

**P. (No. 7)**

*v.*

**WHO**

**123rd Session**

**Judgment No. 3758**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr D. C. P. against the World Health Organization (WHO) on 27 January 2014, WHO's reply of 18 June, the complainant's rejoinder of 7 August and WHO's surrejoinder of 7 November 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges his non-selection for a post.

In February 2010 the complainant applied for the position of National Professional Officer, Office of the Regional Director (post No. 5.0010) in WHO's South-East Asian Regional Office (SEARO). By a letter of 12 March 2010 he was informed by the Administration that he had not been selected for that post.

By a memorandum of 19 July 2011 the complainant received a decision of the Regional Director regarding the internal appeal he had filed with the Regional Board of Appeal (RBA) challenging his non-selection for another post (post No. 5.1954) (this matter later became the subject of the complainant's sixth complaint before the Tribunal which resulted in Judgment 3380, delivered in public on 9 July 2014). Among

other things, the Regional Director concluded that the selection procedure for post No. 5.1954 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 related selection decision and the decision in which the complainant was notified of that selection, to move the successful candidate to a different post with commensurate duties and responsibilities, and, given his recent decision to discontinue to use of National Professional Officer positions in the Regional Office, to abolish post No. 5.1954 and to establish a grade P.2 post instead.

In view of the decision of 19 July, in a letter of 21 July 2011 the complainant requested the Regional Director to set aside the selection for post No. 5.0010 on the basis that the Selection Guidelines had also been applied to the competition for post No. 5.0010. He acknowledged that under the applicable limitation period he was time-barred from filing an intention to appeal in the matter, but he characterised the Regional Director’s decision (of 19 July 2011) regarding the flawed application of the Selection Guidelines as a “new fact” which had just come to light. On 22 August 2011 the complainant filed a notice of intention to appeal with the RBA against the Regional Director’s memorandum of 19 July. By a letter of 25 August he was informed that the Regional Director had refused his request for review on the grounds that he was time-barred from challenging the selection for post No. 5.0010.

On 1 September 2011 the complainant filed a formal statement of appeal in which he challenged the Regional Director’s decision of 25 August. In its report of 11 April 2012 the RBA considered that the appeal was receivable and recommended that, as the complainant had a tenable grievance, he needed to be suitably compensated in a manner deemed fit by the Administration.

The complainant was notified by a letter of 8 May 2012 that the Regional Director had decided to dismiss his appeal in its entirety as irreceivable. In particular, he did not agree with the RBA’s finding that the decision contained in the letter of 19 July 2011 provided grounds to

extend the limitation period applicable to challenge the selection procedure for post No. 5.0010.

On 17 May 2012 the complainant filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) challenging the Regional Director's decision of 8 May 2012. In its report of 7 October 2013 the HBA found that the complainant was, in fact, contesting the decision regarding selection to post No. 5.0010 and it held that that decision had been transmitted to the complainant on 12 March 2010 and that he had failed to file a notice of intention to appeal with the RBA within the prescribed time limit of 60 calendar days. In addition, none of the circumstances of the matter provided any exceptions, as defined by the Tribunal's case law, to the statutory time limit to file an appeal. The Regional Director's decision of 19 July 2011 did not constitute a new fact and a new time limit had not commenced as from the date of that decision. The HBA concluded that the complainant's appeal to the RBA was irreceivable *ratione temporis* and *ratione materiae* and that the Regional Director's decision of 8 May 2012 was not tainted by any grounds for appeal. It recommended that the appeal be dismissed as not receivable in its entirety and that the complainant's claims for relief be rejected.

By a letter of 26 November 2013 the Director-General informed the complainant that, based on the HBA's analysis and reasoning, she agreed with its conclusions and recommendations that his appeal be dismissed as irreceivable in its entirety and that there be no payment of damages or costs. That is the impugned decision.

The complainant asks the Tribunal to set aside the appointment of the successful candidate (Mr K.) to post No. 5.0010. He seeks damages in the amount of 50,000 United States dollars for loss of opportunity to be promoted, moral and material damages, 5,000 dollars in legal costs and any other relief the Tribunal deems reasonable.

WHO requests the Tribunal to dismiss the complaint in its entirety.

## CONSIDERATIONS

1. In February 2010, the complainant applied for a National Professional Officer position, post No. 5.0010. He was notified of his non-selection for the post on 12 March 2010. On 22 August 2011 the complainant filed a notice of intention to appeal his non-selection with the RBA. In his letter of 21 July the complainant acknowledged that the challenge to his non-selection for the post before the RBA was beyond the sixty-day time limit in Staff Rule 1230.8.3. However, he contends that the emergence of a “new fact” rendered the otherwise time-barred appeal receivable. He also asserts that he did not lodge his internal appeal within the time limit because he relied on information provided by the Administration regarding the applicable selection guidelines for National Professional Officer posts.

2. The central issue in this complaint is whether the complainant’s internal appeal to the RBA was receivable. In particular, has the complainant demonstrated circumstances that warrant an exception to the application of the time limit specified in the Staff Rules.

3. The alleged new fact arises from the complainant’s non-selection for another National Professional Officer position, post No. 5.1954. The Administration informed him of his non-selection for that post on 8 February 2010 against which he launched an internal appeal in April 2010. Ultimately, on 19 July 2011 the Regional Director advised the complainant of the dismissal of all the claims he had advanced in his appeal. Notwithstanding this decision, he had decided to set aside the selection decision. The Regional Director gave the following reasons for this decision:

“I have had grounds to review the entirety of this selection in another context, and have had the benefit of further RBA considerations on the selection procedure. Although not an issue raised by you or discussed by the RBA in its consideration of your appeal, I am of the view that the Administration was incorrect in having applied Selection Guidelines for General Service Staff in WHO South-East Asia Region, IC-2007-33 (the ‘GSSC [General Service Selection Committee] Guidelines’) for this NPO selection. I have concluded that this was a flaw in the selection procedure, and

so have decided on this ground to set aside the selection decision of 3 February 2010 and the decision notified to you by letter of 8 February 2010.

[...]

I have in addition taken note of the other suggestions regarding NPO selection guidelines and the formulation of vacancy notices which the RBA made for my consideration. I have referred these matters to [the] Acting Regional Personnel Officer.”

4. Returning to the present complaint, in its 11 April 2012 report, the RBA found that the internal appeal was receivable on the basis that “[t]he [complainant] enjoys the benefit of an extension of the [l]imitation period for the said Appeal on the basis of the Memorandum from the Regional Director to him dated 19 July 2011 setting aside the selection to Post No. 5.1954 on account of procedural flaw/incorrectness of ‘having applied Selection Guidelines of General Service Staff in [the] WHO South-East Asia Region... for this NPO selection ... [which] was a flaw in the selection procedure...’”. On the substance of the appeal, the RBA observed “that it was an extra ordinary situation”. The RBA elaborated as follows:

“The General Service Staff Guidelines were being used for NPO selections in SEARO for over a decade now. For both the posts i.e. NPO-RDO and NPO-Fellowships, the Administration was not incorrect in following the existing selection procedures applicable at the time of selection. The decision taken by the Regional Director [in the] July 2011 memo stating that it was incorrect to apply General Service Selection Guidelines to NPO posts was a new fact.”

The RBA recommended that the complainant had a “tenable grievance and need[ed] to be suitably compensated for the same as deemed fit by the administration”. The Regional Director rejected the RBA’s recommendation and dismissed the appeal in its entirety. The complainant appealed this decision to the HBA.

5. Before reviewing the findings of the HBA, as noted above, the complainant states that on 15 January 2010 before he applied for post No. 5.0010 he sent an e-mail to the SEARO Regional Personnel Officer requesting “a copy of the current selection guidelines for national professional officers in SEARO”. The Regional Personnel Officer replied that Mr S. would provide him “with the guidelines for GS and

NPO selections (as they are the same)". Later that day, Mr S. sent the complainant an e-mail. The subject line of the e-mail reads "Selection guidelines for National Professional Officers" and the text of the e-mail states "The guidelines are attached, please." The complainant adds that, based on this information, he did not lodge an internal appeal against his non-selection for post No. 5.0010.

6. The HBA reviewed the Tribunal's case law in relation to the exceptions to the strict adherence to time limits and found that in the complainant's case no exception was established. The HBA observed that even though the complainant was provided with the Selection Guidelines on 15 January 2010, if he had consulted the HR e-manual he would have learned that the incorrect guidelines had been applied both before and after the selection decision for post No. 5.0010 was taken. As well, two other staff members in their respective internal appeals against their non-selection for post No. 5.1954 argued that the Selection Guidelines were not applicable to National Professional Officer selections. On this basis, the HBA found that there had been no new fact of decisive importance since the decision in regard to the selection for post No. 5.0010 and that the complainant could have been aware of the fact that the incorrect guidelines had been applied before the selection decision for post No. 5.0010 was taken. The HBA concluded that the complainant's appeal to the RBA was time-barred (and irreceivable *ratione materiae*) and, consequently, the appeal under consideration was also irreceivable. On 26 November 2013 the Director-General accepted the conclusions and recommendation of the HBA and dismissed the appeal as irreceivable in its entirety. This is the impugned decision.

7. The complainant submits that a new fact, that is, that the unlawful application of the Selection Guidelines to the selection for National Professional Officer posts only came to light in the Regional Director's 19 July 2011 decision. He claims that he did not have prior knowledge of the incorrect application of the Selection Guidelines nor could he have known about it. The complainant maintains that he "had done due diligence by checking the authenticity of [the] application of selection guidelines with the competent authority i.e. the Regional

Personnel Officer (RPO) conveyed [in] her email of 15 January 2010”. As he did not have any reason to doubt the information he had received confirming the legality of the Selection Guidelines, he did not lodge an appeal from the 12 March 2010 decision.

8. WHO submits that the complaint is irreceivable because the complainant failed to exhaust the internal means of redress. WHO points to the Tribunal’s case law concerning the important purpose served by time limits in view of the need for legal certainty in the legal relations between an organisation and its staff members. It argues that the circumstances of this case do not fall within the exceptions recognized in the case law concerning the purpose of time limits and their strict application. Moreover, the finding in the 19 July 2011 decision that the Selection Guidelines had been incorrectly applied to the National Professional Officer selection process at issue was not a new fact.

9. WHO also disputes the complainant’s reliance on the information he received from the Regional Personnel Officer. It takes the position that the Regional Personnel Officer sent the complainant the Selection Guidelines in line with the practice at the time which amounted to no more than the sharing of information that the complainant was free to challenge. WHO maintains that this does not justify the failure to lodge the internal appeal within the applicable time limits.

10. Under Article VII, paragraph 1, of the Tribunal’s Statute, a complaint will not be receivable unless the impugned decision is a final decision and the complainant has exhausted all the internal means of redress. This means that a complaint will not be receivable “if the underlying internal appeal was not filed within the applicable time limits” (see Judgment 3687, under 9).

11. As the Tribunal has consistently stated, the strict adherence to time limits is essential to have finality and certainty in relation to the legal effect of decisions. “When an applicable time limit to challenge a decision has passed, the organisation is entitled to proceed on the basis that the decision is fully and legally effective.” (See Judgment 3439, under 4.)

12. However, there are exceptions to the requirement of strict adherence to time limits. As stated in Judgment 3687, under 10 and 11:

“10. The case law also recognizes that in very limited circumstances an exception may be made to the rule of strict adherence to the relevant time limit. The circumstances identified in the case law are: ‘where the complainant has been prevented by *vis major* from learning of the impugned decision in good time or where the organisation, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith’ (see Judgment 3405, under 17; citations omitted); and ‘where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or where [the staff member concerned by that decision] is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken’ (see Judgment 3140, under 4; citations omitted).

11. It must also be added that a later discovery after the expiry of the time limit for appealing the challenged decision of an irregularity that might have rendered the decision unlawful does not in principle have a bearing on the requisite adherence to the time limit (see, for example, Judgment 3405, under 16).”

13. At the outset, it is observed that the finding in the 19 July 2011 decision that the incorrect guidelines had been applied is not a “new fact” as contemplated in the case law that would give rise to an exception being made to the strict adherence to the time limit for filing the internal appeal. Rather, it is a discovery made after the time limit for lodging an appeal has expired of an irregularity that might have rendered the decision at issue unlawful. As stated in Judgment 3687, under 11, this in principle does not have a bearing on the requisite adherence to the stipulated time limit.

14. Although the complainant framed his argument in terms of the discovery of a new fact, he also stressed that he relied on the information given to him by the Regional Personnel Officer. As noted above, the HBA discounted the receipt of this information. The underlying premise being that even though he had sought out and received the allegedly pertinent information from the Regional Personnel Officer, he should, nonetheless, have consulted the e-Manual before deciding what steps, if any, he should take. As will be discussed below, this reasoning

fails to take into account an organisation's obligations in circumstances such as those in the present case. The HBA also erred in relying on the fact that two other staff members knew, as evidenced by their respective appeals against their non-selection for post No. 5.1954, that the Selection Guidelines were not applicable to National Professional Officer selections. First, in assuming that since two other staff members knew that the Selection Guidelines did not apply to National Professional Officer selections, the complainant should also have or could have known, the HBA failed to have regard to other evidence. The complainant had also lodged an internal appeal against the same selection decision for post No. 5.1954. However, as stated in the Regional Director's 19 July 2011 decision, the complainant did not raise this argument in his April 2010 internal appeal to the RBA. The fact that he did not raise this well-founded ground of appeal as the others did was consistent with his receipt and reliance on the 15 January 2010 information from the Regional Personnel Officer. Second, this was extrinsic information to which the complainant did not have an opportunity to respond.

