FORTY-SEVENTH ORDINARY SESSION

In re DE ALARCON

Judgment No. 479

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the World Health Organization (WHO) by Mr. Richard de Alarcon on 8 November 1979, the WHO's reply of 15 February 1980, the complainant's rejoinder of 30 May 1980, supplemented on 4 November 1980, the WHO's surrejoinder of 25 June 1981, the complainant's further memorandum of 3 September 1981 and further written evidence dated 4 September and the WHO's comments thereon of 2 November 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 310.4, 340 and 730 and Manual section 11.7, Annex E, containing the Rules Governing Compensation to Staff Members in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties;

Having examined the written evidence and disallowed the complainant's applications for oral proceedings;

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

A. The complainant, a reader in psychiatry at the University of Southampton, was appointed by the WHO on 25 May 1974 to carry out a one-month mission in July 1974 to Nicaragua. During his mission he contracted an illness which grew steadily worse and which in 1976 was diagnosed as "active chronic hepatitis". Because of poor health he had to retire prematurely, on 30 September 1978, at the age of 53. By a letter of 5 March 1979 the Secretary of the Advisory Committee on Compensation Claims informed him that he was entitled to payment of 20,000 United States dollars as compensation for the 66 per cent loss of function which he had suffered. By a letter of 10 August the Secretary informed him that the Director-General had decided to award him the prescribed benefit payable for loss of earning capacity. The amount of the benefit was to be equivalent to two-thirds of pensionable remuneration less the amount of the pension paid by the superannuation scheme of the University of Southampton. The salary which the complainant had received for his consultant mission had been US $1,000 and the corresponding annual pensionable remuneration in July 1974 was $15,714.18. Two-thirds of that sum came to $10,476. The amount was adjusted in later years in line with the consumer price index in the United Kingdom. With such adjustment the amount of compensation paid on 1 July 1978 was $15,809, less $8,241 paid by the superannuation scheme, or $7,568, giving a monthly income of $630.67. On 1 April 1979 the monthly amount was increased by adjustment to $662.17.

B. The complainant objects to the method of computing the benefit payable by the WHO. He contends: (1) The material date for computing annual pensionable remuneration was not that of his illness but that of his retirement. (2) The deduction of the pension paid under the University superannuation scheme was not compulsory and ought in his case to have been waived. (3) The remuneration taken as the basis for calculation ought to have been the salary paid by the University of Southampton which was £16,845 in 1978, plus £1,000 in fees for articles and lectures - plus the fee for the WHO mission. It was only because he was also receiving his University salary that the WHO paid him as little as US $1,000 for a demanding one-month mission drawing up a mental health programme for the Republic of Nicaragua. (4) No provision has been made for his dependants, whom he cannot himself now provide for. (5) The sum of $20,000 is wholly inadequate compensation for loss of function, considering the gravity of his illness, his suffering and loss of expectation of life. In his claims for relief he invites the Tribunal to review the decision of 10 August 1979.

C. In its reply the WHO points out that it has acknowledged liability for the complainant's condition even though he filed his claim long after the time limit had expired and it was no longer possible to determine whether his illness had been service-incurred. As regards compensation for loss of earning capacity, section II.5(a) of the WHO Rules Governing Compensation to Staff Members in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties states that if the claimant was not a participant in the United Nations Joint Staff Pension Fund at the material date the "pensionable remuneration" taken as a basis for computing the benefit shall mean that remuneration which, had he been a participant, would have been considered to be his pensionable remuneration at that date. The only remuneration which the Fund takes into account is that which is paid by the

Organization and on the basis of which the Organization pays contributions. The WHO does not agree that the material date for computing the benefit is the date of the complainant's retirement since it had a contract with him only in July 1974. Moreover, it was in July 1974 that his illness began. The deduction of the University pension is a matter for the Director-General's discretion. Since his decision was not tainted with any abuse of authority, impropriety or unlawful act, the Tribunal may not set it aside. The WHO therefore asks the Tribunal to dismiss the complaint as unfounded.

D. In his rejoinder the complainant observes that the WHO's opening remarks about its own generosity and doubts as to whether the illness was service-incurred are irrelevant. The Director-General rightly acknowledged the causal link between the complainant's mission and his illness. That was not a humanitarian gesture, but a proper exercise of discretion under the rules. The mission has caused serious damage to the complainant's health and put an end to his career. The complainant further argues the following points: the extent of his disability, assessment of loss of function, and the calculation of loss of earning capacity. In determining the degree of invalidity at 66 per cent the medical adviser of the WHO said that the long-term prognostication was uncertain and that the complainant should therefore now undergo further medical examination. The complainant submits that his degree of incapacity is at least as serious now as the total loss of function referred to in section 111.12 of the rules on compensation, and the award of compensation should therefore have been $30,000, not $20,000. In any event work disability is not necessarily equivalent in percentage to loss of function. The complainant utterly rejects the WHO's reasoning about the calculation of the pension. The WHO would not have obtained the services of any consultant of his distinction at a salary of $12,000 a year. When it gave him a one-month appointment the WHO knew that he would continue to receive his salary in Great Britain. The "pensionable remuneration" should therefore also include the amount of his salary for his permanent employment. If that had not been the intention of the relevant rules, they would have expressly provided that the remuneration to be taken into account in the event of injury or illness should be solely remuneration from the WHO, so that consultants would be duly warned and could make proper arrangements for insurance against the risks of missions. Moreover, the adjustment of the pension to the cost of living is inadequate since it takes no account of the increase in the pension to which the complainant would have been entitled had he continued to be employed in the British public service. The cumulative increase would have raised his pension by 86 per cent by December 1978, whereas the actual increase was only 51 per cent. By such a method of computation the complainant arrives at a monthly pension of $886.23. He therefore rejects the computation made on the strength of his $1,000 fees as adjusted since 1974 and contends that his pension should be based on his actual remuneration in 1974 adjusted in accordance with the Pensions (Increase) Act of 1971 of the United Kingdom or else on his annual salary at the date of his retirement, due allowance being made for fluctuations in the value of the pound sterling. If the pension were computed in that way, it would be reasonable to deduct the amount of his pension from the University of Southampton, but if it were computed as at present, his salary in the United Kingdom being left out of account, it would be logical not to take account of the pension from the University of Southampton and not to deduct it. The complainant observes that the WHO has failed to answer his argument about his dependants. He asks that over and above the pension he should be granted entitlement to medical cover and dependants' benefits.

E. The WHO admits in its surrejoinder, in the light of the findings of a medical examination which he underwent in March 1981, that the degree of the complainant's disability and loss of function is 80 per cent. The compensation should, in accordance with the compensation rules, be equivalent to 80 per cent of $30,000, or $24,000. The legal basis for payment of compensation exists only in the WHO's own rules, and they are those which were in force in 1974. As to the amount of the disability pension, Rule 5(a) of the rules on compensation defines "pensionable remuneration" and contains a clear express reference to membership of the United Nations Joint Staff Pension Fund. There is no question, therefore, of taking account of income other than that prescribed in the complainant's contract in calculating the benefit. As regards linking it to the cost-of-living index, the WHO cannot agree to the application of national law. Besides, the rules stipulate that it shall apply the consumer price index established by the United Nations Joint Staff Pension Fund for each country. The WHO also maintains its views on the deduction of the pension from the University of Southampton. In reply to the claim for payment of the dependants' allowance, it observes that that allowance, which is prescribed by Rule 10(b) of the rules on allowances, is limited to staff members, and the complainant therefore is not entitled to it. It has paid all reasonable medical expenses, including the costs of travel and subsistence to enable the complainant to undergo medical examinations. It cannot agree to any claim for other medical expenses. In sum, it invites the Tribunal to dismiss the complainant's claims in their entirety.

