

SIXTY-SIXTH SESSION

In re NAVARRO

Judgment 969

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Zenaida Navarro against the World Health Organization (WHO) on 8 July 1988 and corrected on 3 September, the WHO's reply of 31 October, the complainant's rejoinder of 12 December 1988 and the WHO's surrejoinder of 27 January 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 110.8.4, 1075.2, 1130 and 1230;

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 citizen of the Philippines born in 1939, joined the WHO in 1968 and was employed in the Organization's Regional Office for the Western Pacific, in Manila. At the material time her grade was M.7, she held a career service appointment and she was serving as assistant to the Director of the Support Programme (DSP), Mr. Uhde.

On returning to his office in the afternoon of 26 November 1986 Mr. Uhde found in his in-tray two unsigned typed memoranda. One of them, addressed by "a secretary" to the Regional Director, asked why the Regional Director was "always out of the regional office". The other memorandum, addressed to the DSP, spoke of the kidnapping of a Japanese citizen a fortnight earlier and said that "foreigners not liked by the employees can be salvaged easily (cheaply) nowadays" and that "staff are thinking of having" certain officials "salvaged".

The Administration made an investigation. It came to the view that the memoranda had been typed on a Canon AP-210 typewriter and so it examined all the ribbons that had been used on such typewriters. Suspicion having fallen on the complainant, Mr. Uhde called her to a meeting on 1 December with a personnel officer and another official. She was suspended forthwith from duty, though kept on full pay. On 3 December the personnel officer wrote her a letter recording what had been said at the meeting. The letter said, among other things, that she had "confessed having typed the two memoranda"; she was asked to acknowledge the truth of the charges and reply in writing by 12 December.

In a letter of 10 December she said she must "decline to admit" to having typed the memoranda and that any statements of hers at the meeting had been "made under stressful circumstances". She went on to argue that in any event the texts were "mere expressions of protest", to speak of "widespread dissatisfaction in the ranks" of the office staff and to allude to her own "unsullied" record of service. On 17 December the personnel officer wrote again asking her to give her own version of the meeting. In a letter of 24 December she declined to comment. By a letter of 21 January 1987 the personnel officer said that the Organization could only infer that she had typed the two memoranda; she was guilty of serious misconduct and was summarily dismissed under Staff Rule 1075.2. ("A staff member may be summarily dismissed for serious misconduct, if the seriousness of the situation warrants it, subject to the notification of charges and reply procedure required by Rule 1130. In such a case the staff member shall not be entitled to notice of termination, indemnity, repatriation grant or end-of-service grant.")The complainant appealed under Staff Rule 1230.8.3 on 30 March to the Regional Board of Appeal. In its report of 30 June the Board recommended rejecting her appeal, and by a letter of 3 July the Regional Director informed her that he did so. On 25 August she appealed under Rule 1230.8.5 to the headquarters Board of Appeal. In its report of 29 March 1988 the headquarters Board stated that, there being no consensus, it could make no recommendation.

By a letter of 15 April 1988, the decision she impugns, the Director-General informed the complainant that he was satisfied beyond any reasonable doubt that she had been at least "involved in the preparation of the memoranda" and "aware of the use of [her] typewriter for that purpose" and, in the absence of explanation from her, that she had actually typed them; he rejected her appeal.

B. The complainant alleges (1) breach of Rule 1130, which reads: "A staff member may not be ... summarily dismissed for serious misconduct until he has been notified of the charges made against him and has been given an opportunity to reply to those charges. ...". The complainant points out that when she was summoned on 1 December 1986 no formal charges had yet been notified to her. Nothing she said at the meeting may be held against her.

(2) The evidence against her was insufficient. She later denied having confessed to the charges. She consistently denied having typed the memoranda. The investigation was done in her absence. There is nothing to show when the texts were typed. Anyone could have used her typewriter without her knowledge or permission. The statements by Mr. Uhde and the other two officials are not cogent.

(3) Even supposing that she did type the texts she need not have been the author. According to WHO information circular 79/85 of 10 September 1985 it is only the author of an anonymous communication to a senior officer that may be dismissed for misconduct.

(4) The headquarters Board failed to draw any conclusion from the evidence before it, and she must be presumed innocent unless proved guilty.

(5) She served the Organization well for many years and had never committed the slightest impropriety. That is a further reason for giving her the benefit of the doubt.

She seeks the quashing of the impugned decision and her reinstatement in a career service appointment at grade M.7 without loss of seniority and with consequent payment of the sums due as from the date of her dismissal. She claims "such further relief as may be just and proper" and an award of 4,250 United States dollars in costs.

