

NINETY-SECOND SESSION

In re Axmann

Judgment No. 2105

The Administrative Tribunal,

Considering the complaint filed by Mr Georg Eduard Herbert Axmann against the World Health Organization (WHO) on 27 March 2001, the WHO's reply of 2 July, the complainant's rejoinder of 20 August, and the Organization's surrejoinder of 5 October 2001;

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, an Austrian national born in 1954, joined the WHO in February 1988 at grade P.4. He was promoted to grade P.5 in 1993, following the reclassification of his post, and in 1995 to grade P.6 following reassignment to another post.

Following the election of the new Director-General of the WHO in May 1998, the Department of Budget and Management Reform (BMR) was established at WHO Headquarters to provide "a clearly identified focal point for the Organization's management reform efforts" and the complainant's post was placed in this new department. The department consisted of two units, one of which was named Management Reform (MRF). Post descriptions for all posts in BMR were to be redrafted and, if necessary the posts would be reclassified, to fit the new structure. This was explained to the complainant by his supervisor, the Director of BMR, in a meeting on 24 February 1999. In the months that followed it became apparent that changes to the complainant's post would eventually lead to its being downgraded, although not before a formal classification process was carried out.

On 11 June 1999 the complainant sent a memorandum to the Director of BMR expressing concern about his professional future and asking that consideration be given to transferring him to the P.6 post of Coordinator in MRF. The Director replied in a memorandum of 15 June that the complainant was welcome to apply for the post in question once the vacancy notice had been posted. On 30 July vacancy notice P99/110 was issued for the post and the closing date for applications set at 4 September 1999. The complainant submitted his candidature on 12 August.

On 2 September the Director of BMR sent a memorandum to the Director of Human Resources Services (HRS) to inform him that he wished to hold the filling of the Coordinator post in abeyance for six months and asked that all applicants be notified. In a letter of 29 September the Coordinator of Central Services in HRS informed the complainant of the decision not to fill the vacancy at the present time "due to organizational changes". On 17 November 1999 the Director of BMR, answering an earlier memorandum sent by the complainant, told the latter that although he did not share the complainant's view regarding his qualifications for the post of Coordinator, the complainant would nevertheless be welcome to reapply for it when it was readvertised, "probably towards the end of 2000".

On 13 March 2000 the Director of Administration and Finance in the Regional Office for Europe - Ms T. - was reassigned to Headquarters in the post of Coordinator in MRF.

On 4 April the complainant sent a memorandum to the Director-General requesting that the decision to fill the post of Coordinator be set aside and that the selection process, under vacancy notice P99/110, be reactivated. On 30 June the Executive Director of the General Management Cluster (GMG) responded to the complainant on the Director-General's behalf. She informed the complainant that it was "within the Director-General's prerogative" to reassign a staff member - without promotion and without holding a competition - to a post below the level of Director. Furthermore, in this instance it was in the Organization's interest to do so.

On 4 July 2000 the complainant filed a notice of intent to appeal, seeking to impugn the appointment of Ms T. because the WHO had disregarded the rules governing the filling of posts. The relevant provisions are as follows:

WHO Staff Rule 410.4:

"Posts below the level of director, other than those of a short-term nature, which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion."

WHO Manual paragraph II.3.50:

"Vacant posts are announced in accordance with Staff Rule 410.4 ..."

Manual paragraph II.3.60:

"An announcement is not normally made:

...

60.2 if the post can be filled by the reassignment of a staff member without promotion, provided that it is a post in the speciality for which the staff member is qualified and the proposed reassignment does not entail a move from a project to a regional office or from a region to headquarters."

In its report dated 7 December 2000 the Headquarters Board of Appeal found no reason to set aside the appointment of Ms T., but nevertheless considered that "the way in which the appointment had been handled by the Administration was a major cause of the appeal" and recommended that a maximum of 4,000 Swiss francs be paid towards the complainant's legal expenses. In a letter of 2 February 2001 the Director-General informed the complainant that she endorsed the Board's recommendation that the appointment of Ms T. should be allowed to stand but saw no basis to award the payment of legal fees. That is the impugned decision.

On 1 January 2001 the complainant was reassigned to a P.5 post in MRF. It was agreed that he would retain his P.6 grade on a personal basis.

