

The Administrative Tribunal,

Considering the complaints filed by Mr B. d. B. (hereinafter “the lead complainant”), Mrs A. K. (her second), Mrs S. K., Mr P. K., Mrs C. S. and Mr E. P. V. M. against the World Health Organization (WHO) on 3 May 2006 and corrected on 19 June, the WHO’s reply of 22 September 2006, the complainants’ rejoinder of 2 March 2007 and the Organization’s surrejoinder of 17 April 2007;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants held fixed-term appointments at grade P.4 or P.5 at the material time, except one who was a “long-term short-term” professional. The D.1 post of Director of the Department of Nutrition for Health and Development (NHD) became vacant on 31 July 2003. The lead complainant was appointed ad interim Director of that Department in September 2003.

On 20 April 2004 the Assistant Director-General in charge of the Cluster of Non-communicable Diseases and Mental Health (NMH), who had been asked by the Director-General to advise him on specialists capable of carrying out the duties of the post, provided the Director-General with the names of two persons (non-staff members) to be considered for the position of Director of NHD, one of whom was Dr C. On 3 May 2004 the Director-General announced the nomination of Dr C. to that position by direct appointment. She took up her functions on 1 July 2004.

The complainants together with three other staff members filed a collective appeal on 29 June 2004 with the Headquarters Board of Appeal, challenging that appointment. In its report of 31 October 2005 the Board found that “a selection procedure had taken place, however informal it was”. It considered that the direct appointment, as a result of this type of selection procedure, had limited the number of candidates and had denied the complainants an open and transparent competition, in breach of Staff Regulations 4.2, 4.3 and 4.4. It also held that there had been external influence from at least one entity; however it did not find conclusive evidence of a breach of Staff Regulation 1.3, which provides that, in the performance of their duties, staff members shall not accept instructions from any authority external to the Organization. The Board recommended that “the selection of the Director NHD post be cancelled” and that the Organization “resume the process of the regular selection procedure”.

By a letter of 6 February 2006, which constitutes the impugned decision, the Director-General informed the complainants that he had decided to dismiss their appeal. He indicated that he had the authority to make a direct appointment and that he had carefully considered the “merits and appropriateness” of various individuals. He also pointed out that he had requested advice from senior officials prior to appointing the Director of NHD, and denied that the Assistant Director-General, NMH, had started a selection process; he only asked her to assist him in carrying out an evaluation of suitable specialists for the vacant position.

B. The complainants contend that in appointing Dr C. the Director-General disregarded the hierarchy of rules and violated the Staff Regulations. They refer in particular to Staff Regulations 4.3 and 4.4 concerning the appointment and promotion of staff members, which provide respectively that “[s]o far as is practicable, selection shall be made on a competitive basis” and that “[w]ithout prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organisation in preference to persons from outside”. In making a direct appointment to the post of Director of NHD, the Director-General relied on Staff Rule 410.4, which stipulates that selection for vacant posts below the level of director, other than those of a short-term nature, “shall normally be on a competitive basis”. The complainants argue that, insofar as Staff Rule 410.4 leaves the Director-General the possibility of departing from the normal competitive procedure in the case of

appointments to posts at or above director level, that possibility is subject to compliance with the provisions of the Staff Regulations, which must prevail over the Staff Rules. In this case, the direct appointment contravened Staff Regulation 4.3, because selection on a competitive basis was clearly practicable, and Staff Regulation 4.4, because the Director-General did not give preference to persons already in the service of the Organization, including the complainants themselves, who could have been promoted to the post. It therefore involved an error of law and abuse of authority.

The complainants consider that the appointment procedure was neither fair nor transparent. They assert that the experience and qualifications of Dr C. did not correspond to the job description for the post. Furthermore, only a few staff members at Headquarters were informed orally that the Director-General intended to fill the vacant post of Director of NHD by direct appointment. Consequently, eligible candidates from regional offices were not given a chance to apply.

According to the complainants, the decision to appoint Dr C. was made under external influence, in breach of the principle of independence of civil servants which is laid down in Staff Regulation 1.3. Indeed, the available terms of reference for the post were not used to select the candidate; instead the recruitment was based on a new profile drafted by an external entity to serve its own interests. In support of their allegation they provide e-mails showing that the Assistant Director-General, NMH, received guidance for the selection of the Director of NHD from persons not belonging to the WHO, who then welcomed the nomination of Dr C.

Lastly, the complainants argue that the decision of 6 February 2006 rejecting their appeal was not fully motivated. They refer to the Tribunal's case law according to which where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated.

The complainants ask the Tribunal to set aside the Director-General's decision to appoint Dr C. Director of NHD, as well as the decision of 6 February 2006, and to order that a regular selection procedure be held for the post. They also claim costs.

C. In its reply the WHO asserts that the decision to make a direct appointment complied with Staff Rule 410.4 since the post in question was a director-level post. It submits that the Organization has no duty under Staff Regulation 4.3 to hold a competition when there is a vacant post to be filled. Indeed, Staff Regulation 4.3 provides that staff members shall be selected on a competitive basis "[s]o far as is practicable". In its view, the decision to make a direct appointment does not constitute an exception to the Staff Rules. Referring to the Tribunal's case law, it points out that the decision to fill a post without holding a competition lies at the discretion of the Director-General.

The Organization rejects the complainants' allegation that the direct appointment of Dr C. goes against an established practice. It indicates that two vacancies were filled by direct appointment in 2000 and that two of the complainants were likewise appointed to a post without going through a competition. Moreover, the direct appointment of Dr C. was made in the interest of the Organization. It explains that the post was vacant and had to be filled as promptly as possible. It adds that Dr C. was well qualified to perform the duties of the post and that the appointment was made on an objective basis. According to the defendant, the issue of the job description is a contractual matter which concerns only the appointed staff member and the Organization.

Concerning the fact that the vacancy was not formally announced to all staff members and that no selection committee met, the Organization points out that a direct appointment excludes a competition, which is the process whereby a vacancy is formally announced and applications are considered in accordance with applicable procedures. It nevertheless indicates that, as for any appointment, the Director-General must be in a position to satisfy himself that the person he appoints is suitable. He therefore requested the Assistant Director-General, NMH, to provide him with the names of suitable specialists for the post. However, the measures taken by the Assistant Director-General were not part of a competition or selection procedure.

The defendant denies that the appointment to the post of Director of NHD was made under external influence. It asserts that the recommendation of the Assistant Director-General, NMH, was based exclusively on her own assessment of Dr C.'s qualifications and experience and was free from any outside pressure. It maintains that the Director-General provided reasons, in the letters of 6 February 2006, for his decision to reject the complainants' appeal.

At the Tribunal's request, the Organization invited Dr C. to submit her comments on the complaints. She provides a detailed account of her qualifications and experience and describes her contribution to the work of NHD during her first two years as Director.

D. In their rejoinder the complainants reiterate their pleas. They stress that no fair competition was held prior to the appointment of the new Director of NHD. They point out that the Board of Appeal found that the Organization had undertaken "a sort of selection", which shows that it was practicable to fill the vacant post through a process of selection. The complainants were consequently entitled to have their applications considered in keeping with the basic rules of fair and open competition.

E. In its surrejoinder the Organization maintains its position. With regard to promotion of staff members, it points out that none of the complainants had the "breadth and relevance of Dr [C.]'s experience to the post".

CONSIDERATIONS

1. The complainants are staff members of the WHO and hold fixed-term appointments either at grade P.4 or P.5 except, in one case, where the complainant is a "long-term short-term" professional. The lead complainant was appointed ad interim Director of NHD in September 2003, that post having become vacant on 31 July of that year.

2. On 3 May 2004 the Director-General of the WHO announced the appointment of Dr C. as Director of NHD. The Organization claims that the appointment was a direct appointment pursuant to Staff Rule 410.4 which relevantly provides:

"Posts below the level of director, other than those of a short-term nature, which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion."

3. The complainants and three other persons challenged the appointment of Dr C. and, in due course, their appeal was considered by the Board of Appeal. They advanced two arguments in their appeal. The first was that Staff Rule 410.4 was not consistent with Article IV of the Staff Regulations and, thus, the appointment involved an error of law. The second was that the appointment was made under external influence and, thus, involved a violation of Staff Regulation 1.3 and the principles governing the independence of international civil servants. Staff Regulation 1.3 provides that:

"In the performance of their duties staff members shall neither seek nor accept instructions from any government or from any other authority external to the Organization."

The Board did not rule specifically on the first argument but held that, as some staff members, including the lead complainant, had been invited to express their interest in the post, there had been an informal selection process and that that process did not comply with Staff Regulations 4.2, 4.3 and 4.4. So far as concerns the second argument, the Board considered that, although there had been "external influence from at least one entity", there was not sufficient evidence that it amounted to an "instruction" and thus to establish breach of Staff Regulation 1.3. In the result, the Board recommended that the appointment of Dr C. be cancelled and that a regular selection procedure be undertaken.

4. The Director-General did not accept the recommendations of the Board of Appeal. Instead, he informed the complainants on 6 February 2006 that he had decided to dismiss their appeal. That decision is the subject of the present complaints by which the complainants seek orders that that and the earlier decision appointing Dr C. as Director of NHD be set aside and that a regular selection procedure be held for the post, as well as an order for costs.

5. Before considering the arguments in this matter, it is convenient to note a concession made before the Board of Appeal. The then appellants conceded the right of the Director-General to make a direct appointment pursuant to Staff Rule 050., which allows for an exception to the Staff Rules if it is "agreed to by the staff member directly affected and is, in the opinion of the Director-General, not prejudicial to the interests of any other staff member or group of staff members". However, they did not concede that that Rule was applicable to the

appointment of Dr C. Thus, there is and always has been an issue as to the validity of her appointment on the basis that it was a direct appointment. Accordingly, it is an oversimplification to say, as the WHO does in its reply, that:

“the complainants acknowledge that the Director-General has the authority to make a direct appointment. At the same time, they claim that Dr [C.]’s appointment was unlawful because it was a *direct* appointment – or so goes, in essence, most of their contradictory argument.”

6. The WHO does not rely on Staff Rule 050., which prompted the concession of the complainants before the Board of Appeal. Rather, it relies on Staff Rule 410.4 and Staff Regulation 4.3. Before turning to Staff Regulation 4.3, it is necessary to consider the complainants’ argument that Staff Rule 410.4 which, *prima facie*, authorises direct appointment to posts at the level of director or above is inconsistent with Article IV of the Staff Regulations. That article is concerned with the appointment and promotion of staff members and relevantly provides in part that:

“4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible.

4.3 Selection of staff members shall be without regard to race, creed or sex. So far as is practicable, selection shall be made on a competitive basis.

4.4 Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside. This preference shall also be applied, on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations.”

7. The Tribunal considered Staff Rule 410.4 in Judgment 2105 which concerned a direct appointment to a post below the level of director. It was said in that case that:

“Under the internal rules of the Organization, the Director-General has the discretion to fill a post by means other than a competition. The Tribunal will not interfere with such exercise of discretion as long as there is no abuse of authority [...].”

The question whether Staff Rule 410.4 is consistent with Article IV of the Staff Regulations has not previously been raised before the Tribunal. However, the question is raised in this case and must now be considered.

8. Nothing in Article IV of the Staff Regulations authorises the blanket exemption of posts at director-level and above from either the competitive process required by Regulation 4.3 or the preference directed by Regulation 4.4. Nor is there anything in Article IV that allows a general discretion to dispense with a competition in the interest of the Organization in the case of posts below the level of director. Regulation 4.3 directs a competition “[s]o far as is practicable”. The complainants are correct in their argument that Staff Rule 410.4 does not give effect to Article IV of the Staff Regulations. Accordingly, the valid appointment of Dr C. depends on whether or not it was practicable to conduct a competition as otherwise required by Staff Regulation 4.3.

9. In Judgment 1158 the Tribunal considered Regulation 3.3 of the Staff Regulations of the United Nations Industrial Development Organization (UNIDO). That Regulation is identical with WHO Regulation 4.3. It was said of the former Regulation:

“UNIDO has no duty under Regulation 3.3 to hold a competition in every case where there is a vacancy to be filled: the words ‘So far as [is] practicable’ keep the policy flexible.”

To that it may be added that those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable. For example, there may be a need to fill the vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments. However, the WHO makes no such claim. Presumably, that is because the post in question became vacant approximately nine months before Dr C.’s appointment was announced and approximately 11 months before she took up her functions. Moreover, the WHO was able to fill the post for most of that time by appointing the lead complainant to it on an interim basis.

10. Although the WHO relies on the words “[s]o far as is practicable” of Regulation 4.3, it does so only on the basis that a direct appointment is, in principle, quicker than a competitive appointment. In this regard, it relies on the statement in Judgment 535 that “an immediate appointment is of course quicker than an appointment following a competition and that according to [the] circumstances, several months may be gained”. In this context, it is said that, as there was a need to review the needs of the Department as well as the post description, it cannot “be seriously argued that a competition would have been as quick as a direct appointment”. The fact that a direct appointment will be quicker than a competitive appointment does not, without more, provide a basis for a decision that a competition is not practicable. If that is all that were required, it would render the general requirement for a competition in Staff Regulation 4.3 nugatory.

11. As the WHO points to nothing which might reasonably have led to a decision that a competition for the post in question was not practicable, the direct appointment of Dr C. cannot be justified by reference to Staff Regulation 4.3. It follows that the decision of 6 February 2006 dismissing the complainants’ appeal must be set aside, as must the earlier decision of 3 May 2004 appointing Dr C. to the post of Director of NHD. As the WHO advances nothing to indicate that a competition is not now practicable, there should be an order that a regular competition be held to fill that post.

12. Because the impugned decision must be set aside and a regular competition ordered, it is unnecessary to consider the other arguments advanced in this matter. However, it is convenient to note two further matters. The first is that no error is to be discerned in the finding of the Board of Appeal that there was insufficient evidence to establish a breach of Staff Regulation 1.3. The second is that the decision of 6 February 2006 rejecting the complainants’ appeals is not fully motivated. The letter notifying that decision dealt only with the question whether there had been an informal selection process, as found by the Board of Appeal, and not the question whether the direct appointment of Dr C. was made in accordance with Article IV of the Staff Regulations. It is of the utmost importance that, in cases of disputed appointments where the decision may affect the rights of third parties, decisions be properly motivated. Because of the possible effect on Dr C. in this case, the Tribunal has, exceptionally, considered all arguments advanced by the WHO and not merely the matters relied upon by it in the notification of the impugned decision.

DECISION

For the above reasons,

1. The Director-General’s decision of 6 February 2006 is set aside.
2. Without prejudice to the rights of Dr C., her appointment to the post of Director of NHD is set aside.
3. The WHO shall conduct a regular competition for the post of Director of NHD.
4. It shall pay each of the complainants 1,000 Swiss francs in costs.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

