

113th Session

Judgment No. 3136

THE ADMINISTRATIVE TRIBUNAL,

Considering the third and fourth complaints filed by Mr D.C. P. against the World Health Organization (WHO) on 3 May 2010, the Organization's replies of 28 September, the complainant's rejoinders of 21 October 2010 and WHO's surrejoinders of 2 February 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Indian national born in 1955, joined the Organization's Regional Office for South-East Asia (SEARO) on 9 August 1983 as a Clerk I at grade ND.03. In March 1984 he was promoted to grade ND.04 and in June 1991 to grade ND.05. On 6 December 2000 he was promoted to Assistant at grade ND.06 in the Communications and Records Unit of the Division of Administration and Finance. He was then assigned until 24 September 2001 to perform the duties of a vacant post at grade ND.07 and in April 2003 he was reassigned to the Education, Training and Support Unit as Award Assistant at grade ND.06.

In April 2003 the complainant submitted an application for the post of Administrative Assistant (Head of the Communications and Records Unit), at grade ND.07. In April 2004 he was informed that he had not been shortlisted and would not be interviewed. In July of that year Mr K. was selected for the post.

In August 2004 one of the five candidates shortlisted for the post, Mr S., challenged the appointment of Mr K. After having appealed unsuccessfully to the Regional Board of Appeal (RBA), he brought the matter before the Headquarters Board of Appeal (HBA), which found that the selection panel for the disputed post had breached the Guidelines for the recruitment and selection of General Service staff in SEARO as well as Staff Regulations 4.1 and 4.3. It recommended, inter alia, that the selection should be set aside and that a new panel should be established. By a decision of 5 April 2006 the Director-General set aside the selection of Mr K., who was subsequently reassigned to another post at grade ND.07, and stated that the selection process should be resumed from the interview stage, that a new selection panel would be appointed to consider the applications and other relevant material of the existing candidates in the event that they wished to be considered again for the post, and that the new selection panel could reinterview the candidates if necessary.

The disputed post was not re-advertised. On 30 May 2006 the original five shortlisted candidates were asked if they wished to be considered again for the vacancy and three of them, including Mr S., affirmed their continued interest. In an e-mail of 31 May the complainant expressed his concerns about the resumed selection process and asked the Director of WHO's Office of Internal Oversight Services to intervene in that process. On 12 June the Director replied that he would not do so. In the meantime, the new selection panel unanimously recommended that Mr M. should be selected for the post and the Regional Director accepted this recommendation. Mr M.'s appointment was publicly announced in SEARO on 13 June 2006. That same day, Mr S. filed an appeal with the RBA, challenging Mr M.'s appointment.

By a memorandum of 19 June 2006 to the Regional Personnel Officer, the complainant and five other staff members enquired about the vacancy notice for the disputed post, stating that they had not seen a recent announcement. By a SEARO memorandum of 30 June 2006, the Regional Personnel Officer informed the complainant that, *inter alia*, Mr M. had been selected for the post. On 31 July 2006 he was also informed that the Regional Director's decision to select Mr M. for the post was final. On 18 September 2006 the complainant filed a notice of intention to appeal against that decision with the RBA.

In December 2007 Mr S. was informed that the Regional Director had decided to set aside Mr M.'s appointment, on the grounds that the selection procedure had been flawed, and to order that the procedure be restarted from the point of the error, namely his own consideration of the candidates whose names were forwarded to him by the selection panel. WHO did not re-advertise the vacancy and Mr S. was subsequently selected for the disputed post with retroactive effect from 7 June 2006. The Director-General then decided that the appointment of Mr S. would have retroactive effect from 2 June 2004 instead.

Meanwhile, on 30 October 2007 the RBA issued its report on the complainant's appeal of 18 September 2006 against Mr M.'s selection. It found the appeal receivable and recommended, *inter alia*, that the complainant should be awarded compensation for the injury he had suffered due to the loss of a promotion opportunity. By a letter of 28 December 2007 the Regional Director informed him that his appeal was rejected as irreceivable. On 14 January 2008 the complainant appealed that decision to the HBA, which registered it under No. 681. That same day he filed a second appeal with the RBA, challenging Mr S.'s appointment to the disputed post.

In its report of 29 September 2008 the RBA recommended that the complainant's second appeal should be dismissed and on 17 October the Regional Director endorsed that recommendation. In December 2008 the complainant lodged an appeal against that decision with the HBA, which registered it under No. 707.

In its initial report of 12 January 2009 on appeal No. 681 the HBA recommended that that appeal should be dismissed because the complainant had no cause of action. On 15 June the complainant was appointed to the disputed post following a competitive selection. By a letter of 1 July 2009 the Director-General notified him of her decision to dismiss appeal No. 681 as irreceivable. In an e-mail to the Director-General of 22 July the complainant stated that he had been denied the right to be heard before she had taken her decision. On 24 September he was informed that the Director-General had decided to withdraw her decision of 1 July 2009 and to resume the proceedings in appeal No. 681. In November 2009 the complainant participated in oral hearings before the HBA for both of his internal appeals.

In its second report on appeal No. 681 the HBA unanimously found that the complainant had suffered harm due to flaws in the selection process. In particular, the decision to appoint Mr M. to the post without re-advertising the vacancy, for which the vacancy notice had been issued three years previously, had deprived the complainant of the opportunity to compete for a promotion. The HBA recommended that the complainant should be awarded 8,000 United States dollars in compensation, and costs.

In their report on appeal No. 707 all members of the HBA agreed that the Administration had tried to rectify the problem with the selection process and that both the Director-General and the Regional Director had discretionary authority to take decisions in this respect. A majority of the members found that, although they could not identify a specific rule that had been broken, it would have been reasonable to re-advertise the vacancy. By appointing Mr M. and, subsequently, Mr S. to the disputed post on the basis of a vacancy notice that was more than three years old, the Administration had deprived the complainant of the opportunity to compete for a promotion. In addition, the decision to resume the selection process at the interview stage had ultimately resulted in promotions for three other staff members and injury to the complainant. The majority recommended that he should be awarded compensation in the amount of 8,000 dollars. However, a minority of the members found that the

Administration had acted in good faith, that the Director-General and the Regional Director had not exceeded their authority, and that the decision to resume the selection process at the interview stage had been taken in WHO's interest and had not breached the Staff Rules. It also found that the complainant had not suffered any harm and recommended that the appeal should be dismissed.

In a letter of 31 March 2010 the Director-General informed the complainant that she had decided to dismiss both of his appeals. She questioned whether his appeals were receivable, pointing out that he had failed to appeal the initial decision not to interview him and that he had not appealed his non-selection or Mr K.'s appointment to the post. Furthermore, in her view, his appeal to the RBA regarding Mr M.'s selection had not been lodged within the prescribed time limits. In addition, Mr M.'s appointment had been set aside before the complainant appealed that appointment to the HBA, and while his appeal against Mr S.'s appointment was pending the complainant himself had been appointed to the disputed post following a competition. Consequently, it was questionable whether a cause of action existed at the material time or still existed. On the merits, the Director-General explained that she agreed with the minority opinion in appeal No. 707 and stated that, for the reasons outlined in that opinion, she was dismissing both of his appeals. That is the impugned decision in both complaints.

B. Referring to the Tribunal's case law, the complainant submits that his third complaint is receivable because he could not file an appeal until Mr M. had been appointed to the disputed post in 2006. He points to the second report of the HBA on appeal No. 681 and asserts that the Administration raised objections to the receivability of his appeal but, having heard those arguments, the HBA then considered the appeal on its merits.

He submits that his fourth complaint is receivable, given that he could not challenge Mr S.'s appointment until 2007. Furthermore, the Administration did not object to the receivability of that challenge during the proceedings in appeal No. 707.

On the merits, the complainant asserts that the Organization's decision to resume the selection process for the disputed post at the interview stage was unlawful. In his view, WHO breached the principles of equal treatment and natural justice and violated the Staff Regulations by failing to allow him to compete for the post when the selection process was resumed.

He argues that he in fact lost three opportunities for promotion, because both Mr K. and Mr M. were subsequently reassigned to other vacant positions at grade ND.07 after their respective appointments to the disputed post were set aside and Mr S.'s appointment did not follow an open competition procedure.

The complainant disputes WHO's assertion that his claim for loss of opportunity for promotion is speculative and he points out that, following a 2008 vacancy announcement, he was appointed to the disputed post in the first open competition held for that post since 2003.

He accuses the Director-General of abuse of authority, arguing that she rejected the HBA's recommendation in his favour in appeal No. 681 on the basis of the dissenting minority opinion in appeal No. 707. He also asserts that he has suffered psychological, moral and material injury.