B. The complainant makes three pleas. First, he argues that the WHO disregarded the rules governing the filling of posts. He contends that the Director of BMR only suspended action on vacancy notice P99/110 for six months in order to allow for some organisational changes. However, there were no organisational changes affecting this particular post, therefore the selection process should have been reactivated. Although it is permissible to forego a vacancy notice, in this case one was required under Manual paragraph II.3.60 because the reassignment concerned transferring a staff member from a regional office to Headquarters. This provision is designed to regulate the exercise of discretion granted to the Director General under Staff Rule 410.4. To justify its decision the WHO has claimed that it was taken in "the interest of the Organization", but, the complainant submits, the defendant has failed to explain how this is so. In his view, the interest of the Organization would have been better served by proceeding with the "normal" selection process and even the Board of Appeal noted that it found no reason why the usual procedures were not followed. There were other procedural flaws as well. In recommending the reassignment of Ms T. to the post of Coordinator, the Executive Director of GMG referred to qualifications that were not required in vacancy notice P99/110 and the complainant considers this to be "improper". He asks the Tribunal to conclude from the aforementioned that the decision was tainted by illegality.

Secondly, the WHO disregarded its obligation to the complainant - as a staff member whose previous functions on a P.6 grade post had been abolished - to try to place him in a post with responsibilities corresponding to his grade. There is a long line of the Tribunal's cases which define an organisation's duties towards a staff member when the latter's "status and functions" are affected by restructuring measures. The measures taken to fill the post of Coordinator by direct selection "wholly disregarded the complainant's rights and interests".

Lastly, he submits that there was personal prejudice on the part of his supervisor and recalls an observation made by the Tribunal in its case law that prejudice "is usually concealed and so its existence usually has to be established by inference". He alleges that the appointment of Ms T. was tainted by prejudice and he provides reasons why he believes this to be true.

He requests the Tribunal: to set aside the appointment of Ms T. to the post of Coordinator in MRF and to order the resumption of the selection process in accordance with vacancy notice P99/110; to order the payment of a "just and equitable" sum in compensation to him for moral injury and damage to his professional standing and career; and to order the payment of 10,000 Swiss francs for legal costs and expenses. He also asks the Tribunal to order the production of two documents: the curriculum vitae of Ms T. and a draft memorandum dated 14 January 2000.

C. In its reply the WHO rebuts the complainant's arguments, stating that the reassignment without promotion of another staff member to the post of Coordinator complied with the express wording of Staff Rule 410.4. The reassignment was "clearly" in the interest of the Organization.

The Organization points out that the memorandum dated 2 September 1999 from the Director of BMR to the Director of HRS - which the complainant cites as proof that the competition had not been abandoned - was not sent to him. The competition announced in vacancy notice P99/110 was cancelled on 29 September 1999 and all candidates were so informed. Furthermore, in the memorandum of 17 November the Director of BMR told the complainant that he could apply for the post of Coordinator whenever it was readvertised. He should have had no doubts as to the status of the competition.

Due to the organisational changes, the vacancy notice for the post of Coordinator in MRF no longer reflected the true extent of the duties of the post, or the skills and experience necessary to carry these out, nor did the complainant possess the necessary qualifications to fill this post as changed. Ms T. was amply qualified for the post; there was also "an urgent need to fill the position" and she was able to take up her duties very promptly. If the post were to be filled by competition it would have taken up to six months longer and it is "self-evident" that the work in MRF "could not proceed smoothly and expeditiously" without the post being filled on a permanent basis.

The WHO submits that filling the post through the reassignment of Ms T. without holding a new competition did not breach Manual paragraph II.3.60. The use of the word "normally" in that paragraph provides the Organization with a flexibility to proceed with a direct reassignment without announcing a vacancy. This interpretation is supported by the case law.

It adds that there was no breach of any obligation towards the complainant regarding finding him a post with senior level responsibilities. Although he was informed that the restructuring in BMR would lead to the downgrading of his post there is nothing to suggest that he was not assigned duties commensurate with his grade. In fact, the complainant was still carrying out senior level assignments while the WHO tried to identify a suitable reassignment for him. He was eventually offered and accepted a P.5 level post in BMR for which he kept the P.6 grade on a personal basis.

Lastly, the Organization denies the complainant's allegations that the decisions to cancel the competition and to reassign Ms T. were motivated by personal prejudice on the part of his supervisor.

Regarding the complainant's request for the curriculum vitae of Ms T. the WHO expresses its readiness to provide this document if the Tribunal orders it to do so. As for the draft memorandum dated 14 January 2000, this has been attached as an annex to the reply.

Ms T. was invited to provide her comments on the complaint. She rebuts the complainant's allegations against her qualifications and selection for the post.

D. In his rejoinder the complainant submits that the Organization has tried to misrepresent the position he takes in his complaint. He has never stated that there is an obligation to place him in a P.6 post, nor has he claimed that he should have had priority consideration in the filling of the post of Coordinator. What he sought was "a fair chance" to compete for the post and he stresses that a regular selection process was in the interests of all parties.