F. In his further memorandum. the complainant notes that the WHO's willingness to admit that he is suffering from 80 per cent loss of function. He maintains that he is suffering from total occupational disability. He repeats in greater detail the arguments set out in his complaint and in his rejoinder and presses his claims for relief. He

submits a report dated 4 September 1981 by a consultant physician which states that the 80 per cent figure is fair, but that the implications of the complainant's disability and the unpredictability of his attacks bar him from earning his living in the normal way by private practice or with the British national health service. in further observations dated 2 November the WHO contends that the consultant physician has exceeded the limits of medical assessment and expressed views on legal matters: the WHO's medical advisers believe that part-time work is not only possible but also in the complainant's interests.

CONSIDERATIONS:

The compensation rules

1. The Organization has a scheme for compensation staff for death, injury or illness arising in the course of employment. It is embodied in a set of rules to be found in Manual section 11.7, Annex E. The rules are designed to fit the circumstances of staff members in regular employment. The complainant was employed at a fee of $1,000 as a consultant for the month of July 1974 to visit Nicaragua and prepare a report. Rule 2 seeks to provide for this sort of situation by saying: "The principles and procedures set forth in these rules shall also apply to conference and other short-term personnel, in so far as compatible with the conditions of service laid down for such personnel". Application "in so far as compatible" might prove adequate if the scheme was one providing for full compensation to be assessed individually to fit each case. The scheme does nothing like that. it resembles accident insurance in that it provides specific and limited benefits - so much for the loss of a limb and so forth. Its principal benefits are a lump-sum payment for loss of enjoyment of life and an invalidity pension for loss of earning capacity. For total disability, i.e. complete blindness or loss of two limbs, the lump sum was in 1974 fixed at $30,000 with percentage reductions for lesser disabilities. For total loss of earning capacity the invalidity pension is fixed at two-thirds of the "annual pensionable remuneration", which is much the same as gross salary. It is in respect of the pension that the chief difficulty in the case arises: the complainant had of course no gross salary.

2. The complainant had the singular misfortune during his month in Nicaragua to pick up a virus which developed into hepatitis, being diagnosed as such on the first of his visits to hospital in April 1975. From then on his condition deteriorated and on 30 September 1978 he had at the age of 53 to retire from his principal occupation, which was his post at Southampton University. The degree of his incapacity was at first assessed at 66 per cent and is now as a result of the further examination in March 1981 assessed at 80 per cent. There is no doubt that he has suffered severely both physically and financially. He feels, as is made plain in the dossier, that he ought to be given a complete indemnity and that the rules ought to be made to serve that purpose. His entitlements under the rules, which fix the limit of the Organization's liability, certainly fall far short of that. The Organization has discharged what it believes to be the whole of its liability. The Tribunal will examine under their separate heads the claims which the complainant contends have been insufficiently discharged and also those claims which have been made and rejected.

Invalidity pension

3. Rule 5(a) provides a method of arriving at a notional salary or annual pensionable remuneration for the complainant which produces a figure of $15,714. The complainant would certainly not have accepted a full-time post in the Organization at such a salary. After various adjustments, which it is unnecessary to follow, the invalidity pension becomes $15,809. As calculations these are not disputed. The complainant contends that they are unrealistic. They ignore his considerable income from other sources, notably his university post. While the other incomes carry with them their own pension rights, they do not of course provide insurance against risks incurred in the course of employment by other people. Yet, as the complainant argues, it is the disease incurred in the course of his employment by the Organization that is the whole cause of his loss of all his other earnings.

4. It is impossible to justify this argument by the application of Rule 2. The fundamental principle of the scheme, it must be repeated, is that it is not a contract of indemnity but contract to pay a fixed or calculated sum in certain contingencies. This principle is not affected by the adaptation of the scheme to short-term or temporary employment nor by the fact that in the latter case the earnings are not actual but assumed from an actual basis. It would be futile to try after the event to persuade an insurance company which had insured against accident in a specified sum that the sum specified was in the particular circumstances of the insured person unrealistic. When the sum is specified it leaves no room for argument. When the sum is not specified but is to be calculated, the only argument can be about whether it has been calculated correctly in accordance with the rules.

5. Rule 6(b) provides that "the Director-General may, in appropriate cases, deduct benefits actually paid in respect of the same series of circumstances under the regulations of a national or occupational scheme". Under this rule the organization has deducted the whole of the retirement pension payable by Southampton University, thus reducing the invalidity pension as calculated by rather more than half. The complainant argues that it is unreasonable as well as inappropriate that, while the salary which would have served to augment the invalidity pension is for that purpose disregarded, the retirement pension derived from that salary should be taken into account. The Organization contends that it is a matter for the Director-General's discretion. It is unnecessary for the Tribunal to consider whether or not the deduction is "appropriate", whatever that may mean. It is not authorised by the rule because the retirement pension is not "paid in respect of the same series of circumstances". The invalidity pension is paid in respect of an event that occurred in July 1974 in Nicaragua. The retirement pension is paid in respect of service, deemed to be 20 years, that came to an end on 30 September 1978. It is true that the actual period of service was 11 ¾ years and the remaining 8 ¼ is described as an "ill health retirement addition". But for the calculation of the retirement pension the event which caused the ill health is irrelevant; it does not change the origin of the retirement pension which lies in a set of circumstances quite different from those in which the invalidity pension originated. the deduction was unauthorised.

6. The complainant, while accepting at least by implication the medical assessment of 80 per cent as correct in the abstract, argues that it is being incorrectly applied to the facts of his case. Assuming that he is fit for work for on the average 20 per cent of his time, it remains the fact that he cannot predict what that 20 per cent is going to be, with the result that he cannot carry on any professional work at all. It was because the part-time work which he was doing at the university after he first became ill became impracticable that at it was finally decided in 1978 that he must give up his post. For the same reason his inability to say on what days he will be fit and available makes consultative work impossible. He can do some writing on medical topics, but by this means he has in the last three years earned only £310, which may be ignored as de minimis. So he contends that in reality his earning capacity has been totally extinguished.

7. Rule 12 of the compensation rules provides:

"The degree of invalidity shall be assessed on the basis of medical evidence and in relation to loss of earning capacity in the staff member's normal occupation or an equivalent occupation appropriate to his qualifications and experience."

This makes it clear that the figures proposed by the examining doctors are not conclusive. It is for the Director-General or his advisers as provided by Section IV of the rules to assess the degree on the basis of the medical evidence and as applied to the complainant's normal occupation. The Tribunal considers that the only conclusion on the facts of this case is that the complainant was totally unable to carry on his normal occupation or any equivalent occupation. Accordingly the degree of incapacity should be assessed at 100 per cent.

8. The complainant claims that his invalidity pension should be increased by an allowance for his child. Rule 10(b) provides that "a sum equal to one-third of the annual invalidity pension shall be paid every year for every child in respect of whom a dependant's allowance would have been payable". However, a dependant's allowance would not have been payable to the complainant. His contract did not provide for one in addition to his salary or fee. Staff Rule 340 excludes from the staff members entitled to a dependant's allowance short-term staff and consultants. The claim was rightly rejected.

9. Rule 31(b) prescribes in effect that the invalidity pension shall be increased to match increases in the cost of living by the same percentage as that used by the United Nations Joint Staff Pension Fund. This has been done. The complainant, however, wishes to rely on other indices that appear to produce a more favourable result for him. The point is unarguable.

Lump-sum compensation

10. Rule 14 provides for "lump-sum compensation for permanent disfigurement or permanent loss of a member or function" and prescribes that "the amount of such compensation shall be assessed on the basis of medical evidence and in relation to loss of enjoyment of life, by reference to the schedule annexed". The schedule prescribes a maximum of $30,000 for total disability and thereafter consists of a tariff in which the highest figure is $18,000 for the loss of an arm at the shoulder and the lowest $300 for the loss of a toe other than the great toe. By the inclusion of the word "function" in the schedule it is obviously intended that the loss of the use of a limb or member shall be

treated in the same way as the actual loss. Whether it means more than this is open to question. Unless it does, it will not apply to persons like the complainant who are incapacitated by disease. The Organization, however, does not neglect such persons and applies in their case by analogy the more intelligible Rule 12 quoted in paragraph 7 above. The first assessment under Rule 12 resulted in a figure of 66 per cent and, applying that to Rule 14, the Organization has paid the complainant $20,000 which it is now ready to increase to $24,000, i.e. 80 per cent.

11. The complainant says that the lump-sum payment is inadequate but he does not, except in the one respect mentioned below, elucidate the criticism. He relies on the fact that after 1974 the schedule was changed, apparently to substitute for the fixed amount of $30,000 a sum to be calculated under a formula which the complainant says would produce for him over $60,000. It is unnecessary to follow this calculation since it is clear that it is the text at the time of the event which settles the liability of the Organization.

Miscellaneous claims

12. There is a claim for loss of expectation of life and also one for alleged penalisation by exchange fluctuations. No foundation is provided for either and they need not be further considered. There are, however, three claims which deserve attention. They are for medical expenses, for Protection against inflation and for costs.

13. Rule 9(a) provided for the reimbursement of all reasonable medical expenses. The Organization has paid all the accounts rendered to it under this rule. The complainant says that he has incurred further expenses amounting to about £125 and he asks the Tribunal to declare that he is entitled to reimbursement of expenses so long as his condition requires. There is no need for a declaration. If the complainant presents his claims as they arise and they are within the rule, there is no reason to suppose that they will not be met.

14. The complainant asks for an allowance in respect of inflation and for interest. This need be considered only in relation to the unauthorised deductions covered by paragraph 5 above. It is the general policy of the Tribunal to ensure as far as practicable that money withheld by the organization in error should, when it is eventually paid, have the same value in the hands of the complainant as it would have had if paid on the due date; and that the complainant's loss of use of the money in the interval should be compensated by interest at the market rate. It is usually possible to do this, at least approximately, by ordering payment of interest at the rate current in the country in which the complainant resides. Under modern conditions such a rate is composed in part of a sum considered to be sufficient to protect the lender against inflation and in part of interest in the old sense, that is, the payment made for the use of stable money. In such circumstances it is natural that a complainant should ask that the two components, i.e. protection against inflation and interest in the true sense, should be separated.

15. In the present case there is no difficulty about protection against inflation. The payments from which the unauthorised deductions were made are under Rule 31(b) themselves index-linked. It is therefore easy to order that the reimbursement of the deduction shall likewise be index-linked. Should there in addition to this be interest paid on the basic sum, i.e. on the amount due on the day when it should have been paid? This must depend on whether or not in the country of residence index-linked loans are commonly free of interest or other inducements to the lender. In England an index-linked loan commonly carries some other inducement, either in the form of a discount at the beginning of the loan or as a premium at the end, or in the form of a modest rate of interest. In these circumstances the Tribunal considers that it would be appropriate to order payment of interest on the basic sum at the rate of 2 per cent per annum.

16. The complainant says that he has incurred £4,500 as costs in the preparation of a complicated and difficult case. Undoubtedly some of the difficulties were caused by the attachment to a simple consultancy contract of a complicated scheme intended for regular employees; this made the legal work on both sides unusually elaborate. The complainant has not succeeded on most of the issues he has raised and they occupy a considerable part of the dossier. But the two issues on which he has succeeded give him very substantial gains. In all the circumstances the Tribunal will order the Organization to pay £3,000 towards the complainant's costs.

DECISION:

For the above reasons,

1. The Director-General is ordered:

(a) to give effect to the decision impugned of 10 August 1979 as if the words "less deduction of the pension paid

by the University retiring fund" were omitted;

(b) to pay to the complainant all the deductions made by virtue of these words, each deduction being adjusted for payment in the same manner as the benefit referred to in the decision, together with interest at the rate of 2 per cent per annum from the date of deduction on the sum actually deducted;

(c) to make a new determination of the amount of the invalidity pension in the light of the conclusion expressed in paragraph 7 above;

(d) to pay to the complainant the sum of £3,000 in respect of his costs.

2. All the other claims of the complainant are dismissed.

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

Delivered in public sitting in Geneva on 28 January 1982.

André Grisel
J. Ducoux
Devlin

A.B. Gardner

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