NINETY-FOURTH SESSION

Judgment No. 2168

The Administrative Tribunal,

Considering the complaints filed by Ms A. E. d. L., Ms J. J.-C., Ms A. K., Ms W. M., Mr A. P., Mr B. S. and Ms S. W. against the World Health Organization (WHO) on 11 May 2001 and corrected on 22 October 2001, the WHO's reply of 23 January 2002, the complainants' rejoinder of 9 April, and the Organization's surrejoinder of 12 July 2002;

Considering the application to intervene filed by Ms G. D. on 15 November 2001 and the Organization's observations thereon of 13 December 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. At the material time the complainants were all staff members at WHO headquarters. Several have now taken early retirement and one retired at the prescribed age.

On 8 September 1999 Cluster Note 99/31 was issued by the Office of the Executive Director of General Management announcing the Director-General's decision to implement a mutually agreed separation (hereinafter MAS) exercise in accordance with Staff Rule 1015. It explained the objectives, general guidelines and the process for the exercise; interested staff were invited to submit "expressions of interest" by 27 September. It also stated that:

"Although staff members are invited to express their interest, there is no right to receive an agreed separation and the Organization may refuse applications. Expressions of interest will be evaluated and decisions taken in the best interest of WHO in light of the Objectives stated [in this Cluster Note]. A staff member's decision to volunteer or not to volunteer will have no future repercussions on staff members remaining with the Organization."

The complainants submitted their expressions of interest.

On 19 October Cluster Note 99/41 was issued informing staff of the progress made thus far in the exercise and of additional factors that would come under consideration, and providing staff with a revised time-line for the remainder of the exercise. It was indicated that formal notifications and the conclusion of agreements would take place in the first half of December. It also set out the criteria to be considered for each application.

The Director-General announced on 9 December to all staff that she had agreed to 224 separations and had refused 71 on the grounds that it would not be in the interest of the Organization to let them go. On 13 December 1999 each complainant was informed by the Director of Human Resources Services Department (HRS) that the Director-General had decided that it was "in the interests of the Organization" to retain their services and thus did not agree to their separation from WHO at that time. The complainants appealed against this decision to the Headquarters Board of Appeal on 20 January 2000. In its report dated 20 December 2000, the Board found that there had been no breach of the Organization's rules, nor did it consider the decisions taken regarding the mutually agreed separation exercise to be arbitrary or prejudiced. Based on these findings, it recommended rejecting the appeal. On 16 February 2001 the Director-General informed each of the complainants that their appeal had been rejected. That is the impugned decision.

B. The complainants contend that the WHO failed to implement the MAS exercise in an objective manner.

Additionally, by not according them a voluntary separation the Administration abused its discretion and authority. Furthermore, the WHO's evaluation of their applications was arbitrary and capricious. As an example they mention the grant of a mutually agreed separation to staff employed by the Pan American Health Organization (PAHO) without using that Organization's funds. Even if the WHO was under no obligation to grant a mutually agreed separation to all those who applied, such discretionary decisions should have been taken in an objective, even-handed, and transparent manner. They cite the Tribunal's case law to support their arguments.

The complainants were informed that their separation would not be "in the interests of the Organization", but the WHO has been unable to define satisfactorily what this phrase means. They contend that such a criterion is vague and over-broad. In addition, the Organization has not given them valid reasons for why it granted some staff members separations and not others. They also submit that there was breach of equal treatment because no reasonable differences have been objectively demonstrated to exist between those accorded a mutual separation and those that were denied one. According to them, the unequal treatment was "confirmed and clearly corroborated" by the Board of Appeal.

Lastly, they assert that the Administration's "unjustified" and "invalid denial" of their request caused them moral injury. They contend that they satisfied the conditions for a mutually agreed separation. Therefore, they expected to be granted one and began making plans for the future. To be refused a separation, without a valid reason and in violation of the principles of international civil service law, has caused each complainant psychological and emotional harm.

The complainants ask the Tribunal to order the production of several documents. They request that they be granted a mutually agreed separation pursuant to Cluster Note 99/31 and that they be paid the salary, benefits and other emoluments that they would have been entitled to if they had been granted separation on 1 January 2000, plus ten per cent interest per annum from that date. They claim moral damages in the amount of 50,000 United States dollars per complainant, plus costs. They also claim any other relief that the Tribunal deems necessary, just and proper.

C. The WHO replies that the decisions not to grant the complainants a mutually agreed separation were neither arbitrary nor in breach of the principle of equal treatment.

It explains in detail the global MAS exercise. It was clearly stated in Cluster Note 99/31 that there was no right to receive a mutually agreed separation and that the Organization could refuse applications. Decisions on applications were taken in the best interest of the WHO and in accordance with the objectives set out for the exercise. The MAS Steering Committee, having consulted the Executive Director of each respective cluster and other relevant officials, made recommendations to the Director-General regarding expressions of interest from staff. Recommendations took into account the criteria set out for the exercise. The Director-General carefully reviewed the recommendations before taking her decisions and each individual was personally informed of the Director-General's decision on 13 December 1999. In the case of the complainants she decided, upon the recommendation of the Steering Committee, that a mutually agreed separation would not be in the interest of the WHO.

The Board of Appeal had found no flaws in the individual decisions contested, nor had any of the Organization's rules been breached; based on these findings the Director-General rejected the appeal. The WHO points out that the decisions at issue are discretionary, and are therefore subject to only limited review by the Tribunal. It contends that in the complainants' case the decisions were taken in proper exercise of discretionary authority and were not flawed; the complainants have offered no proof to the contrary.

The WHO argues that the case law cited by the complainants is not relevant here, as it differs in all critical aspects from the case at hand. It also distinguishes each complainant's situation from that of other staff members, arguing that each differed in fact and in law; it rejects the argument concerning the PAHO staff as irrelevant. It contends that the entire process was designed to "ensure objectivity and consistency" and there was no breach of equal treatment. It maintains that it did not discriminate between individuals.

The Organization denies that the complainants have suffered any moral injury. They were fully informed from the outset that the WHO could refuse applications for a mutually agreed separation, thus it would have been "unreasonable" for them to make plans before any decision was taken. Additionally, it states that the complainants' claim for moral damages is irreceivable: as they had claimed moral damages for a lesser amount in their appeal they cannot now expand upon their claims. Regarding the complainants' request for the production of documents, it

notes that these documents are confidential but would make them available to the Tribunal if the latter so requested.

D. In their rejoinder the complainants press their pleas and their claims. They submit that the complaints "clearly and succinctly demonstrate the Administration's arbitrary and deliberate breach of the principle of equal treatment". Furthermore, the Organization has still not provided "substantive reasons" for why it refused to grant them a mutually agreed separation. It has only provided vague references to "the interests of the Organization". The case law states that a discretionary decision must be taken objectively, and in this case such objectivity has been lacking. They also submit that the decisions were taken in a haphazard manner.

The complainants maintain that the criteria defined by Cluster Note 99/41 do not provide the requisite details for a proper decision. The criteria are unclear and confusing, have been inconsistently applied, do not support the objective of the MAS exercise, and do not define "in the best interest of the WHO". They allege that numerous candidates who did not fulfil the criteria set out for the exercise were nonetheless granted separations.

They contest the Organization's assertion that they have modified their claims from those submitted in the internal appeal. They had already made a claim for moral damages in their appeal; it is only the amount that changed in the claim for relief before the Tribunal.

E. In its surrejoinder the Organization refutes the complainants' allegations and observes that they have failed to prove them. Not only did Cluster Note 99/41 set out criteria relating to the retention or abolition of post that needed to be satisfied in order to grant a separation, but it also stated that a separation would not be allowed if it was in the WHO's interest "to retain that staff member's particular skills and experience"; the complainants' skills and experience were such that it was deemed important to the Organization to retain their services. The decisions were neither arbitrary nor capricious; they were taken in the proper exercise of discretionary authority in the light of the stated objectives and criteria for the MAS exercise.

The Organization recalls the Tribunal's case law that one official may not rely on the unjust enrichment of another, as equality in law does not embrace equality in the breach of it. In any event, the complainants' situations are distinguishable from the staff members they mention as having been granted separations even though they did not satisfy the criteria set out for the exercise.

As for the alleged failure to give reasons, the WHO says that these were set out in the letter informing the complainants of the refusal. Nevertheless, the Administration responded individually to each complainant who felt that this explanation was not sufficient.

CONSIDERATIONS

1. Except for some minor and irrelevant matters of detail, and differences in the manner and form, but not the substance of the arguments presented, the case of the present complainants is almost identical to that which was decided by the Tribunal in Judgment 2142 dealing with the mutually agreed separation exercise in the WHO. The cases could and should have been joined.

2. All issues, both procedural and substantive, were definitively dealt with by the Tribunal in that case. Counsel in both cases was the same. While that judgment is not technically *res judicata*, for there is no identity of the parties, it constitutes authoritative case law which the Tribunal will follow. Nothing is to be gained by any further recital.

DECISION

For the above reasons,

The complaints and the application to intervene are dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James

K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.