

114th Session

Judgment No. 3193

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. V. against the World Health Organization (WHO) on 25 August 2010 and corrected on 3 November 2010, WHO's reply of 7 February 2011, the complainant's rejoinder dated 29 May and the Organization's surrejoinder of 26 August 2011;

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

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

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

A. The complainant, a Belgian citizen born in 1969, joined the World Health Organization in 2003 as a Programme Assistant at grade G-5. In November 2005 she was appointed Assistant to the Assistant Director-General (ADG) in the Noncommunicable Diseases and Mental Health Cluster (NMH) on a fixed-term appointment at grade G-6.

She was informed in October 2007 that a Secretary at grade G-5 under her supervision would be leaving the Cluster as of 1 February 2008. Following discussions with Human Resources Management,

and with the approval of the acting ADG/NMH, she began the process of filling the vacancy from a roster of potential candidates and recommended one of the candidates to him. On 14 December 2007 the acting ADG/NMH interviewed that candidate and directed the complainant to seek the approval of the new ADG/NMH, Mr A., who had just been appointed with effect from 1 February 2008.

On 21 January 2008 Mr A. informed the complainant of his plans to upgrade the vacant post to grade G-6 and transfer Ms C., his current Assistant, to it. He explained that he had been advised by the Director of Human Resources Management to use the generic post description of a G-6 Assistant for this upgrade. Two days later he submitted a job description for the vacant post, with a request for its upgrade. On 25 January the complainant wrote to Mr A. and the Director of Human Resources Management expressing her concern over the apparent overlap between her duties and functions and those of the newly upgraded position, and requesting clarification. She received no written response from either. However, following a meeting with Mr A. on 28 January, she summarised the discussion in an e-mail of the same day to Mr A., noting in particular her understanding that she would no longer have a supervisory role over a Secretary and that the tasks of the former G-5 post would be moved to the new G-6 post. Mr A. explained to the Director of Human Resources Management in an e-mail of 15 February that he had proposed several modifications to the job description which would clearly distinguish the main responsibilities of the two G-6 Assistants, and that he had discussed the matter with the complainant on several occasions. Under the modified scheme, the complainant was to retain sole responsibility for ensuring the smooth running of the ADG's Office. The incoming G-6 Assistant would be responsible for more "thematic" matters such as "strengthening new technical partnerships". The revised post description at grade G-6 was approved by the Director-General on 21 February. That same day the Director-General approved the lateral reassignment of Ms C., who took up her functions in NMH on 1 March 2008.

Following that reassignment, the complainant objected that many of the tasks in her post description were now either shared with or transferred to the new Assistant, and also that she had been required to assume some tasks of the former G-5 post. She addressed her concerns to Mr A., the Management Officer for NMH, the Staff Association and the Ombudsman, *inter alios*, and a number of meetings subsequently took place on the subject.

On 9 April 2008 the complainant filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) challenging the classification of the new G-6 position. She requested that the Administration cancel the reclassification of the post and that it transfer her to another unit. In the statement which she subsequently submitted to the HBA, she requested in addition a review of the legality of the lateral reassignment, an overall analysis of the management of the Office of the ADG/NMH and moral damages.

On 5 May 2008 she filed a complaint of harassment against Mr A. with the Headquarters Grievance Panel. On 9 June the Director of Human Resources Management wrote to the Director-General requesting, in accordance with the recommendations of the Health and Medical Services, special approval for the transfer of the complainant on medical grounds out of NMH to another position of the same grade in another Cluster. He explained that “medical grounds are related to a working environment which has either resulted in high levels of stress that have affected the staff member or to inter-personal problems in the workplace which have resulted in the staff member becoming dysfunctional”. On 7 July 2008 the complainant was offered a lateral reassignment to a post of Assistant at grade G-6 in another Cluster, and on 1 October she took up her new position.

By a letter of 29 December 2009 the Director-General wrote to the complainant enclosing the Grievance Panel’s report and informing her that she had decided to close the case on the basis that the complainant’s allegations of harassment had not been substantiated, but that she regretted that the situation had “not [been] handled with sufficient sensitivity in the circumstances”.

In an undated report issued on or after 2 February 2010, the HBA concluded that the complainant had not produced evidence that her employment status had been considerably affected or that there had been prejudice or abuse of authority on the part of Mr A. It considered that the latter was entitled to restructure his Office and that the complainant had been duly consulted on this matter. However, it noted that her own unwillingness to collaborate might have contributed to the conflict and to her perception of unfair treatment. The Board therefore recommended that the appeal be dismissed, but it made a general recommendation, in the light of the fact that this was “not an isolated case”, for “clear guidelines or special provisions [...] as regards procedures of transfer in similar situations, where ADGs or other high level officials may request the transfer of their former assistants”.

On 27 May 2010 the Director-General informed the complainant of her decision to follow the HBA’s final recommendation and to dismiss her appeal in its entirety. That is the impugned decision.

B. The complainant alleges that the reclassification of the vacant post from grade G-5 to grade G-6 and the lateral reassignment of the ADG/NMH’s former Assistant to that post were unlawful since they were in breach of the procedures and principles governing the classification of posts and the selection of General Service staff within WHO. She asserts that the reclassification procedure contravened the WHO Manual, which provides that where a vacant post is reclassified it must be advertised, and that there was no real need to reclassify the post, since she was already there as a qualified G-6 Administrative Assistant, and the G-5 post could have been filled immediately from the available roster of candidates. She underlines that special criteria established in agreement with the Office of the Director-General apply to lateral reassignments, and she asserts that these criteria were not met in this case. On this basis the complainant argues that the reassignment was purely a matter of convenience for Mr A. and, as such, constituted an abuse of authority.

She submits that, as a result of the reclassification and reassignment of the ADG/NMH's former Assistant, some of the tasks included in her post description were transferred to the reclassified post and some of the duties of the former G-5 post were transferred to her, thereby reducing the scope of her work and the level of her responsibilities. Furthermore, her Performance Management and Development System (PMDS) work plan for 2008 was never finalised since, as she stated in an e-mail to Mr A. in March 2008, the tasks in the draft work plan did not reflect her post description. She asserts that the deterioration in her working environment severely affected her health, eventually leading to her transfer out of NMH.

The complainant also alleges procedural irregularities in the proceedings before the HBA and the Grievance Panel. Specifically, the Panel investigating her harassment complaint did not respect the rules concerning the involvement of an external expert, nor did it submit its report within the 90-day time limit. Similarly, in the proceedings before the HBA, the Administration submitted both its statement and its surrejoinder after the respective deadlines had expired, and the Director-General's decision was likewise issued six days after the expiration of the deadline for that decision.

The complainant asks the Tribunal to review the legality of the disputed lateral reassignment of a G-6 staff member to the vacant G-5 post and to award her moral damages "for the prejudice suffered from unhealthy conditions of work".

C. In its reply WHO submits that its decision to reclassify a vacant grade G-5 post to grade G-6 and to fill it through the lateral reassignment of a staff member did not affect the complainant's terms of appointment or involve any breach of the Staff Regulations applicable to her. The complainant's contractual appointment and grade remained unchanged, as did her post description. None of the duties attached to her post were transferred to the new G-6 post, and any overlapping duties would have been shared between the two Assistants, without affecting the complainant's grade or appointment

status. On this basis, and referring to Judgment 2670, WHO contends that the complaint is irreceivable.

In the alternative, WHO argues on the merits that the reclassification of the vacant post from grade G-5 to grade G-6 fully conformed to the Staff Rules and post classification procedures. It states that Staff Rule 410.4 expressly permits a post to be filled by lateral reassignment, rather than through the normal competitive process, when such a reassignment is in the Organization's interest. WHO underlines that the Tribunal's case law gives the Organization wide discretion in determining its programmatic and staffing requirements. As the HBA pointed out, Mr A. acted within the scope of his authority in deciding to restructure his Office and to establish a second grade G-6 Assistant post. This restructuring was reflected in the Human Resources Plan of the *Medium-Term Strategic Plan 2008-2013 and Programme Budget 2008-2009*, which was approved by the Director-General in February 2008. Moreover, the Director-General acted within the scope of her discretionary authority in approving the lateral reassignment of the ADG/NMH's former Assistant. Not only was there a need for additional assistance in the Office of the ADG/NMH, but the staff member in question had the requisite qualifications and experience to undertake the duties and functions of the position. WHO emphasises that since the complainant's reassignment out of NMH, the second G-6 Assistant position has been maintained.

The Organization asserts that extensive consultations took place with the complainant and that efforts were made in good faith to address her concerns. The post description of the reclassified post was distinguished from that of her own post by including in it specific duties and functions reflecting the special needs identified by Mr A. The complainant was to continue to focus on the administration of the ADG's Office, while the incumbent of the reclassified position was to focus on thematic issues. The defendant contends that the complainant was not willing to accept any changes to the Office of the ADG/NMH, and that the only solution agreeable to her was to revert to the previous structure in order that she retain all her previous duties and responsibilities. Such an attitude took into account neither the

needs of the new ADG/NMH, nor the authority of the Organization to restructure his Office.

Regarding the complainant's PMDS work plan for 2008, WHO submits that it was not finalised because the complainant declined to discuss Mr A.'s recommended objectives and planned outputs, despite his invitations for such a discussion. Referring to the complainant's allegation regarding the deterioration of her health, the Organization points out that she could have brought a claim for service-incurred illness through the appropriate channels, but she chose not to do so. Moreover, the Grievance Panel reviewed her work conditions as part of its consideration of her harassment complaint against Mr A., and the Panel's findings were taken into account by the HBA, which concluded that no award of moral damages was warranted. WHO subscribes to this conclusion.

With respect to the alleged breach of procedural rules in the proceedings before the HBA, the defendant asserts that the HBA accepted an extension of the deadlines in accordance with its procedures. It considers that the complainant's submissions regarding the proceedings before the Grievance Panel fall outside the scope of her complaint, since she did not challenge the Director-General's decision on her harassment complaint within the required time limit. In any case, WHO denies that the Grievance Panel breached its rules of procedure.

D. In her rejoinder the complainant presses her pleas. She maintains that the reclassification of the grade G-5 post to grade G-6 was "artificial" in that it was not based on any increased workload, and she asserts that the real reason underlying it was the "ADG's personal interest to move to NMH with his secretary", which constitutes an abuse of authority. Furthermore, the Administration was complicit in this abuse and failed to give due consideration to her dignity and work environment.

The fact that the second G-6 Assistant position has been maintained since her reassignment out of NMH is, in her view, irrelevant to her complaint. Whereas she was faced with a change

in the duties and functions which she had previously been exercising, the staff member replacing her would have been faced with an entirely new situation to which it would have been easy to adapt. Relying on Judgment 631, the complainant asserts that the reclassification and reassignment, by diminishing the responsibilities and effectiveness of her position, did affect her personal status within WHO.

Regarding the relief that she claims, she indicates that she seeks a determination that the reclassification and lateral reassignment constituted an abuse of authority, an award of moral damages equivalent to three years' net salary for the prejudice suffered and the consequences for her health, and 15,000 Swiss francs in costs.

E. In its surrejoinder WHO reasserts its position. It maintains that there was a significant and foreseeable increase in the workload in the Office of the ADG/NMH, and that the additional support of a second G-6 Assistant was authorised solely in the interest of the Organization and not for Mr A.'s "personal interest". In addition, it notes that, insofar as the complainant's claims for redress differ from those put forward in her internal appeal and in her complaint, such claims are, in accordance with the Tribunal's case law, irreceivable.

CONSIDERATIONS

1. The complainant challenges both the reclassification of the vacant post in her Cluster from grade G-5 to grade G-6 and the decision to appoint the ADG/NMH's former Assistant to that post by a lateral reassignment. She alleges that the two decisions involve breaches of the procedures and principles governing the classification of posts and lateral reassignments and the WHO Manual, and she relies primarily on these alleged breaches and the speed with which the decisions were taken to demonstrate that they are tainted by abuse of authority. She submits that the decisions in question affected her appointment status because they had an impact on her functions and responsibilities. She argues that the scope and the nature of the duties used to classify the new G-6 post were similar in several respects

to her own and, as a result, in several aspects deprived her of her own tasks and left her feeling sidelined. She contends that these administrative actions caused her to suffer injury to her health.

2. WHO submits that the decision to reclassify the vacant G-5 post did not affect the terms of the complainant's appointment. Her post grade and description remained the same. Furthermore, none of her duties were shifted to the new post. In terms of any overlap in the duties of the two G-6 posts, WHO maintains that the overlap would have been shared between the complainant and Ms C., taking into account the anticipated increase in the volume of the work of the ADG/NMH's Office. The defendant also submits that the complainant's appointment status was equally unaffected by the lateral reassignment decision. In support of its position the Organization relies on Judgment 2670, in which the Tribunal stated, under 5, that:

"The decision to reassign Mr K. to another post at grade ND.07 did not in any way affect the terms and conditions of the complainant's employment nor did it involve a breach of the Staff Regulations. Furthermore, it did not adversely affect the complainant's rights or interests nor did it cause him any injury."

In short, WHO contends that the complainant has no cause of action.

3. It is convenient to deal firstly with the alleged breaches of the provisions of the WHO Manual in force at the material time. Turning to the reclassification of the post in question from G-5 to G-6, the complainant submits that the decision to reclassify the post was taken less than two years after an earlier review of the post in June 2006, in violation of the version of WHO Manual paragraph II.1.110 then in force, which provided that posts should not be reviewed more than once every two years.

4. The complainant's reliance on Manual paragraph II.1.110 is misplaced. At the material time it read as follows:

"Staff members who feel that their post is not properly classified may request a review by sending a memorandum to the human resources officer/regional personnel officer, [...]. Normally, posts will not be

reviewed more than once every two years, unless there are significant changes in the level of duties and responsibilities.”

This section pertains to a staff member’s right to request a review of the classification of the staff member’s post and limits the frequency of such reviews in normal circumstances. It does not preclude a reclassification of a post by the Administration in the interests of the Organization.

5. The complainant’s reliance on the version of WHO Manual paragraph II.3.290 then in force in support of her assertion that Mr A. wrongfully initiated the reclassification of the G-5 post before it was vacant is also misplaced. At the material time, paragraph II.3.290 stated that recruitment to any post could not take place until the post had been established and classified. It is noted that this section dealt with the creation and classification of a new post and not the reclassification of an existing post. In contrast, at the material time Manual paragraph II.1.80 specifically dealt with requests for classification action in relation to established and classified posts and it provided that the action could be initiated by a supervisor when necessary.

6. The complainant also identifies a number of alleged flaws in what may broadly be described as the recruitment process for the newly classified G-6 post. She alleges that the failure to advertise the new G-6 post contravened Manual paragraph II.1.206, which provided that in “the case of the reclassification of a vacant post, the HRO/RPO initiates action to advertise the post according to the provisions contained in Manual [paragraphs] II.3. 250-310”. She argues that the decision not to advertise the G-6 post and, instead, to fill the vacancy by lateral reassignment deprived qualified fixed-term General Service staff of the opportunity to be considered for the position. Further, she points out that the lateral reassignment was decided at a time when lateral reassignments had been frozen by the Administration. According to the complainant, in November 2007, following a discussion about the issue of lateral reassignments and in keeping with the case law, it was decided that until further notice “all such

opportunities” would be advertised internally and the “applications would be reviewed in the normal way by a selection panel [...] other than in exceptional circumstances where it was not practicable to issue a Vacancy Notice”. The complainant argues that the criteria the Administration established to determine whether issuing a vacancy notice was not practicable in the circumstances may be found in a memorandum dated 21 February 2008 from the Director of Human Resources Management to the Director-General. The Director explained that it would be relevant to consider whether the vacant post was located in a programme that was essential to WHO fulfilling its mandate, whether the post functions were essential to effective programme delivery, and whether there were special management or programmatic circumstances warranting strong leadership or particular technical expertise from the moment the post became vacant. Furthermore, factors should exist underlying the need to fill the post on an urgent basis (e.g. sudden death, dismissal, waiver of resignation period, unexpected reassignment), and there should be no qualified readily available staff member who could perform the duties on an acting basis. The complainant argues that none of these criteria were met and that it was entirely practicable in the circumstances to post a vacancy notice for the new G-6 position.

7. In response, WHO submits that where the reassignment of an existing staff member is in the interest of the Organization, there is no requirement to advertise a newly classified post. It maintains that the Director-General, in keeping with her authority and discretion, determined that there was an immediate need for additional assistance in NMH and that Ms C. had the requisite qualifications and experience to undertake the duties of the position.

8. It is helpful to consider the allegations in relation to the lateral reassignment within the broader context of the post reclassification.

Firstly, in its reply WHO states that before assuming his new role, Mr A. conducted a staffing needs assessment for NMH and concluded that he needed two G-6 posts instead of one G-5 post and one G-6 post in his Office. However, there is nothing in the file record to support

the assertion that such an assessment was carried out before the initial request for the reclassification was made. In particular, there is no evidence of an evaluation of the specific additional duties and responsibilities entailed in meeting the new challenges of the 2008-2013 Action Plan that could not be met within the existing staffing structure of the Office, or of the grade of staff required to meet any identified needs.

Secondly, in an e-mail of 18 January 2008 to the Administration, Mr A. simply indicated his intention to have two G-6s in his Office, stating: “In this respect and as discussed with you, I would like to request the transfer of my Assistant, Ms [C.] [...] as from 1 February.” The Director of Human Resources Management responded that in order to “implement this lateral transfer NMH should request a reclassification”.

Thirdly, the 13 February 2008 Personnel Requisition form for the lateral reassignment pre-dates the finalisation of the post description.

Fourthly, Manual paragraph II.1.60 in force at the material time required, among other things, that for a post description to be valid its substance and content had to be certified by certain officials. The final version of the G-6 post description included the following certification: “Certified as an accurate description of the duties/responsibilities assigned and performed (if post is occupied)”. It stated that it was signed and approved by the first-level supervisor, the second-level supervisor, a Human Resources Officer and a Classification Specialist. With the exception of the Classification Specialist, who signed and approved the post description on the same date that the Director-General approved the reclassification, the signatories approved and signed the certification before the post description was finalised.

Fifthly, given that there was a freeze on lateral reassignments in place at the material time, it could reasonably be expected that there would be some documentation in the file record indicating the justification for the departure from the freeze.

Lastly, it took approximately one month from the date of Mr A.’s request to obtain the approval of the reclassification and lateral reassignment.

9. In Judgment 2803, under 8, the Tribunal observed that “according to a long line of precedent going back to Judgment 476, in order for there to be misuse of authority it must be established that the decision rested on considerations extraneous to the Organization’s interests”. Additionally, the staff member alleging abuse of authority bears the burden of establishing the improper purpose for which the authority was exercised (see Judgment 2104, under 8). It is also equally well established that the executive head of the organisation will generally be regarded as the best judge of what is in the organisation’s interests and the Tribunal will not normally interfere with that assessment. However, it is not sufficient to claim that a decision was taken in the interests of the organisation. The grounds upon which that conclusion is made must be clear to permit the Tribunal to exercise its power of review.

10. WHO submits that in making the disputed decisions the Director-General exercised her discretion and took into account “the particular and immediate needs of the NMH cluster”. It is noted, however, that the Director-General endorsed the HBA’s finding that Mr A. “was in his right to restructure his office as he saw best [...] and that it was part of an approved plan”. Leaving aside the question of the correctness of this statement in law, it is also noted that WHO’s Administration submitted before the HBA, as it did before the Tribunal, that the disputed decisions were the result of an objective evaluation of staffing needs. However, as noted above, there is no evidence in the file record to support this assertion. As well, as in its submissions before the Tribunal, WHO argued that it was anticipated that the heightened agenda and the challenges facing Mr A.’s Office in the years ahead would provide a volume of work sufficient for two G-6 Assistants. While it is reasonable to expect that a major project of some six years’ duration would increase the workload of Mr A.’s Office, there is no evidence of any attempt to identify the anticipated volume and nature of the workload and to formulate a plan to deal with the increased workload. The Tribunal concludes that there was no evidentiary foundation for the HBA’s finding that the decisions were part of an approved plan.

11. It is clear from the above considerations that the reclassification was inextricably linked to the lateral reassignment request. The only reasonable inference that can be drawn is that the reclassification and lateral reassignment decisions were not motivated by the needs of the Organization or the particular needs of NMH. Rather they were made to facilitate Mr A.'s personal interest in having his Assistant continue to work for him in his new position.

12. It is necessary now to consider what is the appropriate relief. In a case where a complainant establishes that the disputed decision involved an abuse of power, the appropriate relief is often to set aside the decision. Indeed, such a decision should not stand in the face of the conclusion that it involved an abuse of power. Usually such a case will involve a decision directly impacting on the complainant, who is entitled to have the decision nullified. However, the present case is somewhat unusual. Firstly, as can be seen under B above, the complainant does not seek to have the disputed decisions set aside. That is understandable because the decisions did not directly impact on the complainant. It was the indirect consequences of the decisions that adversely affected her. Secondly, the person upon whom the decisions operated directly, Ms C., is not a party to these proceedings and has not had the opportunity to make comments on the case presented by the complainant. However, were the disputed decisions to be set aside by an order of this Tribunal, this would have an immediate, significant and likely adverse effect on Ms C.

The Tribunal observed in Judgment 496, under 38, on the question of relief after it had concluded there had been an abuse of power, that:

“Under Article VIII of its Statute ‘the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him’. If the Tribunal was to order the rescinding of the decision, the result would be [...] inadvisable.”

Similarly, in the somewhat unusual circumstances of this case, it would be inadvisable to set aside the disputed decisions notwithstanding the Tribunal's finding that they involved an abuse of power. The appropriate remedy is therefore to award the complainant moral damages for the indirect consequences of the decisions the Tribunal has concluded were legally flawed.

13. WHO maintains, however, that the complainant did not suffer any injury as a result of the challenged administrative actions. The defendant submits that every effort was made to take into account the complainant's concerns through a number of meetings between Mr A., the complainant and Ms C., but the complainant was uncooperative and insisted that she be permitted to retain all of her previous duties and responsibilities.

14. It is difficult to quantify the changes to the complainant's duties and responsibilities as a result of the reclassification exercise; however, it is clear that she lost the responsibility of supervising the work of the G-5 position and that she had to take on some of the duties of that position. Additionally, she lost the thematic aspects of the work she did prior to the reclassification.

15. More importantly, given the manner in which the reclassification and lateral reassignment came about and that the lateral reassignment involved Mr A.'s former Assistant, the complainant had legitimate concerns regarding her role in the reorganised office. She expressed her concerns from the outset; however, these concerns went essentially unanswered until Ms C. assumed the new post on 1 March 2008. In the circumstances, it is not unexpected that the complainant felt isolated and sidelined. During the process of the reclassification and the lateral reassignment, WHO did not treat the complainant with the dignity and respect owed to a staff member, for which she is entitled to moral damages in the amount of 10,000 Swiss francs. She is also entitled to an award of costs in the amount of 1,000 francs.

16. Lastly, on 5 May 2008 the complainant also filed a harassment complaint against Mr A. On 29 December 2009 the Director-General decided the matter in accordance with the Grievance Panel's report and concluded that harassment was not made out in the circumstances. The complainant advances claims concerning the Grievance Panel's failure to respect its rules and procedures. As the complainant did not file a related complaint with the Tribunal within the time limit set out in Article VII of its Statute, these claims are irreceivable.

DECISION

For the above reasons,

1. The Director-General's decision of 27 May 2010 is set aside.
2. WHO shall pay the complainant moral damages in the amount of 10,000 Swiss francs.
3. It shall also pay her 1,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Michael F. Moore
Catherine Comtet