C. In its reply the Organization submits (1) that there was no breach of Rule 1130. Nothing in the rule precluded summoning the complainant before formal charges had been made; indeed it would have been irresponsible of the Organization to charge her before hearing her side of the story. The only conclusion it drew from the meeting of 1 December 1986 was that she had been involved and had known that her typewriter had been used: someone utterly innocent would have reacted otherwise.

(2) She never disclaimed typing the memoranda; besides, the WHO discounted any admission she might have made after she refused to put it in writing. The main evidence against her is the typewriter ribbon. The ribbon that bore traces of the two texts was undoubtedly from her typewriter and the position of the traces on the ribbon put the time of typing in the morning or early afternoon of 26 November 1986. No other culprit would have run the risk of using her typewriter at that time of day when he could have found a less conspicuous one. Though not conclusive, the evidence raised a presumption she was required to rebut. If she were innocent her duty of loyalty would require her to reveal any relevant information she has.

(3) Authorship of the memoranda being hard to prove, the Organization did not rule out the involvement of others. But the complainant was not accused of mere mechanical reproduction of the texts; whether the author or not, she knew what they meant. The penalty of dismissal for misconduct may apply not just to the authorship but to "taking a significant part in the production" of texts.

(4) Boards of appeal make mere recommendations, and the Director-General takes the final decision. The headquarters Board having failed to appraise the evidence properly, the Director-General was free to come to his own conclusions on the facts, and his conclusions were correct.

(5) The complainant's record is no excuse for an offence of such gravity. The second memorandum betrayed racist sentiment unworthy of a WHO staff member. The Organization would have been readier to allow her the benefit of any doubt had she given some explanation.

D. The complainant rejoins that the Organization is mistaken in contending that the rules do not forbid interrogating a staff member before making charges. So much is plain from Rules 1075.2 and 1130. The staff member must be given fair warning of the charges so that he can frame his reply, and that bars inquisition of the kind she had to put up with. There was gross breach of the Staff Rules and of due process. It is absurd to contend that the Organization discounted her alleged confession and found her guilty merely on the strength of the typewriter ribbon. Such evidence is flimsy. There is nothing to show when the texts were typed. No record of the investigation was made at the time. The Organization has failed to show that no one but the complainant had access

to her typewriter. The guilty party could have removed the ribbon and used it on a machine similar to hers. The Organization's attempt to blur the distinction between authorship and typing is specious. Whatever the headquarters Board's functions may be, the fact remains that two of its members found no evidence of her guilt and one of the other three did not agree to rejection of her appeal. That was reason enough for the Director-General to have doubt about his own conclusions. She cited her record not, as the Organization implies, to excuse misconduct but as a plea for more considerate treatment. As soon as suspicion fell on her everyone branded her as guilty.

E. In its surrejoinder the WHO retorts that in alleging procedural flaws the complainant misreads Rules 1075.2 and 1130; that she was not interrogated at the meeting on 1 December 1986; and that what she sees as improper attempts to extort a confession from her was simply action by the WHO in keeping with the rules. Although she was not warned before the meeting that she had come under strong suspicion or that she might refuse to comment on the evidence against her, such omissions did not amount to breach of the terms of her appointment: the WHO met its essential obligation, which was to respect her right to a hearing.

The Organization submits that the evidence against her was not inadequate. She does not even answer and therefore presumably accepts its observation that she never actually denied the charges. Even if the typewriter ribbon were considered to be inconclusive evidence, at least it raised a presumption of guilt of which, in the absence of denial on her part, the Organization need offer no further proof. In any case it has discharged any burden of proof that does fall on it.

In the absence of a plot to incriminate the complainant it is absurd to suggest that someone else might have taken the ribbon from her typewriter and used it on another one. So the fact that she was absent when the ribbon was found does not make the evidence less cogent. It is also unlikely that someone else used her typewriter since it was next to Mr. Uhde's office and the risk of discovery would have been too great. Even if no inference was properly to be drawn from the meeting of 1 December 1986 the fact that the texts were typed on the complainant's typewriter, almost certainly in the morning of 26 November, and the presumption that she typed them herself called for an explanation she declined to offer.

As to the headquarters Board's opinion, though the Director-General was bound to take full account of it, he was free to come to the conclusion that the Board had not approached the main issue correctly.

CONSIDERATIONS:

1. The complainant joined the WHO in 1968 and was employed as assistant to the Director of the Support Programme (DSP) at the Organization's Regional Office for the Western Pacific, in Manila. On 21 January 1987 she was summarily dismissed for serious misconduct in that she had typed two unsigned memoranda dated 26 November 1986 and addressed to the DSP.

The charges against the complainant

2. The first memorandum, typed on Regional Office writing paper, was addressed by "a secretary" to the Regional Director for the attention of the DSP. It read:

"Since I am very new to the Organization I would like to know why the Regional Director is always out of the regional office. Talks in the corridors say he is campaigning. Is this true? Please react."

The second memorandum, also on Office paper, was addressed to the DSP and read:

"Is the RD [Regional Director] being informed of the motive behind the kidnapping of the Japanese national two weeks ago? Is the RD aware that Japanese and other nationals who are not liked by the employees can be salvaged [killed] easily (cheaply) now a days? For only 2,000 pesos contact can be made with the under-world characters and harm could be inflicted on anyone they are told to harass. ..."

The memorandum then named several people who might be "salvaged".

3. The WHO carried out an investigation and examined some ten typewriters, but not the complainant's. On 29 November 1986 it discovered that the typeface on the memoranda seemed to correspond with that of a Canon AP-210 typewriter, the machine used by the complainant and several other staff members. It found the ribbon on the complainant's machine, which was enclosed in a cassette and kept the impression of the keys that had struck it, to

bear traces of the texts of the unsigned memoranda between a text dated 26 November 1986 about her private subscription to a periodical and an official memorandum dated 27 November 1986 typed for the DSP.

4. On 1 December 1986 the complainant was called to a meeting with the DSP, the Administrative Services Officer and a personnel officer, Mrs. Lopez. According to Mrs. Lopez she confessed to having typed the two memoranda and stated that some five or six staff members were involved, but she declined to identify any of them and said she would take full responsibility.

5. On 3 December Mrs. Lopez wrote the complainant a minute summarising what had taken place at the meeting of 1 December and asking her to acknowledge that she had typed the two memoranda and to submit an explanation in writing by 12 December.

6. In her letter of 10 December in reply the complainant stated:

"... I must respectfully decline to admit, as you request, having typed those memoranda. Moreover, any statements I may have made on that occasion were made under stressful circumstances, the full implications of which did not occur to me at the time. Not the least of the considerations dictating my refusal is that to affirm or deny any statement elicited from me at a time when I was alone, in an agitated state, with no one to advise me of my legal rights, might be used against me in violation of my constitutional rights. ..."She went on to say that there was "widespread dissatisfaction" among the staff and that the memoranda "should be dismissed as mere expressions of protest or inappropriate attempts to jolt the officials concerned out of their complacency".

7. On 17 December Mrs. Lopez again wrote to the complainant asking for her account of the meeting of 1 December 1986. On 24 December the complainant replied repeating what she had said in her reply of 10 December but saying nothing about what had taken place on 1 December. She wrote:

"... I regret to note what appears to be the insistence on my admitting formally authorship of the subject memoranda. It is the only conclusion I can draw from your request, considering the fact that any of the three officers present at the meeting could very well have their own recollection of that occasion. Please understand that this is being made in the exercise of a fundamental right. ..."

On 21 January 1987 the complainant was summarily dismissed.

The complainant's pleas

8. Staff Rule 1130 provides that a staff member may not be summarily dismissed for serious misconduct until he has been informed in writing of the charges against him and given an opportunity to reply in writing. The rule stipulates that the staff member shall be given eight days from the notification of the charges in which to submit his reply, although the period may be shortened if urgency so warrants. The complainant alleges breach of the rule in that she should have had a written statement of the formal charges supplied to her before she was summoned to the meeting of 1 December 1986.

9. She contends that she was found guilty of misconduct on insufficient evidence. She points out that the steps taken to identify the typewriter on which the memoranda had been typed were taken in her absence, that the Organization has not established the date when they were typed and that it has not shown that only the complainant had access to the typewriter assigned to her. She concludes that it has not proved her guilt beyond reasonable doubt.

10. She submits that the three officers "grilled" her at the meeting and that evidence of any statement she may have made at the meeting should be rejected because she had not been given a warning that she was under suspicion, time to prepare her defence, or safeguards against entrapment and duress.

11. She argues that even if it were proved that she typed the memoranda the decision to dismiss her is inconsistent with the Organization's position. She cites a WHO information circular of 1985 which states that authors of anonymous correspondence addressed to senior officers will be subject to dismissal for misconduct under Staff Rule 110.8.4. She draws a distinction between the creative act of drafting a text and the purely mechanical act of typing it.

12. She refers to the absence of any recommendation by the headquarters Board of Appeal as supporting her view that there was insufficient evidence to establish her guilt. She draws attention to the following findings of the

Board:

"Three Board members felt that, on the basis of the evidence available and on the balance of probabilities the Appellant was guilty of the offence. Of these three members, two considered that the appeal should be dismissed, but one did not agree, on account of the atmosphere evidently prevailing in the Regional Office. The remaining two members insisted that there was no proof of guilt and that in the absence of such proof the existence of doubt must weigh in favour of the Appellant, who should be considered innocent unless proved guilty."

13. Lastly, the complainant submits that her unblemished record of 17 years' service with the Organization entitled her to be given the benefit of any doubt where the evidence did not meet reasonable criteria of acceptability.

The Organization does not take issue with her on the point because, as it states, her record would have caused it to accept any plausible statement that she might have made and that cast doubt on the validity of the conclusions that it was otherwise compelled to draw from the evidence.

The Organization's pleas

14. In its reply the Organization "recognizes that, on its side, it has an obligation to carry out its enquiry with objectivity and fairness and to give the complainant the benefit of any serious doubt. Above all, the Staff Rules and the principles of natural justice require it to respect the complainant's right to a proper hearing ...". That approach is properly reflected in the personnel officer's letters of 3 and 17 December 1986, which set out the charges against the complainant and invited her to answer them, give any explanation she wished and put forward her own account of the meeting of 1 December. The Organization points out that the complainant did exercise her right to state her defence to the charges and comment on its alleged failure to apply Rule 1130, on the circumstances under which she had answered inquiries at the meeting, on her assessment of the nature of the memoranda and on the relevance of her record.

15. As to the evidence of the typewriter ribbon, the Organization does not suggest that it constitutes absolute proof but submits that it raises a set of precise and concurring presumptions which call for an explanation from the complainant.

The Tribunal's ruling

16. It is common ground that the burden of proof rests on the Organization. By declining to admit the charges, as she was entitled to do, the complainant required the Organization to prove its case; and although the proceedings are not criminal the seriousness of the charges and the concomitant penalty demand that before there can be a finding against the complainant the charges must be proved beyond reasonable doubt.

17. As to her allegation of breach of Rule 1130, the personnel officer's letter of 3 December 1986 gave formal notice of the charges and the complainant's reply of 10 December was the answer to those charges. The answer to the complainant's argument that she was entitled to notice of the formal charges before the meeting of 1 December 1986 is that at that date her superiors were still investigating the authorship of the memoranda and it would have been irresponsible of them not to have asked her how imprints of the text came to be on the ribbon of her typewriter.

18. As to the sufficiency of the evidence, there is no doubt whatever that the memoranda were typed on the complainant's typewriter. Further, from the position of the texts between others which are dated it may be inferred that the memoranda were typed between 26 November and 27 November 1987. Since the other texts deal with personal matters or her official duties the presumption arises, in the absence of any evidence to the contrary, that the memoranda, like the other texts, were typed by her.

19. The admissions the complainant is alleged to have made on 1 December 1986 can be taken into account only if they are shown to have been made of her own free will and not induced by threat, by promise of advantage or by any other improper conduct of WHO officers.

There is no evidence of threat, entrapment or duress or of any prejudice on the part of her superiors against the complainant. In his final decision the Director-General says that, although the atmosphere of the meeting of 1 December 1986 might understandably have struck the complainant as intimidating, there was no conscious intimidation of her at that meeting. As a senior member of the General Service category of staff with 17 years'

experience of the Organization she might have been expected to exercise mature judgment in such circumstances. What is more, she has never given any account of the meeting of 1 December 1986 that detracts from the version in the personnel officer's letter of 3 December. It follows that the statements she made at the meeting, like the evidence of the typewriter ribbon, raised presumptions which she has failed to rebut.

20. The distinction she draws between drafting and typing a text is untenable because the act of typing the memoranda was a significant step in accomplishing the very offence the rules condemned.

21. As for the failure of the headquarters Board of Appeal to make any recommendation, the final decision rests with the Director-General, who did take the Board's report into account. There was adequate evidence upon which the Director-General might properly conclude that it was beyond reasonable doubt that the complainant had been involved in preparing the memoranda and aware of the use of her typewriter for that purpose.

22. Lastly, contrary to the complainant's assertion that the threatening character of the memoranda was more apparent than real, the language was obviously calculated to intimidate by threats to the life of senior officers of the Organization. Participation in preparing such documents amounted to inadmissible conduct which fell within the prohibition of the rules and merited summary dismissal. DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

(Signed)

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner