

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V. (No. 3)

v.

WHO

127th Session

Judgment No. 4100

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr C. K. V. against the World Health Organization (WHO) on 5 March 2015 and corrected on 12 June, WHO's reply of 23 September, the complainant's rejoinder of 4 November 2015 and WHO's surrejoinder of 9 February 2016;

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 the decision not to select him for a position for which he had applied.

The complainant was employed at WHO's Regional Office for South-East Asia (SEARO), in New Delhi (India), as a driver at grade ND.3. He applied for the post of senior driver at grade ND.4 (vacancy notice No. SEAR 2010/13), which was advertised in December 2010, but this vacancy notice was cancelled on 11 May 2011. He then applied for the post of senior driver, also at grade ND.4 (vacancy notice No. SEAR 2011/07) when it was advertised in September 2011.

On 11 November 2011 he was informed that he had not been selected and, on 5 December 2011, he lodged an appeal with the Regional Board of Appeal (RBA) challenging that decision. On 30 November 2012 the Regional Director informed him that he had decided to accept the RBA's recommendation to dismiss his appeal. The complainant filed an appeal with the Headquarters Board of Appeal (HBA) on 22 January 2013 against that decision.

In its report of 6 October 2014, the HBA found that the complainant had not lodged an internal appeal with the RBA against the selection process stemming from the first vacancy notice or against the decision to cancel that selection process. Hence, it considered that any claims made in that respect were irreceivable. The HBA found that the selection process stemming from the second vacancy notice was procedurally flawed, but it found no compelling evidence of abuse of authority and personal prejudice. It found no procedural flaw in the proceedings before the RBA or the HBA. It recommended that the decision of 30 November 2012, the selection process conducted with respect to the second vacancy notice and the resultant appointment be set aside, whilst shielding the selected candidate from any injury. It also recommended awarding the complainant moral damages and costs.

By a letter of 4 December 2014, the complainant was informed that the Director-General had decided that his appeal was irreceivable insofar as it related to the selection process stemming from the first vacancy notice, because he had not challenged that selection process through WHO's internal appeal system. With respect to the second vacancy notice, the Director-General held that the selection process was flawed. She therefore agreed with the HBA's recommendations to set aside the Regional Director's decision of 30 November 2012, to set aside the selection process and to shield the selected candidate from any injury that might result from the setting aside of the selection process. She also agreed with the recommendation to pay the complainant 1,500 United States dollars in moral damages, plus costs. She further decided that the selection for the post of senior driver should be carried out anew. All other requests for redress were rejected. The complainant

impugns that decision before the Tribunal, except insofar as it set aside the selection process.

The complainant asks the Tribunal to quash the impugned decision, except insofar as it set aside the selection process for the post of senior driver. He asks the Tribunal to appoint him to the post of senior driver with retroactive effect from the date of the contested selection. He also seeks moral damages for “wrongful denial of selection”, for inordinate delay in the internal appeal proceedings, and for the “biased decision to cancel the selection recommended by the [General Service Staff Selection Committee]” concerning the first vacancy for which he applied. He further seeks compensation for “loss of professional standing” and for the violation of “the right of objection to two members of HBA under staff rule 1230.4.3”. Lastly, he asks the Tribunal to award him any other relief it deems just and fair.

WHO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress insofar as it concerns the first selection process. It submits that the complaint is otherwise without merit.

CONSIDERATIONS

1. In summary, the complainant does not impugn the Director-General’s decision to set aside the second selection process. However, he submits that the Director-General erred in deciding that the selection for the post should be carried out again. He points out that he was qualified to be appointed to the post and he possessed better standards of efficiency, competence and integrity than the wrongfully selected candidate. Accordingly, the Director-General should have appointed him directly to the post. The complainant claims that the failure to do so denied him of his right to be selected for the post and a promotion. Moreover, it would be unfair to make him compete for the post a third time.

2. In his pleadings the complainant makes a number of assertions regarding the first selection process and alleges, among other things, that the cancellation of that process was an abuse of authority and

showed bias on the part of the Administration. It is noted that in the present complaint, he also seeks an award of moral damages for the “biased decision to cancel the selection recommended” by the selection committee in the first selection process. The complainant disputes WHO’s position that his references to these allegations and claim for moral damages are beyond the scope of the complaint and irreceivable for failure to exhaust the internal means of redress. However, he does not dispute the fact that he did not lodge an internal appeal against any aspect of the first selection process including its cancellation. He also stresses that he is not impugning any aspect of the first selection process in this complaint.

The complainant submits that his references to the abuse of authority and bias underlying the decision to cancel the first selection process are necessary because of the link between the first and second selection processes that shows the second process was also tainted by abuse of authority and bias. For this reason, the complainant argues that as the cancellation of the first selection process is a relevant fact in the present complaint, he is entitled to refer to the reasons underpinning the earlier cancellation decision in support of his claims.

3. The Tribunal’s case law establishes that a known fact arising from an earlier administrative decision or a failure to act on the part of the Administration may be relied on in a subsequent proceeding even though the earlier decision or failure to act was not challenged in a timely manner (see Judgments 1982, under 7, and 3380, under 8). Thus, the complainant may refer to the cancellation of the earlier selection process in the present complaint, for example, as part of the chronology leading up to this case. Although the complainant claims otherwise, in effect, he is attempting to prove the existence of abuse of authority and bias on the part of the Administration in the cancellation of the first selection process to buttress his allegations of abuse of authority and bias in the second selection process. The complainant has not established, as a matter of fact, that the first selection process was tainted by bias and abuse of authority. The complainant’s claims in relation to the cancellation of the first selection process will be dismissed.

4. It is convenient at this point to deal with the complainant's submission concerning the composition of the HBA. He argues that the HBA's composition violated Staff Rule 1230.4.3 because it did not include the member he wished to have on the panel. This submission is without merit. The complainant exercised his right pursuant to the rule and objected to two of the proposed members for the panel. He also requested that they be replaced by two members he identified on the supplementary list. The Administration acceded to this request. Subsequently, for reasons that are not material, one of the panel members requested by the complainant had to be replaced and the Administration notified the complainant of the change. It is observed that the scope of Staff Rule 1230.4.3 is limited to the right of a staff member "to object to not more than two members, whether appointed by the Director-General or drawn from the staff panel". It does not include an appellant's right to choose a member of a panel or require the Secretariat of the HBA to seek the approval of the parties to replace an unavailable member.

5. Returning to the complainant's submission that as a matter of right the Director-General should have appointed him directly to the contested post, it is observed that a staff member has no entitlement or right to be selected for a contested post. The Director-General's decision to order a new selection process for the subject post was entirely within her discretionary authority. In fact, it is, in part, the same relief the complainant sought in his appeal to the HBA. As to the relief claimed in his complaint, it is well settled that the Tribunal "may not replace the Organisation's assessment of the applicants with its own and order any particular appointment" (Judgment 1595, under 4). It follows that his request that the Tribunal appoint him to the subject post with retroactive effect from the date when the impugned selection was made will be rejected. His claim for moral damages for the loss of professional standing will also be dismissed.

6. The complainant submits that there was an unjustifiable delay by the HBA in its disposal of the appeal. The complainant notes that the amount of time taken from the filing of the Administration's surrejoinder to the transmission of the HBA's report to the Director-

General was almost fourteen months. WHO points out that the HBA process occurred at a time when it faced an extremely large volume of cases and adds that additional staff members were employed to help ameliorate the heavy workload.

7. It is well settled in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organization owes to its staff members (see Judgments 3160, under 16, and 3582, under 3). Although it appears that the Administration took some steps to deal with an unusually large volume of work, the time taken to finalize the HBA report was nonetheless unreasonable. In Judgment 3160, under 17, the Tribunal held:

“The amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal. Delay in an internal appeal concerning a matter of limited seriousness in its impact on the appellant would be likely to be less injurious to the appellant than delay in an appeal concerning an issue of fundamental importance and seriousness in its impact on the appellant.”

(See also Judgment 4031, under 8.)

Although the complainant did not make any submissions concerning the effect of the delay, he is entitled to moral damages in the amount of 1,000 United States dollars for the length of the delay. The complainant did not request costs.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 25 October 2018, 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 6 February 2019.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