

EIGHTY-FIRST SESSION

In re FAUQUEX

Judgment 1513

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Arlette Marie-Louise Fauquex against the World Health Organization (WHO) on 4 July 1995, the WHO's reply of 6 October, the complainant's rejoinder of 6 December 1995 and the Organization's surrejoinder of 6 March 1996;

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 complainant, a Swiss citizen born in 1941, joined the staff of the WHO in 1971 under a fixed-term appointment as a technical officer at grade P.2, first in Zambia, then in Malawi. She got promotion to P.3 in 1975 and served in Togo, Nepal and the Western Pacific. In 1988 the WHO promoted her to P.4 at headquarters in Geneva, where she was put on a post under the Global Programme on AIDS. She was granted a permanent appointment in 1990.

The Organization decided to abolish her post for budgetary reasons at 31 December 1993. In a letter of 3 December 1993 the Director of the Division of Personnel made her an offer of "separation by mutual agreement" under WHO Staff Rule 1015. After negotiation in ensuing correspondence she endorsed terms of separation in a letter of 2 February 1994. They included (1) leave without pay from 1 February 1994 until 30 November 1996, when she is to qualify for early retirement; (2) payment by the WHO until then of her contributions and its own to the pension and staff health insurance funds; (3) three months' pay and a termination entitlement; and (4) a promise by the Organization to give her until 30 November 1996 "priority consideration for any short-term employment but also for positions in the [Professional] and [General Service] categories for which [she has] the necessary qualifications, i.e. educational background and experience".

On 23 March 1994 she applied for a P.4 post as supply officer which the Organization had put up for competition on 25 February 1994. But on 16 August 1994 a senior personnel officer told her orally that the Director-General had appointed someone else.

By a letter of 25 August 1994 she asked the Director of Personnel to review that decision under Staff Rule 1230.8.1 on the grounds that the result of the competition and the Organization's failure to consider her for several short-term appointments were at odds with the terms of separation she had agreed to.

In a letter dated 9 September the Director replied that her unwillingness to accept long-term employment outside Geneva made a "suitable" vacancy hard to find.

On 4 November 1994 she appealed to the headquarters Board of Appeal. In its report of 9 March 1995 the Board recommended rejecting her appeal but paying her costs up to the amount of 1,500 Swiss francs and agreeing to "honour its commitment" to seek positions for which she might be "considered and given priority".

By a letter of 18 May 1995, which she impugns, the Director-General endorsed the Board's recommendations save as to costs.

B. The complainant submits that the WHO has failed to keep its promise of 21 January 1994 to give her priority for any position in the Professional or General Service category that matches her qualifications. She sees evidence of that failure in its appointing someone else as supply officer and granting "a whole series" of short-term contracts to others without even considering whether they might suit her.

The appointment of the supply officer shows procedural and substantive flaws. In breach of Manual paragraph

II.3.340 no representative of the Staff Committee took part in the meeting of the Senior Staff Selection Committee. Although the complainant was one of four on the shortlist of candidates "most suitable for the post" under Manual paragraph II.3.420 the acting Director of Personnel told her in a letter of 11 November 1994 that she was not fit to carry out the material duties "in an able manner".

The WHO recruited 26 technical officers at P.3 or P.4 between 1 December 1993 and June 1995, and its failure to give her the "slightest" consideration for any of those positions amounts to breach of its promise of priority.

She asks the Tribunal to order the disclosure to it and to her of the report and other documents about the meeting of the Senior Staff Selection Committee. She seeks compensation for loss of earnings in the amount of three years' pay at her last grade and step; extension of her appointment from 1 December 1996 until she reaches the age of 60 on leave without pay but with "continued payment by WHO and by herself of their respective contributions to the United Nations Joint Staff Pension Fund and to the WHO Staff Health Insurance"; and 5,000 Swiss francs in costs.

C. In its reply the Organization contends that it has kept its promise to her. Putting her name on a shortlist did not entitle her to a post she did not qualify for. There was no procedural defect in the Selection Committee's recommendation and no lack of diligence by the Administration, which asked units to give her "sympathetic consideration" when recruiting consultants.

D. In her rejoinder the complainant challenges the WHO's interpretation of its promise and enlarges on her pleas.

E. In its surrejoinder the WHO seeks to refute her arguments in the rejoinder and presses its submissions in reply.

CONSIDERATIONS:

1. The WHO appointed the complainant to its staff in December 1971. From 1988 to 1994 it employed her at headquarters in Geneva under its Global Programme on AIDS. Before it abolished her post on 31 December 1993 she often saw administrative staff of the Programme to discuss an alternative assignment. Though she was unwilling to be away from Geneva for longer than three months, she had a better chance of transfer to the field since suitable posts were more likely to be available there. Though she was entitled to participate in the prescribed procedure for reduction in force (RIF), she decided not to. Instead she and the Organization concluded an agreement to take effect at 1 February 1994, whereby, instead of having her appointment terminated, she was put on leave without pay until 30 November 1996, when she would reach the age of early retirement and qualify for a pension. The agreement also gave her various benefits, one being that while on leave without pay she was to be given "priority consideration for any short-term employment but also for positions in the [Professional] and [General Service] categories for which she had the necessary qualifications, i.e. education background and experience".

2. On 23 March 1994 she applied for a vacant post for a supply officer. Though she was short-listed and called for interviews, another candidate was chosen. Having heard informally from a senior personnel officer on 16 August that she had not been successful she applied in a letter of 25 August to the Director of Personnel for reconsideration in accordance with Staff Rule 1230.8.1. Confirmation of the previous decision was notified to her by a letter of 9 September 1994. She then appealed on 4 November 1994 to the headquarters Board of Appeal against the Organization's breach of its promise to give her priority for any suitable position and in particular against the appointment of someone else as supply officer.

3. The Board reported on 9 March 1995. It found no breach of the agreement in appointing someone else as supply officer and no evidence to establish that she had been bypassed in recruitment for consultant posts. But it thought that the "current procedures for implementing commitments to give priority to separating staff were not sufficiently rigorous to ensure that the commitments were honoured" and so there was "a need to review these procedures". The Board recommended dismissing the complainant's appeal against non-selection for the post and awarding her no compensation but paying her costs up to 1,500 Swiss francs. It also recommended that "to honour its commitment, the Administration be proactive and take steps to identify suitable positions for which the Appellant [could] be considered and given priority". The Director-General endorsed all the recommendations but the one about costs and so informed the complainant by a letter of 18 May 1995. That is the decision she is impugning.

Discovery

4. The complainant seeks disclosure of:

(a)the Senior Staff Selection Committee's report on its deliberations about the filling of the post of supply officer;

(b)"copies of all documents placed before that Committee, when it deliberated on the filling of the said post, with respect to the complainant"; and

(c)"copies of the information provided to the Board of Appeal to explain the absence of a representative of the Staff Committee from the meeting of the Senior Staff Selection Committee and copies of all notifications covering the meeting sent to those representatives".

5.At the request of the Board the WHO submitted to it a copy of the Selection Committee's report but is unwilling to disclose documents to the complainant on the grounds that the Committee's records are privileged. The complainant contests the WHO's position. The Organization relies on Judgment 1372 (in re Malhotra). In that case the regional Board of Appeal had sought documents from the Selection Committee and been refused them on the grounds of privilege. The Tribunal ordered disclosure on the grounds that an item that formed part of the proceedings that had led to the impugned decision might not be withheld from scrutiny by the Tribunal and that rule held good for any appellate body. The complainant in that case had not sought disclosure to himself.

6.As a general rule a complainant may not be entitled to consult any records that may have been made of discussions by a selection committee: members of such committees would not feel free to discuss candidates independently in future if they felt at risk of having their own views divulged: see Judgment 556 (in re Ali Khan).

7.The Tribunal has ordered the WHO to submit to it the documents mentioned in 4(a) and (b) above and the Organization has produced them. The Tribunal is satisfied that the plea of privilege can be sustained. The documents which were before the Selection Committee and which referred to the complainant consisted of documents she had herself submitted. There were also reports on the interviews with her on 21 April 1994, and they are privileged for the reason set out in 6 above. The privilege that protects the Committee's actual deliberations must cover also interviews held in preparation for its meeting.

The complainant's application for disclosure to her of the documents listed under 4(a) and (b) above is therefore refused. As for the documents under 4(c), the matter is dealt with below, in 15 to 17.

The merits

8.The complainant claims:

(1)compensation for loss of earnings equivalent to three year's pay at her last grade and step;

(2)the extension of her contract, from 1 December 1996 up to the date at which she reaches the age of sixty, on leave without pay but with continued contributions by herself and the Organization to the United Nations Joint Staff Pension Fund and to the Staff Health Insurance Fund;

(3)5,000 Swiss francs in costs.

9.There are two aspects to the complainant's case that the WHO's treatment of her was wrongful: one, its failure to appoint her to the post of supply officer, and the other its granting consultancies and short-term contracts to others in breach of its commitment to her.

The post of supply officer

10.As to her unsuccessful application for the post of supply officer she has three objections. First, if she had not been thought fully qualified for the post and able to perform the duties and functions, she should not have been short-listed. Putting her on the list of four meant that she was suitable. And the Director of the Division of Personnel told her at an interview in April 1994 that he would support her. Her second argument is that the Organization broke its promise by appointing an outside candidate and so disregarding the principle laid down in Judgment 1323 (in re Morris). That case was about the appointment of such a candidate in preference to a staff member whose appointment had been terminated and who was entitled to the application of the reduction-in-force procedure. The Tribunal held that the WHO's Manual provided for preference over any outside candidate, not just over less well or equally qualified ones. Thirdly, she alleges a procedural flaw.

11.The Organization's answer to her first argument is that the reasons why she was put on the short list were that she had a long record of service and was out of a job; she had a permanent appointment; the Personnel Division asked that she be given priority; and her application suggested that she had some of the qualities needed. Though her application did not reveal breadth and depth of relevant experience, the Division which had the vacant post put her on the list to ensure thorough examination of her candidature and to see in interview whether she had experience that her application had not revealed. But the interview showed her relevant experience to be far too narrow for her to be able to work independently as a head of unit at grade P.4. She lacked thorough knowledge of supplies and equipment and experience of procurement. She had no experience of carrying out market surveys, analysing market conditions or negotiating procurement contracts. She could not have given professional guidance to her subordinates but would have had to go to them for guidance. For those reasons the Committee was unanimous that she could not be offered the post.

12.The Tribunal is satisfied that on that score the Organization was not at fault: it made no sort of commitment to the complainant by short-listing her and calling her for interview.

13.The Organization's answer to her second argument - about the appointment of an outside candidate to the post - is that she was not entitled to be considered for reassignment as if she had participated in the procedure for reduction in force. She negotiated separation and the parties' rights and obligations are set out in the agreement she signed. She agreed thereby to separation instead of going through the reduction-in-force exercise. She did ask in her letter of 12 January 1994 to have one clause - about priority for short assignments - brought into line with the broader wording of paragraph II.9.370, which relates to that procedure; but the Director of Personnel refused and his reply of 21 January cannot be construed as consent: the agreement was as set out in that reply.

14.The Organization's plea succeeds. It made no offer to bring the clause of the agreement into line with 370. The separation by mutual consent was seen as an alternative to the reduction-in-force procedure and there are no grounds for construing the clause as if it prescribed such procedure. Judgment 1323 is irrelevant: it was about a reduction in force in which a dental officer applied for another position for a dental officer at the same grade. In this case the complainant was a laboratory technician and applied for the post of supply officer, for which she was not qualified, and the reduction-in-force procedure was not being followed.

15.Thirdly, the complainant alleges breach of due process, and she cites the report of the headquarters Board of Appeal, which said on that score:

"The Board noted that there was no representative of the Staff Association at the Selection Committee meeting, but later learned that representatives of the Staff Association had been invited to the meeting but were unable to attend. The Board considered that the correct procedures had been followed."

The complainant contends that she "has so far had no opportunity to verify the circumstances in which the decision was taken in the absence of a staff representative" and wants "to reserve the possibility of reverting to that issue". That indeed is why she has sought disclosure of the documents mentioned in 4(c) above.

16.In its reply the Organization cites a memorandum issued by the Director of Personnel on 25 October 1990 about staff representation on the Senior Staff Selection Committee. According to that memorandum "Meetings of the [Committee] are not postponed if no staff representative is available to attend a particular meeting". The Organization said that both the staff representative on the Committee and one of the alternates were invited but neither was able to attend. The second alternate did attend the meeting as the staff representative for all the cases presented to the Committee, but because he was the second-level supervisor for the post of supply officer he was unable to sign the Committee's recommendation. In her rejoinder the complainant says that she has spoken to the first of the alternates and he does not remember being invited to any meeting at the material time. In its surrejoinder the Organization further explains that the staff representative was then on holiday and it produces a memorandum by the first alternate saying that so long afterwards he cannot tell from his records whether or not he was invited. The Organization says that its practice is to telephone anyone invited to attend; someone who then says he cannot will get no written invitation.

17.In the light of the rules about the composition of the Committee and the Organization's explanations the Tribunal is satisfied that there was no procedural defect in it at the meeting, and the complainant's application for discovery is not warranted.

Short-term assignments

18. In support of her objections to the grant of consultancies and short-term contracts to others, she refers to the negotiation about separation, in particular a letter which she wrote on 12 January 1994 to the Director of Personnel and in which she said:

"In point 5 of your offer, it is stated that I would be given priority consideration for any short-term employment in my field of specialisation in GPA or in any other service for which there may be a need during my leave without pay. The limitations resulting from the references to only short-term employment and to my field of specialisation do not appear consistent with paragraph 370 of the section of the WHO Manual relating to separation from service, according to which I should be given preference for any vacancy for which I am qualified. I would therefore request that point 5 be brought into line with that broader wording of the said paragraph 370."

The Director answered her in a letter of 21 January:

"I agree that during the period of your leave-without-pay in lieu of termination you should not only be given priority consideration for any short-term employment but also for positions in the P and GS categories for which you have the necessary qualifications, i.e. educational background and experience."

She contends that the Organization's misinterpretation of the commitment it made amounts to an error of law. She says that at the end of 1993 she repeatedly asked the Chief of Administration, Management and Information of the GPA what short-term assignments there might be but he never told her. She later learned that the GPA had engaged a consultant to carry out, among others, functions which she herself had been performing, and that consultants were engaged in other units such as the Health Laboratory Technology and Blood Safety Units and the Division of Emergency and Humanitarian Action. She invited the Board of Appeal to order the Organization to explain, and the Organization supplied a list of those it had employed on short assignments at grades P.1 to P.4 since 1 December 1993. The complainant submits:

(a) Apart from mentioning the promise of priority given to her in a memorandum of 25 May 1995 to programmes at headquarters, the Division of Personnel did nothing to honour the commitment when Professional category staff were engaged on short assignments.

(b) She did not get, until the Board of Appeal asked for it, the information she had sought about short-term assignments in the GPA.

(c) The promise of priority was overlooked in remarks by the acting Chief of the Blood Safety Unit that a consultant employed on a laboratory post under the Programme on Health Technology would perform more competently than the complainant.

(d) The information given to the Board about short-term contracts and consultancies was so meagre as to allow no "precise determination of the functions and qualifications".

(e) In the list of short-term appointments in the Professional category appointments there were 26 technical officers at grade P.3 or P.4. Since she herself had held several posts as technical officer it would be surprising if she were not qualified for any of those 26 appointments.

(f) The same remark holds good as to the possibility of employing her as a consultant.

(g) Since announcements are not issued for short-term staff and consultants she had no means of finding out about the openings.

Though she is not saying that she was wilfully bypassed or that there was a deliberate intention not to honour the commitment, she believes that the failure to "maintain sufficiently rigorous procedures to ensure that commitments are honoured necessarily leads to disregard of those commitments", and did in her own case.

19. The Organization in reply gives a long and detailed account of the efforts it made to find assignments to meet its commitment towards the complainant. It gave her three assignments: one from 6 to 8 April 1994; a second from 15 to 19 June 1994; and a third from 15 November 1994 to 15 February 1995. It explains that it does not choose short-term in the same way as fixed-term staff, whose appointments must go through procedures for recruitment and

selection co-ordinated by the Division of Personnel at headquarters, whereas short-term staff and consultants are directly selected by the unit that needs them. It says that it repeatedly informed divisions at headquarters and regional offices of its commitment. At the outset it sent her curriculum vitae to programmes at headquarters and regional offices with a memorandum saying she was available for both short and long-term assignments. On 25 May 1994 it sent out another memorandum emphasising that she should be given priority for any short or long-term assignment for which she had the right qualifications and experience. On 5 September 1995 it sent a third memorandum to Assistant Directors-General and divisions at headquarters. The Division of Personnel made particular efforts to contact by telephone and in writing the divisions and units most likely to employ her. It even approached outside organisations (the United Nations Programme on AIDS, the United Nations High Commissioner's Office for Refugees and the United Nations Centre for Human Rights). The Chief of Personnel Planning and Recruitment saw her on average once a month from April 1994. As to the particular consultancy she says was granted under the GPA after her departure, the Organization says that the duties of the post she used to hold were quite different from the consultant's terms of reference. As for her objections to remarks made by the acting Chief of the Blood Safety Unit, it points out that what he said was that she had not the experience to carry out the duties being performed and did not qualify for the position.

20. The complainant's plea fails. Again, the above account of what the Organization has done satisfied the Tribunal of its constant efforts to find her a position suited to her background and experience. It may not be held liable for any breach of its general commitment to her.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 11 July 1996.

William Douglas
Mella Carroll
Julio Barberis
A.B. Gardner