to Mexico City; (3) her regrading in a post matching her training and experience; (4) the backdating of her regrading to 1971; (5) the payment of the sums due as a result; and (6) the payment of compensation for the prejudice she has sustained, allowance being made for monetary depreciation since 1971.

D. In its reply the WTO contends that the complaint is time-barred since the decision to dismiss the complainant is dated 24 October 1978 and was confirmed on 14 November after her appeal of 3 November. The decision was therefore a final decision, and she had the choice between appealing to the Tribunal and applying for convocation of the joint committee provided for in Article 66 of the Staff Regulations. It was not until 3 April 1979 that her lawyer asked that the joint committee should be convened. She preferred to negotiate by correspondence to secure review of the decision of 24 October 1978, after the refusal was notified to her on 14 November 1978, and so, according to the Tribunal's case law, she could not claim the benefit of contentious proceedings unless she respected the prescribed time limits.

E. Subsidiarily, the WTO argues the merits. It observes that under Article 15 of the Staff Regulations the Secretary General was empowered, but not bound, to transfer the complainant to Mexico City. She had to undergo the medical examination because the medical certificates she had supplied had cast doubt on her fitness for work in Mexico City. The WTO is entitled to have field staff examined by a doctor other than its own medical adviser in Madrid. There were no grounds for objecting to the choice of the medical adviser of the International Centre for Advanced Technical and Vocational Training of the International Labour Organisation in Turin, where the complainant lived. As for the grounds for termination, she made her consent to the transfer subject to conditions which the WTO found unacceptable, and, moreover, she was physically unfit for work in Mexico City. She knew as early as 9 August 1978 that if she could not be transferred with the CIEST to Mexico City she would be dismissed under Article 53 of the Staff Regulations, which relates to reduction of staff. Under Article 66, which relates to internal means of redress, the Secretary General may refuse to refer a claim to a joint committee. The complainant does not mention the matter of child allowances in her original claims for relief. The matter of regrading falls within the sphere of the Secretary General's discretion. The claim for retroactive regrading from 1971 is quite unfounded since she freely accepted the offers of appointment made to her in the past. The claim for compensation for prejudice suffered in her employment is not supported by any evidence; moreover, the Tribunal is not competent to hear it since it is tantamount to a claim for compensation for a wrong of a kind not covered by Article II, paragraph 5, of the Statute. The WTO accordingly invites the Tribunal to dismiss the complaint as time-barred and, subsidiarily, as unfounded.

F. In her rejoinder the complainant contends that the complaint is not time-barred since Article 66 of the Staff Regulations sets no time limit for submitting a claim to the Secretary General. What constituted her claim was her lawyer's letter of 3 April 1979 asking the Secretary General to convene the joint committee. The Secretary General's unfavourable reply, dated 3 July 1979 and sent by the ordinary mail, never reached the complainant's lawyer, and the copy posted on 14 December 1979 from Madrid did not reach Turin until 22 January 1980. The complaint was sent to the Registrar of the Tribunal on 13 March 1980 and was therefore filed within the time limit. As to the merits, the complainant rejects the defendant organisation's whole case. In particular, she points out that there was no need for her to undergo a medical examination, that the examination was quite irregular and that as her own doctor has shown, the findings were mistaken. Her post was in fact transferred to Mexico City and she was entitled to go with it. Accordingly, if based on the findings of the medical examination, the decision was mistaken and, if based on an alleged reduction of staff, it was unfounded. The complainant therefore presses all her claims for relief.

G. In its surrejoinder the WTO continues to maintain that the complaint is time-barred. The decision is dated 24 October 1978, it was the complainant's letter of 3 November 1978 which constituted her appeal, and the decision of 14 November 1978 upholding the original one was therefore the final decision she ought to have impugned. The fact that much later her lawyer asked that a joint committee should be convened did not have the effect of starting a new time limit for filing a complaint. As regards the medical examination, the certificates she produced after her sick leave afforded grounds for the Secretary General to fear that it might be dangerous to her health to work at the altitude of Mexico City. He therefore asked her to undergo a medical examination, and indeed it showed that his fears were warranted. As regards the termination of her appointment, the WTO states that there was a reduction of staff in Turin when the CIEST was transferred to Mexico City. Since for reasons of health the complainant could not be transferred to Mexico City, she was included in the list of staff dismissed under Article 53, which relates to reduction of staff. The WTO maintains all its other pleas.

CONSIDERATIONS:

Receivability of complaints in general

1. According to Article VII, paragraph 1, of the Statute of the Tribunal a complaint shall not be receivable unless the staff member has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

According to Article VII, paragraph 2, the complaint must also be filed within ninety days after the notification of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.

According to Article VII, paragraph 3, however, where the Administration fails to take a decision upon any claim within sixty days from the notification of the claim to it, the official may appeal to the Tribunal in the same manner as if he were impugning a final decision. The ninety-day time limit set in Article VII(2) will then run from the date of expiry of the sixty-day time limit set in Article VII(3).

2. The purpose of Article VII(3) is twofold. First, it enables an official to defend his interests by going to the Tribunal when the Administration has failed to take a decision. Secondly, it prevents the dispute from dragging on indefinitely and from coming before the Tribunal at a time when the material facts have altered or can no longer be determined with certainty. Such being the purposes of the rule, if the organisation fails to take a decision within sixty days an official will have not only the right but also the duty to go to the Tribunal within ninety days after the expiry of the sixty days. This is the only possible interpretation of the wording of Article VII(3), which expressly provides for the cumulation of the two time limits and thus renders irreceivable any complaint filed after the expiry of the one hundred and fifty days.

Receivability of the complaint

3. According to Article 66(a) of the WTO Staff Regulations a staff member shall address a claim arising out of his employment to the Secretary General, who may refer it to a joint committee for observations and report. Moreover "without prejudice" to Article 66(a), a staff member may, under Article 66(c) apply for referral of the issue to the joint committee for settlement. Article 66(c) does not require the staff member to act within any specified time limit.

4. The connection between a claim under Article 66(a) and an appeal under Article 66(c) is not clearly defined. It is not stated whether, to be valid, an application under 66(c) has to be submitted not later than the claim referred to in 66(a), or may be filed later, at least within a reasonable period.

5. If the former interpretation is the right one, the complainant would have been required to make her application for referral to the joint committee not later than 3 November 1978, the date on which she addressed her claim to the Secretary General, and accordingly the letter her counsel wrote to the Secretary General on 3 April 1979 could not be regarded as an application which was filed in time. The decision to be challenged would then be the one contained in the letter which the Secretary General ordered to be sent to her on 14 November 1978 in answer to the claim dated 3 November 1978. Not being filed with the Tribunal within ninety days after the notification of the letter of 14 November, the complaint would therefore be time-barred.

According to the second interpretation, the letter which the complainant's counsel wrote to the Secretary General on 3 April 1979 - within a time limit which may be treated as reasonable - would constitute a valid application for

referral and the Tribunal would consider the question of receivability in light of the events subsequent to 3 April. Until the complainant made an application for referral to the joint committee and thereby sought to exhaust the internal means of redress she could not properly file a complaint with the Tribunal.

There is no need to choose between the interpretations. Even if the Tribunal adopts the latter, which is the one more favourable to the complainant, the complaint is time-barred for the reasons set out below.

6. In answer to the letter of 3 April 1979 the Chief of Personnel informed the complainant's counsel on 9 May that the Secretary General had just taken note of her application and would reply shortly.

On 21 May the counsel wrote to the Secretary General: "I have not yet received any answer from you and no communication has come to me from the Chief of Personnel of the WTO. I should therefore be grateful if you would be good enough to let me have your reply to Mrs. Barberis' claim to the Joint Committee as soon as possible and in any case before the end of the month. Thereafter I shall regard your silence as failure to take a decision on the matter and I shall reserve my right to take any action which Mrs Barberis' interests may require."

The counsel took the matter up again on 3 July. He wrote: "I must again observe that you have not yet given satisfaction to Mrs. Barberis' repeated claims nor answered her application for review of her case by the Joint Committee referred to in the Staff Regulations. Such clearly dilatory behaviour constitutes a flagrant breach of my client's rights under international law and regulations and I am therefore informing you that I shall await a decision from you up to 28 July. On the expiry of this final time limit of sixty days from 28 May, the day on which the WTO was notified of Mrs. Barberis' final claim, unless you take a clear and final position I shall infer that the WTO has not taken a decision on the matter and I shall immediately refer the matter to the competent Tribunal."

On the very same day, 3 July, the Chief of Personnel wrote to the counsel: "the Secretary General sees no need to exercise his right under the Staff Regulations to refer Mrs. Barberis' claim to a Joint Committee for observations and report".

On 23 November the counsel wrote to the Deputy Chief of Administration saying that he had not received the WTO's letter of 3 July, which he had become aware of merely from mention of it in a letter dated 5 October.

On 11 February 1980 the counsel acknowledged the receipt of the letter of 12 December 1979 and the enclosed photocopy, which he said he had not received until 22 January 1980.

The complaint was filed on 13 March 1980.

7. In considering, on these facts, whether the time limits in Article VII(2) and (3) of its Statute have been respected the Tribunal will determine the date on which the WHO's letter of 3 July 1979 to the counsel may be deemed to have reached him.

Under the general rules on the burden of proof it is for the sender to establish the date on which a communication was received. If he sends a letter by registered post or an official notice of acknowledgement for completion by the addressee he can easily furnish the proof. If he sends it by the ordinary mail he may be unable to do so, and then, for want of evidence as to the actual date of receipt, the Tribunal will accept what is said by the addressee.

The Tribunal will do so in this case. There is no written evidence to indicate whether and, if so, when the letter of 3 July 1979 was delivered to the complainant's counsel. The Tribunal will therefore take his word for it that the contents of the letter were not notified to him until 22 January 1980. It does not follow, however, that the complaint, which was filed on13 March 1980, was filed in time.

8. As what the counsel says himself makes plain, the application he made on 3 April 1979 and repeated on 21 May, seeking an internal means of redress, remained unanswered for over sixty days. On the expiry of those sixty days, therefore, the complainant was required under Article VII(3) of the Statute to appeal to the Tribunal within ninety days. She did not file her complaint until 13 March 1980, long after the expiry of the limits, and her complaint must be dismissed as time-barred.

9. The Tribunal would have come to the same conclusion if there had been normal delivered -before the end of the month - of the letter of 3 July 1979. In that case the ninety-day time limit set in Article VII(2) of the Statute would have begun not later than, say, 1 August 1979 and would therefore have expired several months before the

complaint was filed.

10. Moreover, the complainant cannot plead that after 3 April 1979 she was unaware of her right to appeal to the Tribunal. She had been duly informed by a letter which the Assistant Registrar of the Tribunal had written to her on 5 March 1979.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this Judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.