

EIGHTY-SIXTH SESSION

In re Gran Olsen (Nos. 1 and 2)

Judgment 1806

The Administrative Tribunal,

Considering the first complaint filed by Mrs. Alice Gran Olsen against the World Health Organization (WHO) on 13 October 1997 and corrected on 20 November, her second complaint against the Organization filed on 20 November, the WHO's single reply of 27 February 1998, the complainant's rejoinder of 12 March and the Organization's surrejoinder of 15 June 1998;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant is Danish. She joined the staff of the WHO's Regional Office for Europe (EURO), in Copenhagen, in March 1982. She was a trainee at a local grade, C.2, in the General Service category. In October 1982 she got a fixed-term appointment. She was promoted to C.3 in May 1984 and to C.4 in October 1984. She got another promotion in 1992, to C.5, and one to C.6 in 1993, which became C.7 in July 1993 when EURO revised its grading scheme. She also served at the material time as president of the Staff Association at EURO and as such was one of the officers of the Staff Committee, the executive body of the Association.

On 3 July 1995 the Director of Administration and Finance and the acting personnel manager told her that her post would be abolished as from 31 December 1995 and that she was subject to the Organization's "reduction-in-force" procedure. By a letter of 19 September 1995 the manager told her that the Regional Director had decided to offer her a post of technical assistant at grade C.6. Since that, he said, would lower her personal grade he asked her to say whether she wanted to accept the offer, have her appointment terminated under Staff Rule 1050 or compete for posts in "a different occupational group and if so which group". In a memorandum of 20 September she asked the chairwoman of the Reduction-in-Force Committee to consider her for seven posts in three different groups and stated her preference for "Personnel Management".

On 22 September 1995, one day after she had left Copenhagen to take annual leave in the United States, she got a fax and an electronic mail message from the acting personnel manager telling her that the Regional Director had decided to offer her a post in the personnel unit at grade C.6 - again below her "personal" grade - and giving her until 25 September to choose between termination under Rule 1050 and the offer of the post in the unit provided that "to avoid conflict of interest" she agreed not to hold office on the Staff Committee. She replied by electronic mail on 24 September. Her reply took the form of a memorandum which she asked the acting personnel manager to send copies of, along with his letter of 22 September, to the members of the Reduction-in-Force Committee, among others. In the memorandum she asked the Committee to review her suitability for a post of personnel assistant at C.7; failing reassignment to that post, she would have "no choice" but to accept the offer of the post at C.6. But she challenged the alleged practice of not letting employees in the personnel unit hold office on the Staff Committee. By a memorandum dated 27 September the chairwoman of the Reduction-in-Force Committee told her that the Committee had reviewed its "decisions" but would not change its recommendation to the Regional Director.

On 21 and 27 November 1995 the complainant gave the regional Board of Appeal notice of her intent to lodge two appeals, one against the assignment on a post at a lower grade and the other against the ban on holding office in the Staff Committee while working in the personnel unit. On her appeal against the offer of a post at C.6 the regional Board recommended rejection in a report dated 31 May 1996. By a letter of 5 June the Regional Director endorsed that recommendation. On her other appeal the regional Board recommended in a report dated 7 October informing staff of the practice followed where there was any risk of conflict of interest. By a letter of 31 October 1996 the Regional Director endorsed that recommendation. The complainant then filed appeals against both decisions with the headquarters Board of Appeal, one on 2 August 1996 and the other on 30 December.

On 6 June 1997 the headquarters Board reported on her challenge to the appointment at grade C.6 and declared the appointment lawful. By a decision of 16 July 1997 the Director-General endorsed the Board's recommendation to reject her appeal and to pay one half of the costs of her attending the hearings in Geneva. That is the decision she is impugning in her first complaint.

In a report dated 1 September 1997 the Board reported on her challenge to the condition requiring her not to hold office on the Committee. The Board recommended allowing that appeal, retracting the disputed condition and granting her 5,000 United States dollars in damages plus awards of up to \$1,000 towards legal costs and of any unrefunded costs of travel on account of her other appeal, for which hearings had been held in Geneva on the same day. By a letter of 31 October 1997 the Director-General rejected her appeal. That is the decision she is impugning in her second complaint.

She accepted the offer of appointment to the C.6 post in the personnel unit, though she was later moved elsewhere, still on a C.6 post.

B. The complainant submits in her first complaint that the Organization failed to comply with the reduction-in-force procedure.

Termination of the appointment of a "candidate for retention" under Manual provision II.9.360 is subject to examination by the Reduction-in-Force Committee of any applications by that candidate "to compete for posts in a different occupational group". EURO's constant practice being to invite candidates to list as many occupational groups as they wish and state their preference, the Committee had a duty to assess the complainant's fitness for posts in each of the occupational groups she had picked. What is more, it should have considered first those at her grade, and any lower ones only later. So the WHO was wrong to make her choose between termination under Rule 1050 and assignment at a lower grade before the Committee considered her for posts at her grade in the other groups as well.

Her second complaint turns on the lawfulness of requiring her to stand down from office on the Staff Committee. She submits that there were many precedents at other WHO duty stations for letting officials in personnel units hold such office. As the headquarters Board of Appeal found, there was no evidence to suggest that other international organisations did not let them do so. Making such unlawful condition a sort of ultimatum caused her anguish that warrants an award of damages. She pleads bias.

In her first complaint she seeks the quashing of the Director-General's decision of 16 July 1997, reinstatement in grade C.7 as from 1 January 1996 and full refund of the costs - including *per diem* and travel expenses - that she incurred over her appeal to the headquarters Board of Appeal, less any sums the Tribunal may award under that head for her second complaint. She claims costs.

In her second complaint she asks the Tribunal to set aside the Director-General's decision of 31 October 1997, order the "retraction" of the condition in the offer of employment of 22 September 1995, grant her \$5,000 in moral damages, refund all the costs - including *per diem* and travel expenses - that she incurred over her appeal to the headquarters Board of Appeal, less any sums the Tribunal may award her under that head for her first complaint. Again she claims costs.

C. In its reply on her first complaint the WHO denies breach of the rules on reduction in force: the Committee paid due heed to her preference for personnel management and found her a suitable post in that area. Having recommended such a post, albeit at a lower grade, it had no duty to consider her for posts at a higher grade in any other occupational group. In any event she was entitled to ask it to consider her for only one other group, not for as many as she chose to mention. Although its guidelines require it to entertain requests for leave to compete in more than one field of work, it does not have to consider candidates for posts at the highest grades in all the groups they think themselves suitable for.

To her second complaint the Organization replies that setting the condition was a proper exercise of discretion. The "usual" practice has been to alert staff in the personnel unit to the risk of conflict of interest if they accepted office on the Staff Committee, but the matter had been treated "confidentially" in the few instances in which it had arisen. The defendant cites examples of officials who resigned office on advisory bodies at EURO upon joining the personnel unit. Such practice is firmly established at headquarters too and indeed is in line with Article 19 of the Statutes and Rules of the WHO's Staff Association in Geneva, which says that "membership of the Staff

Committee shall be incompatible with: any office which ... requires independence in relation to the Staff Committee". In any event such office was unsuitable for someone like the complainant whose work brought free access to privileged information about staff. The defendant denies her charge of bias: it did not serve her an ultimatum but merely sought to enable her to take an informed decision. Since she is no longer in the personnel unit her claim to retraction of the condition shows no cause of action.

D. In her rejoinder the complainant observes that both disputes turn chiefly on issues of fact. One - and it relates to her first complaint - is whether the Administration asked "candidates for retention" who turned down the offer of a post at a lower grade to state only one or several occupational groups they wanted to compete in. She produces documents attesting to the Administration's practice of considering unsuccessful candidates for posts in several areas. As to her second complaint the factual issue is whether there was any practice of barring staff of personnel units from holding office on the Staff Committee. She cites several examples to show that there was no such practice in the Organization. According to precedent the only unwritten practices that may be allowed are those which enlarge on staff rights. Besides, the Administration is wrong to rely on a practice that applies only to officers of the Committee rather than to its members at large. She presses her claims.

E. In its surrejoinder the WHO maintains the arguments in its reply and comments briefly on points raised in the rejoinder. It maintains that an unsuccessful candidate has the opportunity of competing in only one other occupational group. It denies infringing the complainant's rights by reminding her of the risk of conflict of interest that her new assignment might create.

CONSIDERATIONS

1. On 1 March 1982 the complainant joined the World Health Organization at its Regional Office for Europe (EURO), in Copenhagen. She was a member of the General Service category of staff and held a local grade known as C.2. She was promoted to C.3 on 1 May 1984 and to C.4 on 1 October 1984. At the same time she was serving as president of the Staff Association of EURO. Having been elected to the full-time position of general secretary of the Federation of International Civil Servants' Associations (FICSA), she was seconded as such to Geneva on 4 February 1989 at grade G.5. On 1 March 1991 she returned to EURO and there the WHO again put her on a C.4 post. It promoted her to C.5 on 1 June 1992, to C.6 on 1 March 1993 which was converted to C.7 on 1 July 1993. She was re-elected president of the Staff Association in November 1992 and so at the material time was an officer of the Association's executive body, the Staff Committee.

2. In 1995 the Organization carried out a "reduction-in-force" exercise, and one of the posts it then abolished was the complainant's. By a letter of 19 September 1995 the acting personnel manager of EURO offered her the choice of assignment to a C.6 post in her own "occupational group", or the termination of her appointment, or the right to be considered by the Reduction-in-Force Committee for appointment to a post in another group. On 20 September she ticked the third of those options and sent a memorandum to the Committee listing three other groups she thought herself suitable for. Her first choice was "Personnel Management related duties", and she identified one C.7 and two C.6 posts in the personnel unit. The next day she went off on annual leave.

3. The Reduction-in-Force Committee at once declared her unsuited for the C.7 post but recommended her for one of the C.6 ones. It did not consider her for any C.7 post in the other two occupational groups she had suggested.

4. By Friday 22 September she was in Arizona. There the personnel unit sent her on that day a fax and an electronic mail message giving her until 3 p.m. on Monday the 25th (6 a.m. in Arizona) to choose between the C.6 post in the unit and termination under Staff Rule 1050. The unit told her that the Organization's "practice is that staff in the Personnel unit do not hold office on the Staff Committee to avoid conflict of interest" and, if she accepted the post, she "must abide by this practice". So she would have to resign as president of the Staff Association.

5. In electronic mail messages she sent to the acting personnel manager and to the Reduction-in-Force Committee on Sunday 24 September she challenged the "practice" and the finding that she was not the best candidate for a C.7 post in any of the occupational groups she had mentioned; but she said that, if her view was rejected, she would have to take the C.6 post. By a memorandum of 27 September, which she got on her return to Copenhagen on 7 October, the chairwoman of the Reduction-in-Force Committee informed her that it had reviewed her case but refused to change its recommendation. The upshot was that she accepted the C.6 post in the personnel unit. She was later assigned to a C.6 post in another unit.

6. She lodged two internal appeals with the regional Board of Appeal, one claiming assignment to a C.7 post in one of the occupational groups she had indicated, the other seeking retraction of the condition that she should not hold office on the Staff Committee. Having failed to get satisfaction, she put two appeals to the headquarters Board of Appeal, one seeking retroactive reinstatement in grade C.7 and the other retraction of the condition.

7. By a decision dated 16 July 1997 the Director-General accepted the recommendation of the headquarters Board of Appeal and rejected her claim to retroactive reinstatement in C.7, and that is the decision impugned in her first complaint. By a decision of 31 October 1997 the Director-General rejected the Board's recommendation for retracting the condition in the offer of 22 September 1995 and for paying her moral damages amounting to 5,000 United States dollars and costs. That is the decision she is challenging in her second complaint. The relief that she seeks in her first one is reinstatement in grade C.7 as from 1 January 1996 and an award of costs, and in her second one the retraction of the requirement that she resign from the Staff Committee and awards of 5,000 dollars in moral damages and of costs.

8. She seeks joinder of her two complaints and the Organization does not object. Each party has dealt with both cases in single briefs. Although the issues of law are different the original administrative decision - the one of 22 September 1995 - and the material facts are the same. The Tribunal therefore joins the complaints to form the subject of a single judgment.

The first complaint

9. The rules on "reduction in force" are in Manual provisions II.9.330 to 360, which read:

"330 Each candidate for retention competes, in accordance with the procedure described below, either for all posts in the Organization as a whole (if the post abolished was subject to international recruitment) or for those posts in the relevant commuting area (if the post abolished was subject to local recruitment) that match the candidate's grade, experience and qualifications:

330.1 a list is first drawn up of all posts of indefinite duration in the Organization as a whole or at the local level that are of the same grade and in the same occupational group as the post of the candidate;

...

330.3 when there are no suitable posts to be considered at the same grade or when, as a result of the competition described in paragraph 340, the candidate is found to be the least suitable for retention, a new list is drawn up in accordance with sub-paragraphs 330.1 and 330.2 but relating to posts that are one grade lower than that of the candidate;

...

340 The competition takes place in accordance with the following principles:

340.1 the candidate for retention and the incumbents of the posts listed as described in sub-paragraph 330.1 are placed in different priority groups ...;

340.2 the competition starts with staff members in the listed posts in the lowest priority group, who are placed in their order of suitability for retention;

...

340.5 the competition ends when either the candidate for retention has been found more suitable than another staff member or when all priority groups up to and including the candidate's own group have been considered.

350 The reduction-in-force committee submits a report to the Director-General (or regional director for a post subject to local recruitment under his jurisdiction), who takes an appropriate decision.

...

360 If the candidate for retention receives no offer of another post or declines such an offer, final action is taken to

terminate his or her appointment in accordance with Staff Rule 1050, subject however to the following provisions:

360.1 if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years. If the request is accepted, the procedure described in paragraphs 330-350 is applied with reference to the new occupational group;

360.2 if the candidate declines an offer of a post at a grade lower than that of the abolished post, or an offer of a post of limited duration, he or she may also make the request referred to in sub-paragraph 360.1."

The Reduction-in-Force Committee of EURO also has its own "operational guidelines", to be applied "in cases where there is ambiguity or doubt in the Manual text", viz in the above provisions of II.9. The guidelines say that the provisions of II.9.360 "may be applied only once for each individual" and, as to 360.1, that:

"The Committee will entertain a request to compete for more than one field of work. If the candidate expresses no priority order, the Committee will determine the order by drawing lots. The procedure described in paragraphs 330-350 will be applied with reference to the first field of work to be reviewed. If no post is offered to the candidate, the procedure will be repeated for the next field of work, and so on. If a post is offered at any stage, no further field of work will be considered for competition."

10. The main issue that the first complaint raises is whether the Committee should proceed -

(1) "vertically" within each occupational group, starting with any posts at the candidate's own grade and then passing down to posts one grade lower in the same group and, if so, how often the process may be repeated;

or

(2) "horizontally", first taking together, for all the named occupational groups, any posts at the candidate's own grade which the Committee thinks suitable and only then passing down to posts one grade lower in all the same occupational groups.

11. As was recounted above, the complainant was first offered a post in her own occupational group at C.6, the grade just below her own. She refused it. She then named three other groups, giving personnel management as her first choice of field of work. When no C.7 post could be found for her she was offered a C.6 one instead in that group.

12. Even though 360.1 says that the candidate may compete for posts in "a different occupational group" - i.e. in one - it is to the advantage of candidates that they should be able to compete for posts in more than one. If limited to one group the candidate may not be found "obviously well suited for work corresponding" to that one; and indeed the Committee has interpreted the rules to allow consideration of the candidate for more than one group.

13. Manual provisions II.9.330 to 350 lay down the procedure for identifying suitable posts. The only question that calls for answer in this case is whether, once a post had been found in the group the complainant preferred at a grade lower than that of her abolished post, she might refuse it and demand repetition of the process for another group. Manual provision II.9.360.1 provides that, if the Committee accepts the candidate's request for leave "to compete for posts in a different occupational group", then "the procedure described in paragraphs 330-350 is applied with reference to the new occupational group". In that event the right conferred on the candidate under 360.2 to compete in a new occupational group does not apply. So the process does not allow the candidate to compete for posts at the grade of the abolished post in all of the groups identified but stops once a suitable post is found, whether it bears the grade of the abolished post or a lower one.

14. The conclusion is that the Committee has no basis in the rules for working "horizontally" but must proceed "vertically" until it finds a suitable post in a preferred group. Since that is what it did in this case, the complainant's challenge to the Director-General's decision of 16 July 1997 and her first complaint must fail.

The second complaint

15. In support of her second complaint she pleads that in the WHO's regional offices for the Eastern Mediterranean, Africa and South East Asia there are many instances of letting the staff of personnel units hold office on staff committees; she alleges personal bias; and she observes that the headquarters Board of Appeal got in touch with the International Labour Office, the Food and Agriculture Organization of the United Nations, the International Telecommunication Union and the Office of the United Nations at Geneva, found in none of those organisations the "practice" that the WHO is relying on, and recommended paying her the moral damages on the grounds that the condition had been tantamount to an ultimatum and had caused her anguish.

16. The practice was never put in writing. The WHO's argument is that it would warn staff of personnel units of the risk of conflict of interest if they held office on a staff committee and discourage such committee members from applying for posts in personnel if they wanted to keep office. By way of justification it argues that one of the main functions of a personnel unit is to apply staff regulations, rules and policies whereas a staff association has to represent and defend the staff; since staff representatives do not always agree with management the two functions are incompatible.

17. Yet the Organization does not argue that the "practice" requires mere members of the Staff Committee, i.e. those who do not hold office, to resign an appointment to a post in a personnel unit, and it is difficult to see what valid distinction it can draw between office-holders and other members of the Staff Committee as to conflict of interest. And, independent though the WHO may be, the fact that other international organisations have no such policy does argue in the complainant's favour. It is important both to protect the right of association and to maintain a staff association's independence. The conclusion is that the condition should never have been attached to the offer that the WHO made to the complainant.

18. The Organization points out that, though the complainant asks for retraction of the condition, she is no longer employed in the personnel unit and retraction would therefore have no practical effect. That does not, however, dispose of her claim to moral damages. She is still entitled to moral damages, and the Tribunal sets the amount at the \$5,000 she claims. She is also entitled to costs.

19. Lastly, the Tribunal finds no evidence of personal bias against her.

DECISION

For the above reasons,

1. The Director-General's decision of 31 October 1997 is set aside insofar as he refused to pay the complainant moral damages and costs.
2. The WHO shall pay her 5,000 United States dollars in moral damages.
3. It shall pay her 2,500 dollars in costs.
4. All her other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella Carroll

James K. Hugessen

A.B. Gardner

