

118th Session

Judgment No. 3380

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr D.C. P. against the World Health Organization (WHO) on 13 September 2012, WHO's reply of 17 December 2012, the complainant's rejoinder of 9 January 2013, corrected on 21 February, and WHO's surrejoinder of 10 April 2013;

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

Having examined the written submissions;

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

A. In June 2009 WHO published a vacancy notice for the position of National Professional Officer (Fellowships) in New Delhi (Post No. 5.1954). The complainant applied for the vacancy and was invited to take a written test but he was not placed on the shortlist. On 3 February 2010 the Administration selected another candidate, Ms S., for the position and the complainant was so informed on 8 February.

In April 2010 he challenged his non-selection before the Regional Board of Appeal (RBA), alleging personal prejudice on the part of a supervisor or of any other responsible official, incomplete

consideration of the facts and failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules, or the terms of his contract. In its report of 11 May 2011 the RBA recommended that the selection for the contested post be treated as null and void. On 19 July 2011 the complainant was informed that the Regional Director considered some of his allegations to be irreceivable and that he had decided to dismiss the claims the complainant had set out in his appeal. Nevertheless, he had concluded that the selection procedure had been flawed, as the Administration had erroneously applied the Selection Guidelines for General Service Staff in the WHO South-East Asia Region, IC-2007-33 (hereinafter “the Selection Guidelines”) to a competition for a National Professional Officer position. As a consequence, he had decided to set aside the decisions of 3 and 8 February 2010, to move Ms S. to a different post with commensurate duties and responsibilities, to abolish the contested post, and to establish a grade P.2 post instead. He awarded the complainant costs, but rejected his claims for damages.

In July 2011 the complainant filed an appeal with the Headquarters Board of Appeal (HBA) in which he reiterated the allegations he had made in his appeal before the RBA. He argued *inter alia* that the Administration had consistently treated him in a biased manner, in particular by delaying its consideration of a request for the reclassification of his post, by dismissing a claim he had made for a difference in pay for a period when he had acted as a National Professional Officer, and by subjecting him to harassment for approximately seven years. He also accused the Regional Director and the RBA of bias. In addition, he asserted that the shortlisted candidates were not properly evaluated in light of the vacancy notice for the contested post, that there were further procedural flaws in the selection procedure and in the proceedings before the RBA, and that the Regional Director had failed to identify in his decision which of the complainant’s allegations were irreceivable. By way of redress, he requested that Ms S. be downgraded and that the vacant position be filled through an open competition. He also sought material and moral damages, costs, and any other compensation deemed appropriate by the HBA and the Director-General.

Before the HBA issued its report, the complainant filed the present complaint with the Tribunal, in which he indicated that he had notified his claim to WHO on 14 September 2011. The HBA subsequently submitted an undated report to the Director-General on 16 November 2012 in which it recommended, among other things, that the complainant be awarded 2,000 United States dollars for the delay in the internal appeal process and that his remaining claims for redress be dismissed.

In a decision of 3 December 2012 the Director-General stated that, to the extent that the complainant challenged his non-selection for the contested post, his appeal had been overtaken by events because the Regional Director had set aside the decisions of 3 and 8 February 2010. The Director-General agreed with the HBA's conclusions that several of the complainant's allegations and claims were irreceivable. She stated that his claim that Ms S. be "downgraded" went beyond his earlier related request for relief before the RBA and thus, was irreceivable. Moreover, the decision to reassign Ms S. was not a decision that affected the complainant's contractual relationship with WHO and therefore, this aspect of his appeal was irreceivable. With respect to his allegations of bias and prejudice related to the cancelled selection, she referred to the findings and conclusions of the HBA and informed the complainant that she endorsed its recommendations that he be awarded 2,000 dollars for the delay in the internal appeal process and that his remaining claims for redress be dismissed.

B. Referring to the Tribunal's case law, the complainant submits that WHO deliberately caused undue delay in the internal appeal process. Thus, he had reasonable grounds upon which to conclude that his appeal had been implicitly rejected by the HBA and to bring his complaint directly to the Tribunal.

On the merits, the complainant asserts that the Regional Director should have based his decision to set aside the selection of Ms S. on the grounds he pleaded, i.e. that there was personal bias against him. In addition he reiterates, in particular, several criticisms of the

selection procedure for the contested post and he accuses Ms S. of influencing the selection. In order to avoid duplication in his submissions, he asks the Tribunal to refer to the arguments and evidence that he presented to the HBA.

The complainant requests oral proceedings in the event that the Tribunal considers such proceedings to be “in the interest of the case” and if the cost of attendance at those proceedings is borne by WHO. He asks that “[a]ccountability [...] be fixed by the Tribunal for the “wanton harassment” to which he was subjected. He seeks one million United States dollars for moral and material injury due to administrative bias against him spanning nine years, costs in the amount of 5,000 dollars, and any other relief the Tribunal deems just.

C. In its reply WHO submits that the complainant is impugning the Regional Director’s decision of 19 July 2011 and that the present complaint is receivable only insofar as he challenges his non-selection for the contested post and alleges bias in the selection process. To the extent that he makes other unrelated and unsubstantiated allegations, his complaint is irreceivable. WHO reiterates the Director-General’s conclusion that the complainant’s claim that Ms S. be “down-graded” is irreceivable both because it expands on his earlier related claim for relief and because the Regional Director’s decision to reassign Ms S. does not affect the complainant’s contractual relationship with WHO.

On the merits, WHO submits that the Regional Director’s decision to reassign Ms S. to another post at the same grade was lawful. Furthermore, referring to the case law, it contends that the complainant bears the burden of proving his allegations of bias, personal prejudice and harassment related to the selection process and he has failed to do so. It reiterates the findings of the HBA and the Director-General in this respect and emphasises that the complainant was not selected for the contested post for objective reasons. It acknowledges that there were delays in the internal appeal process but argues that they were not the result of bias or prejudice against the complainant, nor was he subjected to harassment. The complainant

was awarded 2,000 dollars in damages for the delay, which WHO considers to be full and fair compensation.

WHO asserts that the complainant's claim that the vacant post should be filled by way of an open competition is not warranted by the facts of the case. Indeed, the contested post has been abolished. Lastly, it contends that there is no basis for an award of exemplary damages.

D. In his rejoinder the complainant presses his pleas. He argues that the Director-General was wrong to find some of his claims and allegations irreceivable. Moreover, according to the complainant, the reassignment of Ms S. resulted in a permanent loss of opportunity for him insofar as the Regional Director has abolished National Professional Officer positions in the Regional Office.

E. In its surrejoinder WHO maintains its position in full. It emphasises that there is no connection between the decision to reassign Ms S. and the decision to no longer have National Professional Officer positions in the Regional Office, and that the latter decision is in any case beyond the scope of the complaint.

CONSIDERATIONS

1. The complainant requests oral proceedings. However, the briefs and the evidence submitted by the parties are sufficient to enable the Tribunal to reach an informed decision. The complainant's application for oral proceedings is therefore rejected.

2. In June 2009, the complainant applied for the position of National Professional Officer (Fellowships) but was not selected. In his internal appeal from that decision before the RBA, the complainant alleged "perpetual administrative bias" over the course of seven years that included allegations of unequal treatment in other selection processes, allegations regarding his claim for differential pay

for performing duties pertaining to the National Professional Officer post, and in relation to requests for the reclassification of his former post. For the purpose of this discussion they will be collectively referred to as the allegation of perpetual administrative bias. He also claimed procedural flaws in the selection process that he also attributed to bias against him and bias in favour of the successful candidate on the part of the Selection Committee and irregularities in the composition of the Selection Committee.

3. The Regional Director concluded that the Administration had erroneously applied the Selection Guidelines for General Service Staff to a competition for a National Professional Officer position and set aside the selection decision. In light of his earlier decision to discontinue the use of National Professional Officer positions in the Regional Office, he abolished the post at issue and established a P.2 position against its functions and moved the selected candidate to a commensurate post. The Regional Director also concluded that several of the allegations were outside the scope of the appeal and were, therefore, irreceivable. Although he did not specifically identify each allegation, it is clear from a reading of the decision that he was referring to incidents unrelated to the selection process upon which the allegation of perpetual administrative bias was based. Lastly, he awarded the complainant costs in the amount of 10,000 Indian rupees.

4. The complainant appealed from the Regional Director's decision to the HBA. In addition to the claims advanced before the RBA, the complainant also alleged bias on the part of the Regional Director and the RBA. In summary, the HBA found no evidence of personal prejudice or bias; the allegations concerning the selection process were without merit; and the HBA agreed with the Regional Director that the use of the Selection Guidelines constituted a procedural flaw. The HBA also found undue delay in the internal appeal process, however, there was no evidence that the delay was intended to harm the complainant and the HBA found that it did not amount to harassment. The HBA recommended that the complainant

be awarded 2,000 United States dollars for the delay in the internal appeal process and that all other claims be dismissed.

5. The Director-General found that to the extent the complainant was appealing the decision not to select him for the post, his appeal had been overtaken by the Regional Director's decision setting aside the selection decision. The Director-General endorsed the HBA's opinion that the allegation of administrative bias over the course of seven years and other allegations unrelated to the selection process were beyond the scope of the appeal and were irreceivable. The Director-General accepted the HBA's conclusion that there was no evidence of personal prejudice, bias or undue influence on the part of SEARO or the Selection Committee and that the delay in the appeals proceeding was not evidence of prejudice. The Director-General awarded the complainant 2,000 United States dollars as compensation for the undue delay in the internal appeal process and dismissed all other claims.

6. Before the Tribunal, the complainant essentially reiterates the claims advanced in the earlier proceedings. However, in his rejoinder in this proceeding, he also claims that "the reassignment of the selected candidate has resulted in permanent loss of opportunity for [him] as the [Regional Director] has abolished National Professional Officer positions in the Regional Office". As noted above, the decision to abolish the post at issue was based on the Regional Director's earlier decision to discontinue the use of National Professional Officer positions in the Regional Office. The latter decision was unrelated to the reassignment of the successful candidate or to any aspect of his decision to set aside the selection decision. Accordingly, it is beyond the scope of the present matter and is irreceivable.

7. At this point, it is convenient to observe that the complaint in relation to the non-selection decision is framed in terms of procedural irregularities and other flaws in the selection process. These alleged

irregularities are also relied upon to show that the selection process was tainted by bias and they also form part of the broader claim of a pattern of bias over a long period of time.

8. As set out above, both the Regional Director and the Director-General concluded that the claim of “perpetual administrative bias” was beyond the scope of the internal appeal and irreceivable. It is correct that the complainant cannot challenge the administrative decisions or actions that underpin his allegation of “perpetual administrative bias” in the context of his present complaint. However, events or conduct that cannot be impugned may nonetheless be relevant in assessing whether another event or other conduct was motivated by bias. Prior biased conduct on numerous occasions can be used to support an inference that the impugned conduct was also motivated by bias. Although this aspect of the Regional Director’s and the Director-General’s analysis involves a reviewable error, as will become evident below, no material consequences result from the error and no remedy is necessary.

9. It is well settled that the complainant bears the burden of proving allegations of bias. Moreover, the evidence adduced to prove the allegations must be of sufficient quality and weight to persuade the Tribunal (see Judgment 2472, under 9). It is also recognized that bias is often concealed and that direct evidence to support the allegation may not be available. In these cases, proof may rest on inferences drawn from the circumstances. However, reasonable inferences can only be drawn from known facts and cannot be based on suspicion or unsupported allegations.

10. In this case, the complainant has simply identified various incidents that have occurred over time and alleges that they show a pattern of bias against him. He has not adduced any evidence whether circumstantial or otherwise to show that the various actions identified either collectively or alone were motivated by bias or reflect a broader

attitude of bias against him. His allegations of bias are unsupported by any evidence, are grounded on suspicion and do not permit any reasonable inference of the existence of bias to be drawn.

11. As to the alleged flaws in the selection process, as the Director-General correctly determined, all of the claims arising from the selection process have been overtaken by the setting aside of the selection decision and require no further consideration. As concerns the complainant's assertion that the delays in the internal appeal process were deliberate and amount to harassment, there is no evidence to support the assertion and it is rejected. The unacceptable delay was acknowledged by the Director-General and the complainant was awarded compensation for the undue delay. While the Tribunal cannot condone such delay, it must be observed that the complainant's claims were extensively and carefully examined and objectively reviewed at both levels of the internal appeal.

12. One matter remains. At the RBA hearing in January 2011, the Administration agreed to provide the complainant with copies of certain documents he had requested. However, on the grounds of confidentiality, the Administration later refused to give the copies to the complainant. Nonetheless, the documents were submitted to the RBA. As the Tribunal stated in Judgment 3264, under 15:

"It is well established in the Tribunal's case law that a 'staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him'. Additionally, '[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality' (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23)."

In the present case, one of the documents was clearly material and, in fact, was, later in the appeal process, relied on by the HBA in its finding that the replacement of the interested party on the Selection Committee was due to conflict of interest and not bias. The failure to

disclose this document constitutes a breach of procedural fairness. In the circumstances of this case the appropriate remedy is an award of moral damages in the amount of 1,000 United States dollars. All other claims are dismissed.

DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the amount of 1,000 United States dollars.
2. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

DOLORES M. HANSEN
MICHAEL F. MOORE
HUGH A. RAWLINS
DRAŽEN PETROVIĆ