

*Registry's translation,
the French
text alone
being authoritative.*

105th Session

Judgment No. 2761

The Administrative Tribunal,

Considering the complaint filed by Ms E. F. against the World Health Organization (WHO) on 20 March 2007, the Organization's reply of 26 June, the complainant's rejoinder of 19 September and WHO's surrejoinder of 19 December 2007;

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

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

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

A. The complainant, who has dual French and Senegalese nationality and was born in 1946, has been employed by WHO since 1994. She has been a Public Health Adviser, at grade P.5, in the Sustainable Development and Healthy Environments (SDE) Cluster since 2002.

In 2004, following a restructuring of the HIV/AIDS Department, several new posts were advertised. The complainant applied for the post of Medical Officer in this Department.

In March 2005 she was informed that she had not been selected. On 4 March 2005 she submitted notification of her intention to appeal to the Headquarters Board of Appeal against the decision not to select her for the above-mentioned post. Another candidate was appointed by the Assistant Director-General of the HIV/AIDS, Tuberculosis and Malaria (HTM) Cluster and took up her duties in July 2005.

On 23 June 2006 the Board of Appeal issued its report in which it noted that there had been a conflict of interest insofar as the successful candidate's spouse had taken part in the restructuring and job-matching exercise prior to the advertising of the post. It recommended that the selection be set aside, that an independent panel be established to review the post in question in order to determine whether its functions were vital to the HTM/HIV programme, that a new selection process be initiated, should it be confirmed that these functions were needed and the creation of the post was warranted, and that legal costs be reimbursed to the complainant.

By a letter of 25 August 2006 the Acting Director-General informed the complainant that he had decided to follow the Board's recommendations that the selection should be set aside and that a new selection process should be undertaken. He did not, however, share the Board's opinion regarding the need to review the post in question to determine whether its creation had been warranted. In addition, he informed the complainant that her legal costs would be reimbursed up to a maximum of 1,000 Swiss francs upon submission of bills.

The complainant wrote to the Acting Director-General on 24 October 2006 to draw his attention to the fact that no action had been taken on his decision to cancel the disputed appointment and initiate a new selection process. She enclosed a copy of her counsel's invoice. Having received no reply to her letter, the complainant filed a complaint with the Tribunal.

By a memorandum of 10 July 2007 the Director of Human Resources Services asked the complainant to supply the original invoice. The Administration received it on 7 August 2007 and reimbursed the complainant in October 2007.

By a letter of 28 November 2007 the new Director-General informed the complainant that, having reviewed the situation, she did not consider it necessary to advertise the post because it no longer met the Department's needs. In

view of the totality of the circumstances, including the time which had elapsed since the Acting Director-General had made his decision, she announced that an indemnity of 9,000 Swiss francs would be paid to the complainant, as well as 1,000 francs for her costs.

B. Relying on the Tribunal's case law, the complainant considers that a period of nine months represents an inordinately long time to set aside the selection and initiate a new process following the decision of the Acting Director-General. She says that her legitimate expectation that the Director-General's decision would be implemented in a timely manner has been dashed. She stresses that she has lost a considerable amount of time in waiting for the publication of a new vacancy notice in order that she may apply. In her opinion the Organization should have acted promptly, whereas more than two years have passed since the beginning of the competition process.

The complainant requests the implementation "as soon as possible" of the Acting Director-General's decisions as set forth in his letter of 25 August 2006, additional compensation of 4,000 Swiss francs for the legal costs arising out of the delay since 25 August 2006 and 5,000 francs in compensation for the moral and professional injury suffered on account of the fact that between January 2004 and July 2006 she had to continue to perform duties which did not match her experience and aspirations.

C. In its reply WHO submits that the complaint is irreceivable for several reasons.

Firstly, the complaint appears to be an application for execution of the Acting Director-General's decision of 25 August 2006. However, according to the case law and the principles underpinning it, the power to order the execution of a decision lies with the authority which took the decision in question. The complainant should therefore have submitted her application for execution to the Director-General.

Moreover, the Organization argues that by filing a complaint directly with the Tribunal, the complainant disregarded not only the requirement established in Article VII, paragraph 1, of the Statute of the Tribunal, because she has not exhausted internal means of redress, but also the prerequisite laid down in Staff Rule 1240.1 concerning disputes which cannot be resolved internally.

Secondly, the complainant cannot contend that her letter of 24 October 2006 is a claim within the meaning of Article VII, paragraph 3, of the Statute of the Tribunal. The Organization points out that, in this letter, the complainant thanks the Acting Director-General for his decision and expresses her intention to contact the Headquarters Board of Appeal and the staff of the Management Support Unit to ascertain the stage reached in implementing that decision. The letter therefore cannot be regarded as a claim concerning the decision or the manner in which it was being executed. In addition, the complaint is premature since, in the absence of any evidence that the letter was received, the sixty-day period as from notification, to which the above-mentioned article refers, has not started to run. The Organization further contends that before a complaint may be filed with the Tribunal against a decision, the latter must be final, which presupposes that internal means of redress have been exhausted, even where the decision in question is an implied rejection. In its view, this condition has not been met.

Thirdly, the Organization holds that in claiming compensation for moral and professional injury suffered between January 2004 and July 2006, the complainant appears to be criticising her appointment to the post of Public Health Adviser in the SDE Cluster in September 2002. But since she did not challenge this appointment in due time, she is time-barred from claiming such compensation. The Organization adds that the complainant did not submit any such claim in her internal appeal against the decision not to select her for the disputed post; any claim in this connection is new and therefore irreceivable. Lastly, if the complainant is questioning the decision of 25 August 2006, she did not challenge it in due time and she is therefore time-barred in this respect as well.

On the merits WHO rejects the allegation that no action has been taken to give effect to the decision of 25 August 2006. Although the HIV/AIDS Department did not receive the decision until November 2006 because of an unintentional forwarding error, it did apply the decision to cancel the successful candidate's appointment by transferring her to another post.

Moreover, the initiation of a new selection process ran into difficulties owing to the fact that the post was redundant since, according to WHO, a new survey had disclosed that the Department's needs had altered and that the duties of this post could be absorbed by existing units. It submits that the difficulties encountered in executing the Acting Director-General's decision stem from "objective reasons related to a shift in the Organization's needs".

D. In her rejoinder the complainant maintains that she is entitled to rely on Article VII, paragraph 3, of the Statute of the Tribunal, and she asserts that she has exhausted internal means of redress, since the Acting Director-General's decision of 25 August 2006 is a final decision in that it constitutes "the last stage of an internal appeal procedure".

She states that she did present a claim in her letter of 24 October 2006 in which she expressly requested the Acting Director-General to ascertain whether his decisions had been duly implemented. The Organization had plainly received her claim and taken note of it because the Administration expressly refers to her letter of 24 October 2006 in its memorandum of 10 July 2007. She denounces the Organization's bad faith and explains that her claim concerns the failure to execute the Acting Director-General's decision, but does not challenge the decision *per se*.

On the merits the complainant draws attention to the fact that the selection was set aside because there had been a conflict of interest and that the only aspect of the decision which has been implemented concerns the transfer of the successful candidate, a transfer of which she was informed only on receiving the Organization's reply during the proceedings before the Tribunal.

She denies that she has expressed criticism of her post as a Public Health Adviser, recalling that in the proceedings before the Board of Appeal she referred to the "considerable injury" caused by the decision not to select her for the post of Medical Officer for which she had applied. She considers that the reformulation of her claim for compensation is warranted, because she is now engaged in proceedings before a different body.

E. In its surrejoinder the Organization maintains its position regarding the irreceivability of the complaint. It adds that since June 2007 the Director-General has reviewed the file and that the complainant has been able to submit her comments.

The Director-General informed the complainant in a letter of 28 November 2007 that she had decided to request the updating of the description of a similar post which had become vacant in order to align it with the Department's current needs and advertise it immediately, and to grant her an indemnity and costs in the total amount of 10,000 francs.

CONSIDERATIONS

1. The complainant joined WHO in 1994 as a consultant in the Regional Office for Africa. At present she is a Public Health Adviser, at grade P.5, in the Sustainable Development and Healthy Environments (SDE) Cluster.

In 2004 she applied for a post at the same grade in the Regional and Country Coordination Group (RCC) in the HIV/AIDS Department of the HIV/AIDS, Tuberculosis and Malaria (HTM) Cluster. She was not selected and another candidate was appointed in July 2005.

On 25 August 2006 the Acting Director-General, following an appeal by the complainant, decided to set aside the selection, to order the initiation of a new selection process and to pay the complainant 1,000 Swiss francs to cover her legal costs, subject to the submission of the corresponding invoice.

2. On 24 October 2006 the complainant drew the Acting Director-General's attention to the fact that no action had been taken on the decision regarding the appointment and the new selection process. Having received no formal reply to this letter in the two months following this first step, the complainant filed the complaint before the Tribunal against a decision constituting an implicit rejection.

3. The Tribunal notes that, in a new decision taken on 28 November 2007, the Organization responded to all the issues giving rise to an interest of the complainant which is worthy of protection. It has provided a detailed explanation of the organisational reasons for not re-advertising the post for which the complainant had not been selected.

The Tribunal finds that the file contains nothing to support the view that, by opting for this solution, the Organization abused the wide discretion it must be allowed in order to organise its services.

The complainant's claim that the post coveted by her should be re-advertised cannot therefore be allowed.

4. (a) The indemnity owed to the complainant in respect of her legal costs in accordance with the decision of 25 August 2006 was paid in October 2007.

In her decision of 28 November 2007, the Director-General nevertheless awarded the complainant an additional indemnity of 1,000 Swiss francs for legal costs not covered by legal insurance, subject to the submission of the corresponding invoice.

(b) In the same decision, the Director-General agreed to pay the complainant an indemnity of 9,000 Swiss francs for all injuries, taking into account the totality of the circumstances. This sum matches the amounts requested in the complaint.

(c) It must therefore be concluded that the decision of 28 November 2007 satisfies all the pecuniary claims contained in the complaint (except the claim for costs relating to the proceedings before the Tribunal) and that they are now redundant. There is therefore no need to rule on the receivability of the complaint.

5. The decision of 28 November 2007 was taken only after the complaint had been filed. There is therefore justification for awarding the complainant costs in the amount of 2,000 Swiss francs for the proceedings before the Tribunal. This indemnity shall be paid by the Organization in addition to that already awarded to the complainant to cover legal costs, pursuant to the decision of 28 November 2007.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim that she should receive compensation for the moral and professional injuries she has suffered.
2. WHO shall pay the complainant costs in the amount of 2,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

