

SEVENTY-EIGHTH SESSION

In re RIO RUMBAITIS

Judgment 1383

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. María del Río Rumbaitis against the World Health Organization (WHO) on 27 February 1994, the WHO's reply of 6 June, the complainant's rejoinder of 11 July and the Organization's surrejoinder of 13 September 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The WHO employed the complainant, a citizen of Argentina, in its Regional Office for the Americas (AMRO) in Washington D.C. from June 1988 until December 1990.

On 5 March 1990 the WHO announced a vacancy, No. 4.5889, for an "AIDS education methodologist" at grade P.4 in the programme of AMRO known as Health Situation and Trend Assessment (HST) in the Health Promotion Unit. The notice gave as minimum requirements a postgraduate degree in behavioural or social sciences; five years' experience of "communication strategies" and "formal and non-formal education systems"; "expertise in health education and promotion"; and "very good knowledge of English and Spanish", knowledge of "French or Portuguese" being "an asset". The work consisted in providing technical support for the Organization's campaign against AIDS in the Americas.

At the time the Organization described the complainant as a "temporary adviser" in HST. By a letter of 30 March to the Chief of the Personnel Department she applied for the post. There were 22 applicants, 9 men and 13 women.

A Selection Committee of five members was set up to make recommendations for appointment to the post, and it met on 15 June. In a memorandum of 18 June to the Regional Director its secretary said that three of its members had recommended appointing Dr. Rafael Mazin, a Mexican, "in view of his extensive knowledge and experience in the preparation of educational materials, his communication skills, his command of the working languages of the Organization, and his excellent performance ... in HST". Dr. Mazin had a degree in medicine, which - the memorandum acknowledged - "is not in line with the requirement of this post". The other two members preferred another applicant, but not the complainant.

In a minute of 20 June to the Regional Director the Chief of Personnel said that "the minority view has more merit" and that Dr. Mazin would do better on some other post.

On 9 July, however, the Regional Director endorsed the majority's recommendation and appointed Dr. Mazin; by a letter of 28 August the Chief of the Manpower Planning and Staffing Unit informed the complainant of the appointment; and on 21 September 1990 she appealed to the regional Board of Appeal.

In its report of 7 January 1992 the Board unanimously held that for several reasons the process of selection had been improper; so it recommended reversing the appointment, convening another Selection Committee and paying the complainant's costs.

In a letter of 3 March 1992 the Regional Director told her that he disagreed with the Board since Dr. Mazin "is not only performing the duties and responsibilities very well indeed, but also possesses the overall requirements for this type of assignment"; he was rejecting her appeal.

By a letter of 16 March 1992 her counsel applied to the Director-General for leave to go straight to the Tribunal in accordance with Staff Rule 1240.2, but the Director-General refused in a letter of 27 April, and on 7 May she appealed to the headquarters Board of Appeal in Geneva.

In its report of 29 September 1993 the headquarters Board concurred with the regional Board's conclusions and recommended setting aside the Regional Director's decision, declaring the process of selection null and void and granting the complainant costs.

By a letter of 26 November 1993, the decision impugned, the Director-General told her that he was rejecting the Board's recommendations: as a mere temporary adviser she had no locus standi before the Board of Appeal, and even if she had, her appeal could not succeed since post 4.5889 was to be abolished anyway at the end of December 1993 because of cuts in the budget of the AIDS programme.

B. The complainant submits that the successful applicant failed to meet the minimum educational requirements for the post since he did not have a degree in behavioural or social sciences. That was in breach of WHO Staff Regulation 4.2 ("The paramount consideration in the appointment, transfer or promotion of staff shall be the necessity of securing the highest standards of efficiency, competence and integrity ..."); of Staff Rule 410.1 ("The paramount considerations in the selection of staff shall be competence and integrity ..."); and of paragraph II.3.344 of the Organization's Manual ("In addition to meeting the minimum qualifications, candidates are considered on the basis of their total qualifications ..."). As both boards of appeal acknowledged, the complainant was fully qualified.

She contends that she did have the right to appeal to the Boards: she was holding a short-term appointment when she applied for the post. Besides, any applicant has the right to have the rules of competition properly observed.

The process of selection was flawed. The composition of the Selection Committee was irregular in that the representative of the Staff Association had not been chosen "randomly", as paragraph II.3.310 of the Manual required; a memorandum that HST wrote as "receiving unit" on 25 May 1990 about the applicants for the post was slanted in Dr. Mazin's favour and to the complainant's detriment; and the description, or "matrix", of duties that HST put to the Committee was contrived to help Dr. Mazin.

There was discrimination on grounds of sex in breach of WHO Staff Regulation 4.3: "Selection of staff members shall be without regard to ... sex". Though five women were qualified the appointment went to a man who was not.

Observing that she did not get a full-time job until October 1993 the complainant maintains that had the process of selection been proper she would have been appointed to post 4.5889 in mid-1990.

She claims the quashing of the Regional Director's decision of 3 March 1992 and the Director-General's one of 26 November 1993. She claims damages equivalent to the difference between what she would have earned had she been appointed and her actual occupational earnings since mid-1990: she puts the amount at 173,415 United States dollars. She also claims payment of the Organization's contributions to her pension and an award of costs.

C. In its reply the WHO submits that, being a mere "temporary adviser" when she applied for the post, the complainant had no access to the boards of appeal; nor may she appeal to the Tribunal. Staff Rule 1230.1 says: "... a staff member may appeal against any administrative action or decision affecting his appointment status ...". According to Manual paragraph II.12.590 "Temporary advisers are not considered as staff members in any sense". The issue of a notice is a mere invitation to applicants and makes no contractual commitments. In the Organization's submission the complainant was not the only applicant to meet the minimum requirements for the post and was not better qualified than Dr. Mazin. Three members of the Committee, HST and the Regional Director all concluded that he was the best qualified. Not even the minority of the Committee recommended the complainant. Indeed she was not among the first three chosen by any impartial assessor. Many duties of the post are such that someone with medical qualifications would be more likely to perform them better than someone without. The curriculum for a doctorate in medicine includes studies of behavioural science. It is therefore mistaken to say that Dr. Mazin did not come up to requirements. Besides, the complainant herself lacked training and experience in medicine, public health and the campaign against AIDS.

As to the alleged flaws in the process of selection, the complainant offers no evidence to show how, if not at random, the staff representative on the Selection Committee was appointed; or that the staff representative was prejudiced against her in favour of Dr. Mazin; or that HST's rating of the applicants or the "matrix" of the post was "slanted".

Lastly, there is no breach of any right that warrants an award of damages to the complainant. Since she had no right of appointment to the post the decision not to appoint her causes her no actionable injury. Besides, she has

persisted in her claims even though she knows that the post was abolished on 31 January 1994. They are vexatious.

D. In her rejoinder the complainant submits that according to the case law an appointment must be set aside where the process of selection shows, as it does in this case, some procedural or substantive flaw. She alleges that her supervisor asked her to draft a description of duties for inclusion in the vacancy notice and to tailor it to suit her own qualifications and experience. She reaffirms that Dr. Mazin did not meet the minimum requirements for the post. She observes that at the material time he "was living in the house" of the woman then chairing the local Staff Association, who chose a compatriot of his as staff representative on the Selection Committee. Indeed both boards of appeal held that the staff representative had not been appointed at random. She contends that information on her educational attainments was not put to the Selection Committee and that its failure to take proper account of her own qualifications shows that the decision impugned rests on incomplete consideration of the facts.

In her view the purported abolition of post 4.5889 is "an obvious manoeuvre by the Organization to end the complaint". HST still exists in substance under another name, AIDS and Sex-transmitted Disease, and Dr. Mazin is still working in the Organization in that section on a P.4 post for a "medical officer".

The WHO is also mistaken in saying that a medical doctor is fit for duties that relate mainly to education. Had that been true the vacancy notice would have said so. As the regional Board held, Dr. Mazin's degree did not meet the requirements of the notice; nor did the further studies he had done in "sexology and sex education" since they had not formed part of a university degree course.

She develops her allegations of discrimination on grounds of sex.

She maintains that if the rules had been observed she would have won the competition since she was the only applicant with experience of the job and was highly qualified. Education in the prevention of AIDS was something new that she herself had helped to foster. To be denied the appointment was morally damaging and to lose the job caused her substantial material injury.

E. In its surrejoinder the WHO observes that the rejoinder raises no new issues of fact or law. It reasserts that the complainant was not a staff member but a "temporary adviser" and therefore had no right of appeal under the Staff Rules. There is not a shred of evidence to substantiate the complainant's allegation that the abolition of Dr. Mazin's post was a "manoeuvre" on the part of the WHO. His and the other 45 posts were abolished as a result of a reorganisation of the WHO's Global Programme on Aids. It appends a document signed by the complainant's supervisor refuting the allegation that she had been asked to draft a post description to suit her own qualifications. Neither the regional nor the headquarters Board of Appeal endorsed the complainant's claim to the disputed post and she has suffered no loss or injury as a result of not being selected.

CONSIDERATIONS:

1. The complainant was employed by the Organization on several short-term contracts that began in June 1988. In March 1990 she was working in the Health Situation and Trend Assessment Programme (HST) in the Health Promotion Unit under a one- month contract, and she had it extended by two months. On 5 March 1990 the Organization announced a vacancy for a grade P.4 post, No. 4.5889 as AIDS education methodologist with HST and she applied on 30 March 1990. Her complaint arises out of the decision not to appoint her to the post.
2. On 15 June 1990 a Selection Committee met to review the candidates. Three of its five members recommended appointing one candidate, Dr. Rafael Mazin, and gave another as the alternate; the minority of two members recommended appointing the latter and gave yet another candidate as the alternate. The complainant was not one of the three candidates thus recommended.
3. On 28 August 1990 the Chief of the Manpower Planning and Staffing Unit informed the complainant that the candidate recommended by the majority had been appointed. She appealed to the regional Board of Appeal. Although the Board made a recommendation in her favour, the Regional Director rejected it in a letter of 3 March 1992. On 7 May 1992 she appealed to the headquarters Board of Appeal. Both boards of appeal held that she had a right of appeal, that the selected candidate did not have the minimum educational qualifications required for the post, whereas she did, that there were procedural flaws, that the selection process should be annulled, and that she be paid reasonable costs. The regional Board did not accept her plea of discrimination on grounds of sex and she did not pursue it before the headquarters Board.

4. In a letter of 26 November 1993 the Director-General rejected the recommendation by the headquarters Board on the following grounds:

(a) though a staff member might appeal against any decision affecting his appointment status, here the decision did not affect the complainant's status as a consultant;

(b) "given the short term nature of a consultant contract, and the limited application of the Staff Rules and Regulations to consultants", the complainant had "no right to use the internal appeal procedures available to regular staff members to appeal against non-selection for fixed-term positions"; and

(c) in any event the post was "among 46 posts being abolished Organization-wide effective 31 December 1993 due to cuts in the budget for the Global Programme on AIDS for the biennium 1994/95".

That is the impugned decision.

The complainant's right of appeal

5. The Organization contends that the complainant was not a staff member within the meaning of Staff Rule 1230.1, which confers on staff members the right to appeal against any administrative decision affecting their appointment status.

6. Although in the impugned decision the Director-General accepted that the complainant was a consultant on a short-term contract, the WHO's reply to the complaint takes a different position. Commenting upon a statement in her pleadings that when she applied for the vacancy she was working as a "temporary adviser", the Organization contends that she was not a staff member and cites paragraph II.12.590 in support of that view:

"The term 'temporary adviser' applies to persons invited for short periods of not more than sixty consecutive days to give advice or assistance to the Organization. ... Temporary advisers are not considered as staff members in any sense and receive neither appointment nor salary."

7. A "personnel authorization" form that the WHO issued in April 1990, when it extended the complainant's contract by two months, to 12 June 1990, did describe her as holding an appointment as "STC", or short-term consultant, at 2,300 United States dollars a month. But her contract including the extension was for a total of over ninety days, she was therefore not a "temporary adviser" within the meaning of II.12.590.

8. Staff Regulation 4.5 provides that, apart from the Deputy and Assistant Directors, other "staff members" shall be granted either permanent or temporary appointments. Staff Rule 420.2 provides for only two types of temporary appointment: fixed-term ones for one year or more and short-term ones for less than a year. What the complainant held at the material time was a temporary short-term appointment as a consultant and she therefore qualified as a "staff member".

9. In the impugned decision the Director-General acknowledges that Rule 1230.1 entitles a "regular" staff member to appeal against non-selection for a fixed-term appointment. The inference is that the term "appointment status" used in Rule 1230.1 includes future status. What is more, in conferring the right of appeal against decisions affecting appointment status the Rules draw no distinction between "regular" staff members and the holders of temporary appointments: both groups have the same right of appeal.

10. The conclusion is that the complainant had the right to avail herself of the internal appeal procedures.

The merits

11. The Selection Committee and both boards of appeal took the view that the selected candidate's medical degree did not meet the minimum educational qualification, which was a post-graduate degree in any of the behavioural or social sciences. The Organization does not dispute that but argues instead that a medically-qualified candidate was more suitable and that Dr. Mazin was the best qualified for the post.

12. That view is clearly mistaken: it is axiomatic that a candidate who does not fulfil the minimum requirements set out in a vacancy notice does not qualify for selection. The impugned appointment was therefore fatally flawed in that respect, and it is unnecessary to consider the complainant's other pleas.

13. The Tribunal would ordinarily set aside the selection process and the appointment where there is such a flaw. But by the time the impugned decision was taken the Organization had decided to abolish the post with effect from 31 December 1993. The complainant pleads that such abolition was just a manoeuvre to frustrate her complaint; that the unit continued under a different name, and that the selected candidate continued to work in a new position that was more suitable for a medical doctor. The Organization explains that programme changes and budget cuts required not only the abolition of the disputed post but also the reassignment of many staff in the Professional category, that having abolished the post it had to apply the reduction-in-force procedure, and that the outcome was the appointment of Dr. Mazin to a new post. Indeed the complainant herself admits that the Health Promotion Unit lost almost all its credits for educational activities and her supervisor was left with so few functions that she had to be reassigned to Brasilia. So the complainant's plea is without foundation. A fresh process of selection for the disputed post being no longer possible, no useful purpose would now be served by quashing the impugned decision.

14. The complainant has asked for damages for material and moral injury on account of the gravity of the irregularities and the humiliation she suffered by not being fairly considered. The selection process began in mid-1989, when her supervisor asked her to draft a description of the post. She admits that she drafted the description to fit her own qualifications and experience, and she says that she did so on the instructions of her supervisor, who denies it. Thus, while the gravamen of her complaint is that the proceedings of the Selection Committee were flawed because the aim was the selection of an unqualified candidate, she was on her own admission endeavouring from the outset to pervert the process to secure her own appointment. Yet she was not even the Selection Committee's third choice. In the circumstances she is not entitled to any damages at all.

15. Accordingly, the Tribunal will neither quash the impugned decision nor award the complainant damages for material or moral injury. But since she has established that the impugned decision was flawed, she must be granted costs, and the Tribunal sets the amount at 2,000 United States dollars.

DECISION:

For the above reasons,

1. The complaint is dismissed.
2. The Organization shall pay the complainant 2,000 dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner