

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S. (No. 2)**

**v.**

**WHO**

**121st Session**

**Judgment No. 3587**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms R. S. against the World Health Organization (WHO) on 16 May 2013 and corrected on 15 July, WHO's reply of 8 November 2013, the complainant's rejoinder of 6 January 2014 and WHO's surrejoinder of 2 April 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision not to initiate a new selection procedure after the decisions not to select her for a vacant post and to appoint another candidate were set aside due to a flawed selection procedure. She also challenges the decisions to transfer the successful candidate to a post with a commensurate level of duties and responsibilities and to abolish the post for which she (the complainant) had unsuccessfully applied.

The complainant joined WHO's Regional Office for South-East Asia (SEARO) in June 1983. Following several reassignments and promotions, she reached the highest grade in the General Services category at SEARO.

In June 2009 a post of National Professional Officer (Fellowships) was advertised in SEARO via a vacancy notice. The complainant applied for the advertised post. She was among the 16 candidates considered eligible by the General Service Selection Committee (GSSC) to take the written test, evaluated through blind scoring. The GSSC determined the weight of the written test and interview to be at 40 per cent and 60 per cent, respectively. The results of the written test showed that the complainant had obtained the highest score, whereas the selected candidate had been ranked last out of the five candidates shortlisted to proceed to the interview stage. After the interview, the complainant was ranked in the fourth position and the selected candidate was ranked first and was selected for the post.

The Administration informed the complainant on 8 February 2010 that her application had not been successful. In April 2010 the complainant submitted a notice of intention to appeal against her non-selection for the post to the Regional Board of Appeal (RBA), alleging personal prejudice, incomplete consideration of facts and failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules, or the terms of her contract.

By a letter of 19 July 2011 she was informed that, on the basis of the RBA's recommendations contained in its report of 11 May 2011, the Regional Director had decided to dismiss her allegations of personal prejudice and failure to consider properly her educational qualifications or experience. The letter further stated that the Regional Director did not entirely agree with the RBA's reasoning for concluding that the GSSC had committed "procedural lapses" by designating the second-level supervisor of the advertised post as the interested party on the GSSC in place of the first-level supervisor on the premise of conflict of interest (whereas the second-level supervisor also happened to be the first-level supervisor of the selected candidate) and by changing the Chairperson midway in the selection exercise. However, the Regional Director agreed with the RBA's finding that the Administration had erred in applying the Selection Guidelines for General Service Staff in the WHO South-East Asia Region of 10 December 2007 to the selection procedure for a National Professional Officer post. On that ground, he

had decided to set aside the selection decision and the decision not to select the complainant. The letter of 19 July 2011 also informed the complainant that the selected candidate would be moved to another position with commensurate levels of duties and responsibilities and that, given his recent decision to discontinue the use of NPO positions in SEARO, he had decided to abolish the post in question and to establish a grade P.2 position instead, which would be advertised shortly. The complainant was also awarded costs.

In August 2011 the complainant appealed before the Headquarters Board of Appeal (HBA) challenging the decision of 19 July 2011. In particular, she challenged the decision to the extent that it had dismissed her allegations that the interested party on the GSSC had been prejudiced in favour of the selected candidate; that the selected candidate did not meet the minimum requirements of the advertised post; that the Regional Director had not provided reasons for his conclusion not to agree with the RBA's finding that the GSSC had committed procedural lapses; that the selected candidate should not have been moved to another post at the same level of duties and responsibilities as the post advertised; that the decision to discontinue the use of National Professional Officer positions in the Regional Office, to abolish the post advertised, and to replace it with a P.2 position were *ultra vires* and the context in which those decisions had been taken was unclear; that the legal costs awarded in the amount of approximately 190 United States dollars were insufficient and humiliatingly low; that she was entitled to moral damages for all the procedural irregularities committed by the GSSC, as well as for the excessive delay of the RBA in reviewing the appeal and its refusal to share all the information it had received from the Administration.

In its report of 30 January 2013, the HBA considered that the complainant's challenge to the decision to transfer the selected candidate to another post with commensurate levels of duties and responsibilities was not receivable, as the decision in question did not affect her appointment status. It found no evidence of personal prejudice, bias or undue influence on the part of the Administration or the GSSC. While recognizing that the GSSC had applied the wrong guidelines to the

selection procedure, the HBA observed that this flaw had not caused moral injury to the complainant, since her non-selection was based on her overall score. The substitution of the Chairperson in the course of the selection process was also found to have had no consequence on the outcome of the selection procedure. Moreover, the Regional Director had acted within his discretion and within the authority conferred on him by the Director-General when he had decided to abolish the advertised post, and the HBA referred to a Memorandum of November 2011 in which the SEARO Administration had noted that the creation of a P.2 position had not been pursued due to budgetary constraints. However, the HBA found that there had been an unnecessary delay in the internal appeal procedure and recommended that the complainant be awarded moral damages in the amount of 2,000 United States dollars on that account, but that her other claims be dismissed.

In her decision of 15 February 2013 the Director-General decided to follow the HBA's recommendations and to dismiss the complainant's appeal as unfounded, but to award her moral damages in the amount of 2,000 dollars for the excessive delay in the internal appeal procedure. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 15 February 2013 as well as the Regional Director's decision of 19 July 2011. She requests that the case be remitted to WHO in order that a new selection procedure to fill the post for which she had applied may be held or, alternatively, to be awarded compensation for the loss of a valuable opportunity for promotion. She seeks moral damages for the wrongful actions of the Administration and the delay in the internal appeal procedure. She also claims costs.

WHO submits that the complainant's claims are partly irreceivable and entirely unfounded.

## CONSIDERATIONS

1. In her brief the complainant does not appear to raise the illegal selection process in itself as an issue. In her rejoinder, however, the complainant states, among other things, that her complaint is against

the: (i) “illegal selection exercise at the very threshold, and failure to hold selection afresh under the applicable Selection Guidelines; (ii) rigged selection of a candidate who did not meet the minimum qualifications stipulated in the vacancy notice”. To the extent that these statements challenge the illegal selection process per se, they raise issues that are now moot as the selection decision was set aside.

2. The Tribunal also considers that the complainant has provided no evidence, as against conjecture, to discharge the burden to prove bias, personal prejudice or influence on the part of SEARO against her.

3. The complainant contends that having set aside the selection process because it was illegal, the Regional Director erred when he nevertheless decided to reassign the candidate who was selected by that process to another post with a commensurate level of duties and responsibilities to the post to which she had been appointed by the flawed selection process. This claim is irreceivable and will accordingly be dismissed, as there is no evidence that the reassignment of the selected candidate adversely affected the complainant’s rights or caused her injury.

4. The complainant contends that the Panel “was also guilty of abusing its assumed authority by gross partiality towards the so-called selected candidate” or showed prejudice, bias or lack of good faith towards her (the complainant) in the selection process. She made similar allegations against the Administration as well, primarily on the ground that it had stacked the Panel in favour of the selected candidate. These claims are unfounded as the complainant provides no evidence to substantiate them.

5. The complainant claims that the abolition of the subject post was unlawful, thereby robbing her of a valuable opportunity to compete for it. In response, the Organization states that the complainant has not substantiated or explained this claim and has not detailed her allegation that the provisions of the WHO e-Manual were violated. The Organization maintains that the Regional Director properly abolished the subject post

but does not explain how the post was properly abolished. The Tribunal observes that it was in the Memorandum of 19 July 2011 in which the Regional Director withdrew the flawed selection process that he stated that, “given [his] recent decision to discontinue the use of NPO positions in the Regional Office, [he] ha[d] decided to abolish the [subject post] and advertise a P.2 position shortly”.

6. The Tribunal observes that several decisions were taken by the Regional Director simultaneously: to set aside the flawed selection process; to move the selected candidate to a commensurate post; to abolish the subject post; to promise to establish and advertise a new P.2 post in the place of the subject post with no apparent authority or prior budgetary provision for it. These simultaneous decisions undermined the requirement that a new selection process be conducted, thereby denying the complainant an opportunity to compete for possible promotion. This entitles the complainant to damages for which the Tribunal awards 20,000 United States dollars.

Unlike an earlier case involving the same selection process that the Tribunal considered in Judgment 3380, the complainant in this case grounds the plea of lost opportunity on the unlawful abolition of the subject post without reliance on the selected candidate’s reassignment to a commensurate post.

7. On the question of delay, in Judgment 3380 in which the delay was similar to the delay in this case, the Tribunal stated in consideration 11:

“As concerns the complainant’s assertion that the delays in the internal appeal process were deliberate and amount to harassment, there is no evidence to support the assertion and it is rejected. The unacceptable delay was acknowledged by the Director-General and the complainant was awarded compensation for the undue delay. While the Tribunal cannot condone such delay, it must be observed that the complainant’s claims were extensively and carefully examined and objectively reviewed at both levels of the internal appeal.”

In that case, as in the present case, the Director-General awarded the complainant 2,000 United States dollars as compensation for the delay in the internal appeal proceedings. This earlier award was not disturbed by the Tribunal in Judgment 3380 and the Director-General’s award

to the complainant in the present case will not be disturbed in this proceeding.

8. As she succeeds in part, the complainant is entitled to an award of costs, which the Tribunal sets at 1,000 United States dollars.

#### DECISION

For the above reasons,

1. WHO shall pay the complainant damages in the sum of 20,000 United States dollars.
2. WHO shall also pay the complainant costs in the amount of 1,000 United States dollars.
3. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