

In re Fauquex (No. 2)

Judgment 1778

The Administrative Tribunal,

Considering the second complaint filed by Miss Arlette Marie-Louise Fauquex against the World Health Organization (WHO) on 5 May 1997, the WHO's reply of 31 July, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 27 November 1997;

Considering Articles II, paragraph 5, and VII 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, used to be an official of the WHO. Details of her career in the Organization are set out under A in Judgment 1513 of 11 July 1996, which dismissed her first complaint.

In this one too she alleges breach of a commitment by the defendant under an agreement that came into force on 1 February 1994 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 had] the necessary qualifications, i.e. educational background and experience".

By a notice of vacancy of 30 October 1995, No. P95/83, the Organization announced a competition to fill a post for a technical officer

at grade P.3 under its Action Programme for the Elimination of Leprosy (LEP). By notice LR/95/19 of 23 November 1995 it announced a post at grade G.6 for a laboratory technician in the Joint Medical Service of the United Nations in Geneva. On 11 December 1995 the complainant applied for both those posts. The Director of the Medical Service interviewed her on 18 January 1996. In a letter dated 19 March 1996 a personnel officer told her that her application for the post of laboratory technician had been unsuccessful. The next day the chief of Personnel Planning and Recruitment told her that the successful candidate had already been working in the Medical Service and that, no-one having been appointed to the leprosy programme, the notice of the vacancy might be issued again later. By a letter of 11 April 1996 she asked the chief of Personnel to review the decisions not to select her for the posts.

From the absence of a reply she inferred rejection and she lodged an appeal with the headquarters Board of Appeal on 19 August 1996. By a letter dated 26 September 1996 the chief of Personnel explained that she lacked the clinical experience and knowledge of new laboratory techniques and radiology that the post in the Joint Medical Service required, but said that her application for the other post would be "given every due consideration".

In its report of 30 January 1997 the Board recommended rejection. By a letter of 3 March 1997, which she impugns, the Director-General endorsed the Board's recommendation.

B. The complainant submits that the WHO broke its promise to give her "priority consideration". She seeks to show that her qualifications met the requirements in the notice of vacancy. She has a diploma as a medical technician and relevant clinical experience in Europe and other parts of the world. The last post she won by competition, a P.4 one, called for "considerable experience in practical and operational application of laboratory diagnostic methods" and "knowledge of laboratory work [and] skills in applying diagnostic and screening methods". How then can she have been found to lack the "clinical experience and knowledge of new laboratory techniques" required for work as a technician at G.6? As for radiology, she points out that the notice said that experience of it was desirable, not necessary; besides, she was willing to undergo training. Twenty years' experience of WHO work, many in the field, amply qualified her for the P.3 post in the leprosy programme.

She disputes the WHO's interpretation of the term "priority consideration" to mean that she had a right to selection

only if she and another candidate were equally qualified. The construction which she relies on, and which she says is in line with precedent, is that she was entitled to any assignment she qualified for, whatever the other candidates' qualifications might be. Not only did the Administration break its word but it drew a wrong conclusion from the evidence. It decided without even interviewing her not to fill the vacancy in the leprosy programme and it gave her no reasons for the decision.

She seeks reassignment to a post in keeping with her qualifications or, failing that, an award of damages in an amount she leaves it to the Tribunal to set. She claims material damages for the delay in reassigning her and 4,000 Swiss francs in costs.

C. In its reply the WHO submits that the complaint is in part irreceivable and in any event devoid of merit. Insofar as no-one has been appointed to the post in the leprosy programme she has no cause of action: the Director-General has taken no challengeable decision on the filling of that post. After screening the candidates the Administration felt that none of them was qualified and it suspended the process of selection. It reissued the notice a few months later but cancelled it again "for the same reason".

On the merits it observes that the complainant was not fit for either post. Selection being at discretion, the Tribunal will not replace a selection committee's views with its own. In any event her application got the "priority consideration" she was entitled to.

D. In her rejoinder the complainant enlarges on her pleas. She submits that the cancellation of a notice of vacancy does amount to a decision. Since she was a qualified candidate entitled to priority consideration, breaking off the process of selection was an "actionable wrong". She produces a letter of 29 May 1997 from the Division of Personnel telling her, after the reissue of the vacancy for a technical officer, that because of "organizational changes" the WHO had again cancelled the notice. That, she observes, is at odds with the reason the Organization has given in its reply. She presses her claims.

E. In its surrejoinder the WHO presses its pleas and comments on new issues she raises in her rejoinder. It maintains that the reason why it withdrew the notice of vacancy in the leprosy programme was the lack of good candidates.

CONSIDERATIONS

1. The complainant used to hold a post under the World Health Organization's Global Programme on AIDS. The Organization abolished the post on 31 December 1993. She concluded an agreement with it, to take effect on 1 February 1994, whereby instead of terminating her appointment it put her on leave without pay until 30 November 1996, the date at which she would reach the age of early retirement and qualify for a pension. It also agreed to give her "priority consideration" for any short-term employment and for posts in the Professional and General Service categories of staff for which she was qualified by education and experience. The facts are fully set out in Judgment 1513, in which the Tribunal dismissed her first complaint challenging the Organization's failure to appoint her to a P.4 post as a supply officer and generally to honour its commitment to her.

2. On 11 December 1995 she applied for two posts: one, at grade G.6, for a laboratory technician in the Joint Medical Service, and the other, at grade P.3, for a technical officer under the Organization's Action Programme for the Elimination of Leprosy (LEP).

3. As to the post in the Joint Medical Service, its Director interviewed her and the Selection Committee considered her candidacy, but the Organization decided not to select her and so informed her by a letter dated 19 March 1996. She wrote to the chief of Personnel Planning and Recruitment on 11 April 1996 requesting review but got no reply until 26 September 1996. On 6 August 1996 she had given notice of appeal to the headquarters Board of Appeal. As to the post with the leprosy programme, the chief of Personnel told her orally on 20 March 1996 that no selection had been made and that the notice of vacancy would be reissued. In the same letter of 11 April she made a request for review of the decision to reissue the notice. In her statement of appeal dated 19 August she sought either "appointment to a suitable position" or "financial compensation", and costs.

4. In its report of 30 January 1997 the headquarters Board of Appeal declared her appeal receivable. As to the post in the Joint Medical Service it held that the Selection Committee had been given full information and that proper procedures had been followed, i.e. that the successful candidate had the qualifications and experience required for

the post; it found no evidence of personal prejudice. As to the post with the leprosy programme it held that her rights had been respected and that the decision to reissue the notice was justified. It recommended rejecting her appeal. The Director-General accepted the recommendation and so informed her by a letter dated 3 March 1997, the decision she is impugning.

5. The Organization contends that insofar as it relates to the LEP post her complaint is irreceivable because no final decision has been taken to fill the post and she has no cause of action. She retorts that the reason for not proceeding with the selection was directly related to assessment of the candidates' qualifications: the Director of the leprosy programme stated in a memorandum of 20 December 1996 to the chairwoman of the Board that, having considered all the applicants, including her, he found none of them "suitable enough in terms of qualifications, skills and experience to be short-listed for selection". According to the Board's report he told the Board that "he would not recommend [the complainant] for selection" for the post.

6. The reissuance of the notice was a challengeable decision. The information given to her orally on 20 March 1996 did not amount to a challengeable final decision within the meaning of Staff Rule 1230.8.1, which requires that the staff member should have received "written notification". The complainant got no reply to her request of 11 April until 26 September 1996. According to Rule 1230.8.2 she was entitled after two months of silence, i.e. by 11 June 1996, to infer rejection of her request, and in accordance with 1230.8.3 she lodged on 6 August, i.e. within sixty calendar days, her appeal relating to the two posts. Since she duly followed the internal appeal procedure her complaint is receivable insofar as it relates to the LEP post. As for the other post, the Organization does not challenge the receivability of her complaint.

7. She submits that as regards both posts, and during the period up to 30 November 1996, when she was on leave without pay, the Organization failed to keep its promise to give her "priority consideration" for Professional or General Service category posts that she qualified for.

8. There were two candidates - she and another - for the post in the Joint Medical Service. The chief of Personnel Planning and Recruitment informed her by a letter of 26 September 1996 of the Selection Board's conclusion that she lacked the "clinical experience and knowledge of new laboratory techniques and radiology" that were necessary for competent performance in the post. For her part, she sees that conclusion as "entirely false and gratuitous". She observes that training in radiology was said to be desirable but not necessary and that she had stated anyway her willingness to undergo training, which should not have taken long. She describes her experience and says that she won her last post, a P.4 one, by competition, and the notice of vacancy had required "considerable experience in practical and operational application of laboratory diagnostic methods". She observes too that in its report the headquarters Board of Appeal held:

"rather than referring to [the complainant's] lack of clinical experience and knowledge of laboratory techniques, it would have been more accurate to refer to the better qualifications and experience of the selected candidate, as related to the requirements of the post."

Citing the Board of Appeal's rejection of the view that she lacked "clinical experience and knowledge of laboratory techniques", she submits that the Selection Committee made a wrong finding of fact on her fitness for the post.

9. It is clear on the evidence that the reason why the complainant was not selected for the post was that the other candidate, who was also on the Organization's staff, had all the necessary qualifications and experience and was therefore preferred. The complainant herself acknowledges that she did not have training in radiology, though the notice said that training in radiology was desirable and knowledge of it an advantage.

10. The qualifications and experience required for the leprosy programme post were set out in vacancy notice P95/83. The complainant cites what the Director of the programme told the headquarters Board: that he found none of the candidates good enough to be short-listed. She argues that his conclusion was not that she actually lacked the qualifications for the post but rather that he wanted to find someone with better qualifications. But, as the Organization points out, she herself acknowledges that she did not have the educational requirement stated in the notice, namely a "university degree in either educational technology, physical rehabilitation, public health or social sciences". Since on her own admission she did not have the minimum requirements stated in the notice, she did not qualify for selection: see Judgment 1383 (*in re* Río Rumbaitis), under 12.

11. The conclusion is that the candidate appointed to the post in the Joint Medical Service was better qualified and

that the complainant did not have the educational requirements for the post with the leprosy programme. So she is mistaken in contending that the Organization failed to honour its commitment to her.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner