

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.
v.
WHO

127th Session

Judgment No. 4098

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. O. R. against the World Health Organization (WHO) on 13 April 2015 and corrected on 21 May, and WHO's reply of 18 September 2015, no rejoinder having been submitted by the complainant;

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), at grade P-4. He applied for a P-5 post in Malaysia that was advertised in September 2011, and was informed on 29 June 2012 that he had not been selected.

On 21 September 2012 the complainant sent a notification of intention to appeal to the Headquarters Board of Appeal (HBA), which received it on 2 October 2012. His request for a waiver of the requirement to first file an appeal with the Regional Board of Appeal was accepted. He challenged the decision not to select him, alleging several flaws in the selection process, and he sought the setting aside of the contested

decision, an award of moral damages, and costs. He also asked to be awarded damages in an amount equivalent to the difference in the salary and pension to which he would have been entitled as from 29 June 2012 had he been appointed to the P-5 post, together with any other relief that might be considered just and fair. He asked that a new selection process be conducted by a duly constituted selection panel considering only internal candidates.

In its report of 21 November 2014, the HBA found that the selection process was flawed, in particular because external candidates had been short-listed in violation of Information Note 33/2010, and because the composition of the selection panel violated Section III.4.2 of the e-Manual. It concluded that, in light of the need to shield the selected candidate and to maintain the smooth functioning of the department to which the contested position belonged, it was not appropriate to recommend the setting aside of the selection process. Thus, it recommended that the complainant's personal grade be reclassified to P-5, step 1, with effect from 29 June 2012, and that he be paid the difference in salary and entitlements between his actual grade and his personal grade (P-5, step 1) as of 29 June 2012 until his retirement. The HBA also recommended awarding him 10,000 Swiss francs in moral damages and reimbursing his legal fees upon presentation of invoices up to a maximum of 5,000 Swiss francs.

By a letter of 19 January 2015, the Director-General informed the complainant that she had concluded that the selection process was flawed, but that it was not tainted by personal prejudice. She agreed with the HBA that it was not an appropriate case for carrying out a new selection process and decided to award the complainant damages. She explained that the recommendation of the HBA as to the amount of damages seemed to reflect the view that, had the selection process been followed correctly, he would have been selected. The Director-General disagreed with that analysis, stressing that there was no guarantee that the complainant would have been appointed at the end of the selection process, but she found that he had been denied a valuable opportunity to be properly considered for the position and that this had resulted in him suffering material injury. She decided to award him 25,000 Swiss

francs in material damages and 10,000 Swiss francs in moral damages. She also agreed with the HBA's recommendation concerning costs. That is the impugned decision.

The complainant retired on 31 August 2015 after having filed his complaint with the Tribunal in April. He asks the Tribunal to set aside the impugned decision, to "[r]eclassify [his] personal grade" to P-5 effective 29 June 2012, and to pay him the difference between his salary and entitlements in his P-4 grade and those corresponding to the P-5 grade from 29 June 2012 with 10 per cent interest. If the amount of 25,000 Swiss francs granted by the Director-General has been paid to him at the time the order is made, he requests that that amount be deducted from the amount claimed. He also claims moral damages, and 3,000 United States dollars in costs.

WHO asks the Tribunal to dismiss the complaint as unfounded. It adds that the compensation sought is excessive.

CONSIDERATIONS

1. In its report, the HBA identified a number of flaws arising from the failure to follow the selection process in the WHO e-Manual Section III.4.2 and in the Information Note 33/2010 in force at the relevant time. The HBA concluded that in the circumstances it was not appropriate to recommend setting aside the selection process. Instead, the HBA recommended the retroactive reclassification of the complainant's personal grade from P-4 to P-5, step 1, effective 29 June 2012, the date he was informed of his non-selection for the position of Coordinator, Global Procurement and Logistics. The HBA also recommended the payment of the difference in salary and entitlements between grade P-4 and grade P-5, step 1, as of 29 June 2012 until his retirement. It further recommended awarding him moral damages and costs.

2. In the 19 January 2015 impugned decision, the Director-General agreed with the HBA's conclusion that the selection process was fundamentally flawed and observed that, "[g]iven the full circumstances of th[e] case", she also agreed with the HBA that it was not "an appropriate

case for the carrying out of a new selection”. However, the Director-General rejected the HBA’s recommendation regarding the award of material damages. The Director-General noted that this “amount of damages seem[ed] to reflect the view that, had the selection process been followed correctly, [the complainant] would necessarily have been selected”. The Director-General disagreed with this view on the basis that there was no guarantee that the complainant would have been appointed at the end of the procedure. The Director-General found, however, that due to the errors in the selection process the complainant was denied a valuable opportunity to be properly considered for the position that resulted in the complainant suffering material injury. The Director-General awarded the complainant material damages in the amount of 25,000 Swiss francs.

3. The complainant takes issue with the Director-General’s finding that his appointment was not guaranteed and submits that she did not give a “valid argument” for rejecting the HBA’s recommendation for the award of material damages. The complainant points out that he fulfilled all the requirements of the position and the selection panel ranked him in second place after the successful external candidate, in breach of the Information Note in force at the relevant time. In particular, he observes that the Information Note specifically provided that external candidates would only be considered in the event an internal candidate was not selected. The complainant requests the setting aside of the impugned decision. He seeks the retroactive reclassification of his personal grade from P-4 to P-5, step 1, effective 29 June 2012 and the payment of the difference in salary and entitlements between those two grades from that date to the date of payment together with 10 per cent interest on the amount due less 25,000 Swiss francs if the Director-General’s award has already been paid.

4. The complainant contends that he would have been the successful candidate if the selection panel had not considered the external candidate in breach of the Information Note. There is nothing in the file to suggest that he would not have been selected. As the Director-General correctly concluded, the flawed selection process

deprived the complainant of a valuable opportunity to be properly considered for the post that resulted in the complainant suffering material and moral injury. But he also lost a valuable opportunity to be appointed to the post.

5. As to the determination of the award for material damages, in recommending the retroactive reclassification of the complainant's personal grade and the payment of the consequential difference in salary and entitlements to the date of his retirement, the HBA, in effect, recommended granting him a personal promotion. As the Tribunal held in Judgment 3043, under 18, a personal promotion "should certainly not be granted as redress for an alleged injury". It is also observed that a personal promotion is not one of the mechanisms for promotion available in the e-Manual. But it is tolerably clear that the HBA's recommendation of a promotion was a device to ensure that the complainant was paid at a level aligned with the position to which he might well have been appointed until retirement age.

6. Having regard to the foregoing, the complainant is entitled to material damages. Taking into account the lost opportunity to be appointed to the post, the real prospects he would have been appointed, the difference in salary between the position he held to retirement and the position he applied for, and the impact of non-appointment on other entitlements, the Tribunal considers an appropriate amount of material damages would be 25,000 Swiss francs. That was the amount awarded by the Director-General, and the Tribunal notes that the complainant did not advance any alternative submissions regarding the adequacy of this amount. Accordingly there is no reason to disturb this award.

7. Lastly, the complainant submits that the Director-General's award of 10,000 Swiss francs for moral damages does not adequately take into account the loss of professional standing and the inordinate delay in the internal appeal process. Save for the question of delay, the Tribunal is satisfied the amount paid by way of moral damages is appropriate.

8. Regarding delay in the internal appeal proceedings, the complainant submits that the almost 28 months from the date of the filing of the appeal with the HBA to the date the Director-General rendered the final decision amounts to inordinate, inexplicable and unjustifiable delay. WHO counters that the complainant's request for compensation for delay is unwarranted. WHO notes that the waiver of the regional appeal procedure significantly reduced the amount of time for the internal appeal process. WHO also points out that the Administration submitted all the required pleadings and responded to HBA's requests for additional information in a timely manner.

9. The HBA's report contains a detailed chronology of the steps taken from 2 October 2012, the date the appeal was received, to 21 November 2014, the date its report was transmitted to the Director-General. The chronology shows the time taken for the parties' submissions and their respective requests for short extensions of time to file their submissions. This process was completed on 27 March 2013 and does not reflect any unreasonable delay. However, from this date to 28 February 2014, a period of 11 months, no steps were taken in the proceeding. The period from this last date to 27 March 2014, when the HBA met for the first time to consider the appeal, was taken up with the HBA's requests to the Administration for additional documents. The HBA transmitted its report to the Director-General approximately eight months later. The Director-General issued her final decision on 19 January 2015 within the sixty days provided in the rules. The Tribunal finds that the unexplained delay of 11 months noted above is unreasonable.

10. 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 Judgment 3160, under 16; see also Judgments 3582, under 3, and 3688, under 11). In the present case, there was unreasonable delay in the appeal process, for which the complainant is entitled to an award of moral damages in the amount of 1,000 United States dollars. As the complainant succeeded in part, he will be awarded costs in the amount of 750 United States dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in an amount of 1,000 United States dollars in addition to the Director-General's earlier award of moral damages.
2. WHO shall pay the complainant costs in an amount of 750 United States dollars.
3. 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