The complainant's request in his memorandum of 11 June 1999 to the Director of BMR that consideration be given to transferring him to the Coordinator post should be seen in the light of the circumstances prevailing at that time: it was sent before the vacancy notice had been issued, the post he occupied at the time was to be downgraded, the post of Coordinator was due to fall vacant that year, the Organization had an obligation to try to place him in a post at a level of responsibility corresponding to his grade, and his transfer under these circumstances would not have breached any of the WHO's rules or regulations. By contrast, the reassignment of Ms T. to the post of Coordinator was made under entirely different circumstances: she was not in danger of being demoted, there was no obligation

to try to find her another assignment, and her transfer from a regional office was barred by Manual paragraph II.3.60.

He now argues that the Director-General's decision to reassign Ms T. failed to take account of essential facts and warrants review by the Tribunal.

E. In its surrejoinder the WHO maintains its argument that there has been no breach of either Manual paragraph II.3.60 or Staff Rule 410.4. The selection process which began with the issuance of vacancy notice P99/110 was abandoned at the end of September and the complainant was duly informed. There is no point in "reactivating" the competition. The rules do not require that the Organization issue a vacancy notice every time a staff member is reassigned from a region to headquarters on a vacant post, they only state that this is "normally" done.

The Organization submits that the Director-General was fully apprised on all relevant facts and issues prior to taking the decision to reassign Ms T. The complainant's allegations to the contrary are without merit.

CONSIDERATIONS

1. The complainant was employed by the WHO in February 1988 at grade P.4. He was promoted to grade P.5 in 1993 and to P.6 in 1995.
2. In 1998, following structural reforms, the Department of Budget and Management Reform (BMR) was established and the unit in which the complainant worked was abolished. The complainant was transferred to BMR with his P.6 grade.
3. The complainant's supervisor until the end of 1993 had been transferred to the WHO Regional Office for Europe and was retransferred to WHO Headquarters and appointed Director of BMR in November 1998. In line with the structural reforms, BMR was to consist of only two units, although posts from three different entities were transferred to that Department. One of the units was called Management Reform (MRF) and that is where the complainant was assigned. Post descriptions were to be redrafted and reclassified accordingly. At a meeting on 24 February 1999, the Director of BMR explained to the complainant that there might be a change to the grade of his post, but not before a formal classification process was carried out.
4. Under the revised post description, the complainant realised that his post would be at a "substantially lower level of responsibilities" than those of his present grade. Hence, on 11 June he wrote to the Director of BMR, stating that he trusted that "the Organization will make all reasonable efforts to find [him] a position corresponding to [his] grade and responsibilities, background and experience". He concluded by expressing his wish to be considered for the position of Coordinator in MRF. The Director replied to the complainant in a memorandum of 15 June 1999 that he understood the complainant's concerns and he had therefore asked the Director of Career Development to follow-up with the complainant in this regard; he added that the complainant would be welcome to apply for the position of Coordinator in MRF when the vacancy notice was posted. On 12 August the complainant submitted his application for that position, but the Human Resources Services informed him on 29 September that it had been decided not to fill the vacancy due to organisational changes.
5. The Director of Career Development met with the complainant on 8 November 1999, informing him of the availability of a post, for which he would be qualified, in the WHO Regional Office for Africa as Administrative and Finance Officer. Although the post was graded at the P.5 level, he would be allowed to keep his P.6 grade on a personal basis, subject to the agreement of the Director-General. The complainant stated that he could not consider a post classified lower than P.6.
6. By a memorandum dated 11 November 1999, the complainant explained to the Director of Career Development that since he wished to obtain an assignment to a post with responsibilities corresponding to his grade, he had applied for the post of Coordinator in MRF, a P.6 vacancy "squarely within [his] specific area of competence". He was informed by his Director, to whom he sent a copy of the memorandum, that the subject post did not fall within his specific area of competence, which are "management studies and organizational analyses", whereas the vacant post required "extensive background and specialization in programme evaluation in terms of knowledge, practical experience and academic qualifications".

7. On 13 March 2000 Ms T. was reassigned from the D.1 post of Director of Administration and Finance in the WHO Regional Office for Europe to the P.6 post of Coordinator in MRF.
8. On 4 July 2000 the complainant appealed against that appointment. In its report dated 7 December 2000 the Headquarters Board of Appeal recommended to the Director-General that Ms T.'s appointment be allowed to stand; since it had not damaged the complainant's professional standing or career it decided not to recommend the payment of compensation on these grounds. However, the Board recommended the payment of up to a maximum of 4,000 Swiss francs to cover the complainant's legal costs due to "the inappropriate manner in which the Administration had dealt with the appeal itself".
9. The Director-General, in a letter dated 2 February 2001 to the complainant, stated that she was in agreement with the Board of Appeal's recommendation to let the appointment of Ms T. to the post of Coordinator in MRF stand, but she did not agree with its recommendation regarding the payment of legal fees. That is the impugned decision.
10. In his submissions, the complainant requests the Tribunal to set aside the appointment of Ms T. to the post of Coordinator in MRF, and to order the resumption of the selection process for filling the said post in accordance with vacancy notice P99/110. He also wants to be awarded 10,000 Swiss francs for legal costs and expenses.
11. The Organization based the reassignment of Ms T. on Staff Rule 410.4 which, it says, allows the filling of a post by reassignment not involving a promotion, when it is in the interest of the Organization.
12. On the other hand, the complainant argues that such a reassignment violates Manual paragraph II.3.60 which rules out reassignment of a staff member without promotion and without issuing a vacancy notice where the reassignment entails a move from a region to headquarters.
13. Staff Rule 410.4, while stating as a general rule that posts below the level of director which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and that selection for such posts shall normally be on a competitive basis, explicitly removes from the coverage of its terms by way of exception "any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion".
14. The appointment of Ms T. to the post of Coordinator was made after an announced competition, in which the complainant participated, had been cancelled since "it had been decided not to fill [the] vacancy at this stage due to organizational changes".
15. In the aftermath of the organisational changes the Director-General decided to give BMR the responsibility for developing a global Information Technology policy. Consequently, the post description for the Coordinator in MRF, who would have to assume directly that responsibility, was revised. Because of the additional duties now required of the post, the former qualification of being "computer literate" was changed to also having "extensive knowledge of information and communications technology, including in-depth knowledge of the application of such technology in large, complex organizations".
16. Considering that it was "in the interest of the Organization" to fill the vacancy by direct selection and not by competition, and that Ms T. as Director of Administration and Finance in the WHO Regional Office for Europe, had ample experience in management reform and IT policy at a senior level, as well as experience in working in a regional office, the Director-General decided to reassign her to the post of Coordinator in MRF.
17. As is clear from precedent what is "in the interest of the organization" as to warrant an exception under Staff Rule 410.4 should be left to the Organization to decide. The Director-General's discretion in this regard may be exercised to the detriment of the interests of the individual affected. Moreover, that is "in keeping with the general principles of international public service, which affirm the priority of the general interest, represented in each organisation by the Director-General, over individual interests" (Judgment 325, *in re Verdrager*).
18. The complainant contends that Ms T.'s reassignment violates Manual paragraph II.3.60 which allows a reassignment without announcement provided that it does not entail a move from a region to headquarters. Since Ms T.'s reassignment was from a regional office to Headquarters, there should have been a vacancy notice issued for the post.

19. A close reading of Manual paragraph II.3.60 shows that it does not require that the Organization issue an announcement in all cases. The relevant statement declares: "An announcement is not normally made ...". The use of the word "normally" allows exceptions to be made and it is the prerogative of the Director-General to exercise his/her discretion provided he/she does not do it in an arbitrary manner or in violation of the relevant Staff Rules and Staff Regulations.

20. The complainant not only asks for the setting aside of the appointment of Ms T. but likewise for the resumption of the selection process for filling the said post in accordance with the vacancy notice P99/110.

21. In upholding the decision to appoint Ms T., the Tribunal rejects the claim to the reactivation of the competition process. Under the internal rules of the Organization, the Director-General has the discretion to fill a post by means other than a competition. The Tribunal will not interfere with such exercise of discretion as long as there is no abuse of authority, and there was not.

22. The Director-General cannot be taken to task for effecting necessary and desired reforms. If, in her discretion, this meant abandoning a competition which had been announced, she was within her rights in so doing.

23. By transferring a qualified official the Organization permanently filled a post which had had no staff on a permanent basis for seven months. There is no gainsaying the fact that such an appointment was more expeditious than resuming or starting a competition with revised qualifications.

24. The complainant asks for an award by way of compensation for moral injury and damage to his professional standing and career. This claim hinges on the success of the claims to set aside the direct appointment of Ms T. and to order the resumption of the selection process. Since the complainant does not succeed in those claims, this claim also fails.

25. It follows also that he is not entitled to an award for legal costs and expenses.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Catherine Comtet