15. The facts of this case engage two important obligations of an international organisation. As stated in Judgment 2170, under 14, "[a]n international organisation has a duty to comply with its own internal rules and to conduct its affairs in a way that allows its employees to rely on the fact that these will be followed". An organisation also has a duty to ensure that accurate information is provided to staff members. In turn, a staff member is entitled to rely on that information.

16. WHO submits the complainant's argument to the effect that he checked the validity of the application of the Selection Guidelines with the competent authority is without merit. WHO maintains that the Regional Personnel Officer sent the applicable Selection Guidelines to the complainant for information. WHO points out that the "consistent practice in SEARO had been to use the selection guidelines for general service staff which the [Regional Personnel Officer] had properly transmitted to the complainant for [National Professional Officer] selections". Moreover, the Regional Personnel Officer's action amounted to no more than the sharing of relevant information that could be challenged.

17. WHO's position must be rejected. It is not disputed that on 15 January 2010 when the complainant requested "a copy of the current selection guidelines for national professional officers in SEARO", Selection Guidelines for National Professional Officer posts did not exist. Given that the HR eGuide in place at the time contemplated specific criteria and a process for the selection of National Professional Officers separate and apart from those applicable to the general service staff, the Regional Personnel Officer's response that the guidelines for General Service and National Professional Officer selections were "the same" was completely misleading in terms of the question posed and was completely at odds with the provisions in the HR eGuide. The existence of the practice of applying the Selection Guidelines to the selection of National Professional Officers for a number of years did not absolve the Regional Personnel Officer of her obligation to verify and provide accurate information in response to the complainant's inquiry.

18. In the circumstances of this case, the complainant was entitled to rely on the accuracy of the information he received and he could take from the information he received that the practice of applying the same Selection Guidelines to both categories of staff was lawful. The complainant, in fact, relied on the information to his detriment. He did not lodge an internal appeal against the decision at issue in this case until a long after the time limit for doing so had expired and, only then, because he had learned that the information he was given was inaccurate. Also, he did not raise the inapplicability of the Selection Guidelines, a well-founded ground of appeal, in his internal appeal against his non-selection for post No. 5.1954.

19. Although the motivation for doing so is unknown, the Tribunal finds that, contrary to the opinion of the HBA, the Administration acted in bad faith by deliberately misleading the complainant to his detriment. It follows that an exception must be made to the strict adherence to the time limit for lodging the internal appeal against the selection decision for post No. 5.0010. Accordingly, as the internal appeal to the RBA was receivable as was the appeal to the HBA, the complainant has exhausted the internal means of redress and the present complaint before the Tribunal is receivable.

20. On the merits, the complainant claims that “his complaint is full of merit and hence needs to be thoroughly evaluated and [he should] be suitably compensated”. However, he did not elaborate any further. He also maintains that the selection decision should be set aside on the same grounds as those that were applied to set aside the selection for post No. 5.1954. This argument is misplaced. The legality of a decision can only be considered on the basis of the evidence adduced in the proceeding in which the decision is being challenged and on the applicable law. Regard may not be had to findings in other cases. The complainant also submits that as a result of the Regional Director’s decision to abolish National Professional Officer posts he lost a valuable opportunity for promotion. That decision is clearly beyond the scope of this complaint and requires no further consideration.

21. The complainant, however, is entitled to moral damages in the amount of 10,000 United States dollars for WHO’s breach of its duty to act in good faith in its dealings with him.

22. In the circumstances the decision of the Director-General of 26 November 2013 will be set aside and the matter will be remitted to WHO for consideration by the HBA on the merits of the appeal against the selection for post No. 5.0010.

23. The complainant also claims compensation for the delay in the internal appeal. Given that the internal appeals were largely directed at the question of receivability, a delay of approximately 27 months is excessive. For this the complainant will be awarded moral damages in the amount of 2,000 United States dollars. He is also entitled to costs in the amount of 750 United States dollars.

## DECISION

For the above reasons,

1. The Director-General’s decision of 26 November 2013 is set aside and the matter is remitted to WHO for consideration by the HBA

on the merits of the appeal against the selection for post No. 5.0010.

2. WHO shall pay the complainant moral damages in the sum of 12,000 United States dollars.
3. WHO shall pay the complainant costs in the amount of 750 United States dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