

The Administrative Tribunal,

Considering the complaint filed by Mr C.G. S. against the World Health Organization (WHO) on 9 April 2002, the WHO's reply of 10 July, and the letter of 3 October 2002 from the complainant's counsel informing the Registrar of the Tribunal that the complainant did not wish to file a rejoinder;

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 neither party has applied;

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

A. The complainant is a Swedish national born in 1945. At the material time he held a post at grade P.6 in the Department of Budget and Management Reform. Some facts relevant to this case may be found in Judgment 2004, delivered on 31 January 2001. That judgment was based on a complaint brought by another staff member challenging the appointment of the candidate selected for the post of Director of the Department of Financial Services. Finding that the selection process had been flawed, the Tribunal ordered the Organization to set aside the selected candidate's appointment and sent the case back to the Organization. The complainant in the current case had been on the short list for the post in question.

On 26 March 2001 the complainant sent a memorandum to the acting Director of Human Resources Services, asking to be informed when the new vacancy notice for the post of Director of Financial Services had been issued. He also reserved his right to appeal. On 25 April the acting Director replied that the Organization had decided that it would not be in its interest to reopen the competition, therefore it had reached a settlement with the complainant concerned by Judgment 2004. The complainant notified his intention to appeal to the Headquarters Board of Appeal on 13 June 2001.

In its report dated 17 December 2001 the Board of Appeal, while emphasising that the members did not have the legal background necessary to "fully appreciate" the legal arguments of the appeal, nevertheless considered that the "issues of principle" raised were of major importance to all staff and therefore to the Board itself. Notwithstanding its conclusion that the WHO had the right to settle with the complainant concerned by Judgment 2004 insofar as the award for moral damages and costs, it concluded that this settlement did not affect the Tribunal's conclusion that the Organization had to hold a new competition, nor its decision quashing the selection. Consequently, the Board recommended "that the Administration should either take immediate steps to implement the [...] judgment in full, or contest it through the available channels". It also recommended reimbursing the complainant's legal fees. On 25 February 2002 the Director-General informed the complainant that she disagreed with the Board's reasoning and conclusions, and thereby rejected his appeal. That is the impugned decision.

With effect from 1 March 2002, following a reorganisation of the complainant's cluster, he was appointed Deputy Comptroller and Director of Budget at grade D.1; the candidate who had been selected for the post of Director of Financial Services was appointed Comptroller with effect from the same date. She is the complainant's immediate supervisor.

B. The complainant asserts that "the material question in law" is whether the WHO must execute the Tribunal's judgments. He submits that to find that the Tribunal's decisions do not bind the Organization would be to deny the rule of law, putting all staff members in jeopardy and exposing them to arbitrary decisions.

He submits that he has standing to come before the Tribunal; he had no reason to challenge the competition in 1999 because he was not aware of the same information as the candidate who successfully challenged the competition.

To follow the Administration's position, that he should have challenged the competition earlier, is "an invitation" to all unsuccessful candidates to challenge all nominations, in case there might have been a procedural flaw. But to do so would "uselessly" overload both the internal appeals system and the Tribunal. He states that he is not challenging the appointment of the selected candidate, as the Tribunal has already set it aside in Judgment 2004.

Furthermore, that judgment was one of a general nature which affected the creation, modification or abolition of a right, administrative act or state of affairs and therefore it can be contested by any staff member and is not barred by *res judicata*. He states that the Tribunal's decision to set aside the appointment of the selected candidate left her "legally" without a post in the WHO. The Tribunal also ordered the Organization to hold a new competition for the post in question. Thus any of the unsuccessful short-listed candidates, as well as the selected candidate herself, has an interest in seeing that the competition be reopened.

Since the selected candidate had been an external candidate at the time she applied for the post in question, it was as if she had never become a staff member when her appointment was quashed. Consequently, the WHO could not convert her post to that of Comptroller and her appointment as such will automatically be quashed if the Tribunal finds in his favour. Therefore, it is not necessary for him to make a claim to that effect.

He asks the Tribunal to quash the Director-General's decision of 25 February 2002, thereby ordering the WHO to execute Judgment 2004. He claims moral damages and costs.

C. The WHO replies that the complaint is irreceivable. It observes that the complainant fails to show any violation of the terms of his contract. He must bear the consequences of his decision in 1999 not to contest his non-selection for the post of Director of Financial Services, which he had been made aware of by an e-mail of 29 January 1999. He did not appeal against this decision within the requisite 60 days. According to the Organization, the Tribunal has consistently rejected the argument that a complainant should not be penalised for not becoming aware of a material fact until after the deadline for appealing has passed. It asserts that the complainant has tried arguing essentially the same idea.

The complainant was neither a party nor an intervener in Judgment 2004; thus he has no standing to apply for the execution of that judgment, nor can he plead that the execution was flawed. According to the WHO, it is a firmly established legal principle that a judgment of the Tribunal affects only the parties to it. The right to request execution of a judgment lies only with the successful party in a complaint. It questions on what basis the complainant in this dispute can rely on *res judicata* to support his arguments. There is no basis in the Organization's statutory provisions, nor in the Tribunal's jurisprudence, to support the complainant's contention that any staff member can contest the non-execution of judgments of a "general nature".

The WHO denies that it disregarded Judgment 2004. Bearing in mind "the critical situation" it faced at the time, the Organization decided to seek a mutually agreed resolution with the complainant in that judgment, who waived his right to claim full execution of the judgment. In addition, it states that its decision to seek an alternative resolution needs to be seen "in the context of significant events of the time". It had decided that carrying out a new competition for the post of Director of Financial Services would have "a profoundly disruptive and negative effect" on the Organization's work. This decision did not amount to a denial of the rule of law.

It dismisses as "illogical and mistaken" the complainant's arguments regarding the selected candidate's status as a staff member and the Organization's authority to convert her post to that of Comptroller.

CONSIDERATIONS

1. The complainant applied for the D.2 post of Director of Financial Services and was placed on a short list of six. In January 1999 an outside candidate - a woman - was appointed to the post. One of the other candidates (Mr M.) appealed to the Tribunal contending that there had been gender bias and that there were flaws in the selection process. On 15 November 2000 the Tribunal upheld Mr M.'s complaint in Judgment 2004. It set aside the appointment of the successful candidate and sent the case back to the Organization with an order that the latter conduct a new competition. Following the pronouncement of that judgment on 31 January 2001, the WHO settled with the complainant, confirmed the appointment of the person concerned and did not open a new competition.

2. The complainant now wants the Organization to "execute" Judgment 2004 and award him moral damages. He is

not, however, directly challenging the appointment of the successful candidate. He argues that the Organization has to execute judgments of the Tribunal and that it has refused to do so in the case of Judgment 2004 because it has neither annulled the appointment of the successful candidate nor conducted a new competition as ordered by the Tribunal. The Organization argues that the complaint is irreceivable and devoid of merit. Tribunal judgments affect only the parties to the dispute. Since the complainant did not appeal against his non-selection to the post in question or intervene in the successful complaint of Mr M., he cannot now seek to remedy his inaction by an application for execution of a judgment to which he was not a party. He has no standing to apply for such execution.

3. There can be no doubt that the complaint is receivable *ratione temporis*. The "decision" which the complainant attacks is the decision to settle with Mr M. rather than conduct a new competition and the complainant's appeal to the Headquarters Board of Appeal was timely launched after the complainant was first notified of that fact in April 2001. The Board recommended in the complainant's favour and the present complaint was properly brought against the Director-General's decision of 25 February 2002 refusing to follow that recommendation. Alternatively, since there is no time limit applicable to complaints seeking the execution of Tribunal judgments and since that is arguably the proper characterisation of the present complaint, it would also be formally receivable on that basis.

4. There can equally be no doubt, however, that the complaint is without merit because the complainant has no standing to bring it. He was neither a party nor an intervener to the proceedings leading up to Judgment 2004. He did not contest the appointment of the successful candidate and the time within which he could do so is now long past. The Tribunal's consistent case law has it that in such circumstances he cannot claim any benefit of Judgment 2004. In Judgment 1935, the Tribunal said:

"6. With regard to Judgment 1679, on which she bases her claims, the Tribunal holds that she cannot invoke in support of her pleas the authority of *res judicata* in a judgment to which she was neither party nor intervener."

(See also Judgment 1979.)

5. The complainant claims that Judgment 2004 constitutes an exception to the general rule of *res judicata* because it is of "general" application. There is no such exception to the rule. The judgments of the Tribunal operate only *in personam* and not *in rem*. Notwithstanding the generality of the terms in which the Tribunal may dispose of a case before it, the judgment has effect only as between the parties to it. The complainant confuses the rule of *res judicata* with the rule of *stare decisis*. The former, which is a rule of law, applies absolutely when the necessary three identities of person, cause and object are present, which is not the case here. The latter rule, which is simply a matter of judicial practice or of comity, holds that, in general, the Tribunal will follow its own precedents and that the latter have authority even as against persons and organisations who were not party thereto, unless it is persuaded such precedents were wrong in law or in fact or that for any other compelling reason they should not be applied. Judgment 2004 enunciated a number of important general principles with regard to gender bias in the selection process which the Tribunal will no doubt follow in future cases; but its declaration that the selection of the successful candidate was flawed and that a new competition must be held was binding only as between the parties to it and they were free to carry it out or not in whatever way they saw fit.

6. Sound judicial policy requires that the Tribunal encourage parties to settle their disputes after as well as before judgment. That cannot happen if persons, like the complainant, who did not participate in a case, even though he might have done so, can interfere after the fact and prevent such settlement.

7. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K.

Hugessen, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.