In his third complaint the complainant seeks an award in the amount of 2 million United States dollars as compensation for the Organization's "two illegal selections". In his fourth complaint he claims damages in the amount of 1 million dollars. In both complaints he asks the Tribunal to assign responsibility for what he describes as a "wanton abuse of authority" and he claims costs in the amount of 5,000 dollars, as well as any other compensation the Tribunal deems just and fair. He also applies for an oral hearing.

C. In its replies the Organization submits that the complainant's third and fourth complaints are linked because they raise common issues of fact and law, the pleadings are largely interdependent, and both complaints impugn decisions conveyed to him by a single letter from the Director-General. Consequently, it requests that they be joined.

The defendant contests the receivability of both complaints, relying on the conclusions reached by the Director-General on this issue in her letter of 31 March 2010.

On the merits, WHO asserts that the action it took to correct defects in the initial selection process by resuming it at the interview stage did not violate any internal regulations, rules or policies and the related decisions were within the authority of the Director-General and/or the Regional Director. The decision to resume the selection process was taken in WHO's interest and in good faith. In addition, the complainant's opportunity to compete for the disputed post was not affected by the resumption of the selection process at the interview stage. He had been given the opportunity to compete and had in fact applied for the post and participated in a written test. Based on the results of that test, he was not invited to an interview or selected for the post, and he did not challenge those decisions within the prescribed time limits.

WHO asserts that it did not breach the principle of equal treatment. The complainant was treated in the same way as other similarly situated staff members who had competed for the post but who had not been shortlisted for an interview. In the Organization's view, neither the complainant's evaluation of the suitability of Mr K., Mr M. and Mr S., nor his subsequent appointment to the disputed post are evidence that he would have been successful in a competition had it issued a new vacancy notice earlier.

It submits that it dealt with the complainant's various appeals in good faith during the internal appeal process. It opposes his claim for exemplary damages and states that he was treated with dignity and that the course of action it followed in this matter was not motivated by malice, ill will or personal prejudice.

D. In his rejoinders the complainant presses his pleas. He contends that the events leading to his two complaints are different and he opposes WHO's request for joinder. He asserts that his third complaint is receivable, not only because he filed his appeal with the RBA within 60 days from the communication of 31 July 2006

confirming the decision to appoint Mr M. to the contested post, but also because both the RBA and the HBA confirmed the receivability of appeal No. 681. He points out that the HBA also upheld the receivability of his second appeal and that his fourth complaint is therefore also receivable.

E. In its surrejoinders WHO maintains its position in full.

CONSIDERATIONS

1. Before turning to the substance of the complaints, two preliminary matters will be considered. First, since the two complaints before the Tribunal concern the selection processes regarding the same post and share, to a significant extent, the same factual background and raise common issues of fact and law and seek the same redress, they are joined to form the subject of a single ruling. Second, the complainant applies for an oral hearing for the purpose of clarifying his case. However, he has not identified any evidence he wishes to adduce or any clarification that he cannot make equally well in his written pleadings. Further, as these complaints largely address questions of law an oral hearing will not be ordered.

2. In 2003 the complainant participated in an open competition for the post of Administrative Assistant (Head of the Communications and Records Unit). The competition process involved three steps: a written examination, an interview, and a final selection by the Regional Director. Fifteen staff members applied for the post, of whom five were shortlisted for interviews. The complainant was not among them. The Administration advised the complainant that he was not on the list of candidates to be interviewed and in July 2004 the successful candidate, Mr K., was appointed to the post.

3. On 5 August 2004 one of the shortlisted candidates, Mr S., successfully appealed the result of the initial selection process on the grounds that it had been procedurally flawed. In April 2006 the Director-General set aside Mr K.'s selection and ordered a resumption of the selection process from the point of the error, i.e. the interview

stage. WHO did not re-advertise the vacancy and the complainant's candidacy was not reconsidered. Mr M. was the successful candidate in the resumed selection process which concluded in June 2006. This process is the subject of the complainant's third complaint.

4. On 13 June 2006 Mr S. appealed the selection process again and was informed on 10 December 2007 that the Regional Director had set aside Mr M.'s appointment and ordered that the selection process be restarted from the point of the error, namely his own consideration of the candidates forwarded to him by the selection panel. As before, WHO did not re-advertise the vacancy. In this latter selection process, Mr S. was the successful candidate and he was eventually appointed to the post with retroactive effect from June 2004. This process is the subject of the complainant's fourth complaint.

5. On 18 September 2006 the complainant appealed Mr M.'s selection to the RBA. The Regional Director did not accept the RBA's finding that the appeal was receivable or its recommendation that the complainant be awarded compensation for loss of a promotion opportunity. He therefore informed the complainant on 28 December 2007 that he had decided to dismiss his appeal as irreceivable. The complainant appealed that decision to the HBA on 14 January 2008. On the same day he filed an appeal with the RBA challenging Mr S.'s appointment. The RBA did not find in favour of the complainant and the Regional Director informed him on 17 October 2008 that he was dismissing his appeal. The complainant appealed that decision to the HBA on 15 December 2008. For the purpose of resolving the present case, a review of the HBA's recommendations is unnecessary. On 31 March 2010 the Director-General dismissed both appeals.

6. In both complaints the issues of receivability are determinative. In the third complaint, WHO submits that the complainant did not file his notice of intention to appeal the decision to appoint Mr M. to the disputed post with the RBA until 18 September 2006, that is well beyond the sixty-day time limit provided for by Staff Rule 1230.8.3. WHO notes that the complainant was informed in June 2006 of Mr M.'s selection for the post.

It maintains that subsequent correspondence from the Regional Personnel Officer merely reiterated that decision and did not operate to reset the time within which an appeal had to be filed.

7. The complainant maintains that he received the Administration's final decision on Mr M.'s appointment on 31 July 2006 and that his appeal of 18 September to the RBA was, therefore, filed within the statutory time limits. Relying on Judgment 2868, under 12 and 13, he argues that, as WHO did not object to receivability during the internal appeals process, it may not do so now. He also argues that, since the HBA accepted his version of the timeline that included the receipt of the notice of the contested decision on 31 July 2006, receivability cannot now be challenged. Lastly, in relation to the correspondence from the Regional Personnel Officer, he points to Judgment 2901, under 10, in which the Tribunal observed that a complaint can be receivable "notwithstanding the expiry of the time limit for filing [...], if a particular step taken by an organisation, such as sending a dilatory reply to the complainant, might give that person good reason to infer that his or her claim is still under consideration".

8. The documentary record directly contradicts the complainant's assertion that he did not receive the final decision regarding Mr M.'s appointment until 31 July. The Regional Personnel Officer wrote to him on 30 June 2006 stating that "[t]he selection of Mr [M.] has been made against Vacancy Notice 2003/7 [...]". Further, there is nothing in the Officer's memoranda of 17 and 31 July to the complainant from which it could be inferred that a final decision had not been taken. Moreover, the memorandum of 31 July merely confirms the decision at issue.

9. While it is true that the RBA's report, the Regional Director's decision and the HBA report do not discuss the question of whether the complainant's appeal is time-barred in a consistent and clear manner, in her decision of 31 March 2010 the Director-General specifically addressed the issue. She stated:

"[Y]ou were informed of Mr [M.]'s selection in June 2006. You appealed his selection with the Regional Board of Appeal on 18 September 2006. I

note that this matter was not addressed by the HBA, but I would consider that, on the basis of those two dates, your appeal was filed out of time under the Staff Rules and was therefore irreceivable.”

10. As the Director-General’s decision included a finding in relation to receivability, it is a live issue in the present complaint. It is also observed that, in these circumstances, the complainant’s reliance on Judgment 2868 is misplaced. The Tribunal agrees with the Director-General’s conclusion that the complainant’s third complaint is time-barred.

11. As to his fourth complaint, according to Article II, paragraph 5, of the Statute of the Tribunal, to be receivable claims must relate to decisions involving the terms of a staff member’s appointment or the provisions of the Staff Regulations. The Tribunal observes that the complainant’s involvement in the selection process for the relevant post ended in April 2004, when he was informed that he had not been shortlisted for an interview. He did not challenge that decision when it was rendered and he does not allege now that it was improperly taken. Subsequent to the complainant’s elimination from the applicant pool, the selection panel erred by failing to refer Mr S.’s name to the Regional Director. Mr S. was able, on the basis of that error, to appeal successfully the decision appointing Mr K. to the post. The complainant did not challenge Mr K.’s appointment at the time. The subsequent decision to resume the selection process from the stage of the Regional Director’s consideration of the names referred to him by the selection panel did not concern the complainant; he had already been validly screened out of the process at that point. It follows that it cannot be said that the decision in any way engaged the terms of the complainant’s appointment or breached the Staff Regulations. Accordingly, the complainant’s fourth complaint is irreceivable.

DECISION

For the above reasons,

The complaints are dismissed as irreceivable.

In witness of this judgment, adopted on 10 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet