SIXTY-FOURTH SESSION

In re MORRIS

Judgment 891

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robert Emmet Morris against the World Health Organization (WHO) on 7 August 1987 and corrected on 12 August, the WHO's reply of 12 October, the complainant's rejoinder of 18 November 1987 and the WHO's surrejoinder of 29 January 1988, the complainant's further brief of 30 March and the WHO's observations thereon of 14 April 1988;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal, WHO Staff Rules 440.3, 1040, 1050

and 1230.8 and WHO Manual provisions II.9.260 and III.3.2O;

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

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

A. The complainant, a United States citizen and a dentist, was appointed to the WHO in 1975 and assigned to the staff of the Pan American Health Organization (PAHO), the WHO's Regional Office for the Americas. He held a series of appointments, each for several months. In May 1982 he was assigned as a dental officer to a P.4 post under a project in Guyana. His latest appointment was to expire on 31 December 1984. On 22 August 1984 the Chief of Personnel of the PAHO wrote him a minute in Guyana saying that there would be no funds for the project after 31 December 1984 and that his appointment would therefore expire under WHO Staff Rule 1040, on the completion of temporary appointments. On 20 December 1984 he appealed to the PAHO Board of Appeal seeking the application of Rule 1050, on abolition of post and reduction in force. Rule 1050.2 says that when a post "of indefinite duration" is abolished there shall be a "reduction in force" and the incumbent shall be given "priority for retention" on the staff. Under 1050.4 he shall be awarded an indemnity if his appointment is nevertheless terminated. In its report of 3 February 1986 the Board recommended applying 1050.2 and, should the case arise, 1050.4. The Director of PAHO having rejected those recommendations, on 10 April he lodged an appeal with the WHO headquarters Board of Appeal under Rule 1230.8. In its report of 5 February 1987 the headquarters Board recommended paying him the indemnity under 1050.4. In a letter of 4 March 1987 the Director-General accepted the recommendation, but the letter was misdirected and not until 28 May 1987 did the complainant's counsel get a copy.

B. The complainant is challenging the refusal to apply to him the reduction-in-force procedure. Though the WHO accepts 1050 as the material rule, both the headquarters Board and presumably the Director-General contend that it is too late to apply the procedure. He does not see why. According to Manual provision II.9.260 the WHO is bound, under that procedure, to identify other posts the incumbent of an abolished one may compete for, arrange for competitive selection and, if he cannot be placed, give him priority for reappointment. The complainant wants reinstatement as from 1 January 1985 for the purpose of applying the procedure.

He seeks the quashing of the decision, reinstatement, costs and any other relief the Tribunal deems fair.

C. In its reply the WHO observes that because member States decide from year to year what use to make of project funds the duration of project posts like the complainant's is often unknown.

The Director-General did agree with the Board of Appeal that the material rule was 1050 - and not 1040 - because the reason for non-renewal was the abolition of post and the complainant therefore got the 1050.4 indemnity. But the Director- General did not endorse the Board's reasoning in full and he refused to follow the reduction-in-force procedure, not because it was too late but because the procedure did not apply.

If the complainant's post was "of limited duration" 1050.1 applied: "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished". In

that case the Organization need only see whether any other post was available at the time and, if not, pay the indemnity. The complainant does not allege that it failed in that obligation. If, however, his post was "of indefinite duration" 1050.2 applied and the WHO had to put him even on an occupied post if he was fitter for it than the incumbent.

Although at the material time the rules did not define the terms, criteria laid down by the Tribunal in several judgments show that the complainant's post was one "of limited duration". Manual provision III.3.20 allows the establishment of posts "by direct request through annual budget approval", and the budget proposals for 1984-85 show that it was planned for a finite period, the reason for abolition being not lack of funds but a shift in the Guyanese Government's priorities. Project posts have to be easy to establish and to abolish and the incumbents can never have certainty of tenure. To let someone like the complainant, who had no promise of tenure, displace someone who did would unreasonably thwart the latter's legitimate expectations, especially if the displacement came years later.

Even if 1050.2 applied the claim to reinstatement would be unsound. Insofar as the complainant seeks payment of salary or pension rights as from 1 January 1985 his claim is irreceivable because it was not part of his internal appeal. In any event it is misconceived because he has no contractual right to application of the reduction-in-force procedure. According to the case law the remedy he ought to be claiming is damages for injury due to the disappointment of an expectation, not for the breach of a right. Yet he offers no evidence to suggest he would have succeeded had the procedure been applied. Besides, even when it is possible reinstatement will be refused if it is inappropriate, as it would be in this case.

D. The complainant rejoins that his post was not one of limited duration. There is nothing in the Rules or in their contracts to tell staff what sort of post they hold though it matters in determining their rights and though the Tribunal first pointed out the omission in 1982.

According to the case law a project post is of limited duration only if the instrument that created it set the period or if the project itself had a finite period; otherwise it will be of indefinite duration.

No instrument created the complainant's post, and the budget proposals the WHO cites are immaterial since, as the Tribunal has held, the distinction does not turn on financing. In the 1979 and 1985 editions of the Manual the text of III.3.20 is not as the WHO quotes it: in fact clause 4 thereof excludes project posts. Nor did the post come under a project of limited duration. The WHO had no project agreements with Guyana but only three "basic agreements", all of which were for an indefinite period.

What the complainant has sought all along is specific performance of his contract and Article VIII of the Statute empowers the Tribunal to order it. Since according to Rule 440.3 the Staff Rules form part of the contract the refusal to apply 1050.2 was in breach of his contractual right. Displacing someone else in his favour may be unfortunate but is what the Rules require.

E. In its surrejoinder the WHO enlarges on its earlier submissions. It supplies the up-to-date text of the material provisions of the Manual. It submits that the basic agreements with Guyana, not being "project agreements", are irrelevant. The only material issue is whether the duration of the post or the project it came under was limited. The budget proposals are reliable evidence because they show what the Organization intended when plans were drawn up, and indeed its policy is that all field posts be of limited duration. The complainant's post was established for 1984-85 only and he could never have imagined that his appointment or post would go on indefinitely.F. In a further brief which the Tribunal authorised him to submit the complainant comments on the text of the provisions supplied with the surrejoinder, which he contends do not invalidate his case. Submitting that they bear out its own arguments, the Organization puts in observations on that brief.

CONSIDERATIONS:

1. The complainant was released from service when his post was abolished and his contract expired the same day. The rules governing departure from service differ according to the reason for separation. The Organization treated the complainant's case under the provisions on expiry of contract in Rule 1040, which were less favourable than those on abolition of post in Rule 1050. When he appealed, the Organization conceded that he should come under Rule 1050 and offered him compensation. The complainant claims the application of the reduction- in-force procedure provided for in Rule 1050.2, under which he would be entitled to compete for retention in the

Organization with others holding similar posts. Only if he were not successful would an indemnity be payable under Rule 1050.4.

2. The matter at issue is whether the abolished post was one of indefinite or limited duration. If it was of limited duration the reduction-in-force procedure did not apply.

3. The Organization's case is that a post is of

limited duration if a definite limit has been prescribed for its duration, whatever the reasons for the limitation, whether operational or budgetary or both.

4. There is no definition in the rules of the terms "limited duration" and "indefinite duration", but the Tribunal held in Judgment 515 (in re Vargas):

"A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed, its length will be the length of the project. If the project is of limited duration, the post likewise will be of limited duration."

That does not cover the case where a post is created for a fixed period but its duration is later extended.

5. The facts in this case are that on the acceptance of budget proposals a grade P.4 post for a dental officer in Guyana No. 4.5514, was established for a period of twenty-four months with funding from the United Nations Development Programme. The complainant was assigned to the post in May 1982 on the expiry of an appointment in Trinidad and Tobago and he was appointed for the twenty-four months. In April 1984 it was decided to terminate the post at the end of the year and his appointment was accordingly extended to 31 December 1984.

6. On those facts it is clear that the post was, when created, one of limited duration lasting twenty-four months. But the renewal shows that it was not circumscribed by the terms of its creation but could be extended.

7. In its reply the Organization explains the instability of the complainant's situation in the following terms:

"The short periods of renewal and the final decision not to renew the appointment were due to the uncertain duration of the two posts held by the Complainant. This is typical of project posts. Part of the Organization's budget is made available to promote WHO's objectives in Member States. Each such Member decides, from year to year, in consultation with the Organization how the funds should be used. Provided that the Member's plans correspond to the Organization's collectively agreed policies, the Organization allocates the necessary funds and establishes any necessary posts or disestablishes posts for which the government has no further need."

This shows that having been extended once the post could be extended again if the priorities existing or the funds available at the end of the extended period so warranted. In the absence of a definition in the rules the post, though it began as a post of limited duration, became one of indefinite duration when prolonged after the period for which it had been created.

8. The provisions of Rule 1050.2 should therefore have been applied and the complainant is entitled to the application of the reduction-in-force procedure.

9. The delay in following the procedure, which was the Organization's own fault, is not a good reason for refusing to implement it. Neither is the Organization's fear that applying it might mean disappointing the legitimate expectations of someone who accepted service because of the likely continuity of his post. The Organization says that the complainant could not have expected continuity. But legitimate expectations can exist only in the context of the Staff Regulations and Staff Rules, and it is not the type of appointment but the type of post held by a staff member that determines his entitlement to the application of the reduction-in-force procedure. The complainant, too, has legitimate expectations that his rights under the rules will be respected.

10. The complainant has applied for reinstatement for the purpose of implementing the procedure, but that is not necessary. There is nothing to prevent the application of the procedure even though he is no longer a staff member. If he is successful, he will get an appointment; if not, he will get compensation.

DECISION:

For the above reasons,

1. The Director-General's decision of 4 March 1987 is quashed.

2. The Organization shall apply the reduction-in-force procedure in accordance with Staff Rule 1050.2.

3. The complainant is awarded 3,000 United States dollars in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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