FORTY-FOURTH ORDINARY SESSION

In re HALLIWELL

Judgment No. 415

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mrs.Valerie Ann Halliwell on 8 March 1979, the WHO's reply of 20 June, the complainant's rejoinder of 28 August and communication of 2 November, the WHO's surrejoinder of 14 November 1979, the WHO's further memorandum of 25 February 1980 in reply to a request dated 1 February 1980 from the Tribunal for further information and the complainant's observations dated 11 March 1980 on that memorandum;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Regulations 4.3 and 4.4, WHO Staff Rules 410.1, 570.1.3, 1040 (formerly 940) and 1050 (formerly 950) and WHO Manual provisions II.9.260 and 370;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 1 December 1971 the complainant was locally recruited to the staff of the WHO Regional Office for Africa in Nairobi and was given a two-year appointment as a secretary. Her appointment was renewed for two years, for another two years, and for one month, and expired on 31 December 1977. She appealed to the Regional Board of Inquiry and Appeal against the decision not to extend her appointment on the grounds that it had been based on incomplete consideration of the facts and constituted a breach of the staff rules, particularly Manual provision II.9.370, under which the WHO is bound to "make every effort to employ ... surplus project staff on other suitable projects...". The Regional Board recommended that the Regional Director should dismiss her appeal as unfounded, and he did so. She appealed to the headquarters Board of Inquiry and Appeal. That Board held that there had been a "reduction in force" and that Manual provision II.9.370 ought therefore to have been applied. The Director-General did not accept that recommendation. In a letter which he wrote to the complainant on 21 December 1978 and to which he appended a copy of the Board's report he explained that the "reduction-in-force procedures" - Staff Rule 1050.2 (formerly 950.2) - and the special rules in annual provision II.9.370 relating to project staff applied when a reduction in force compelled the WHO to terminate appointments before their normal term. The complainant's appointment had reached its normal term. As a matter of principle the Director-General was not prepared to accept a reconcendation to grant an indemnity to a staff member whose fixed-term appointment had come to an end in the normal way. It is the final decision of 21 December 1978 which is impugned.

B. The complainant contends that there was another suitable post vacant at her duty station when her own post was abolished. The headquarters Board of Inquiry and Appeal found that her application for that vacancy had been rejected on the grounds of her nationality, that vital information about her had been withheld when the appointment was made, that the selection procedure had not been impartial and that preference ought to have been given to a staff member of proven ability whose post had been abolished. She contends that the WHO had a duty to make every effort to employ her in view of the quality of her services. Moreover, she argues that the decision to abolish her post was based on incomplete consideration of the facts. The project needed a full-time secretary, particularly since the campaign for eradication of smallpox in East Africa made its extension likely. Lastly, although her post was abolished on financial grounds, possible sources of WHO funds had not been fully explored. By the impugned decision the Director-General merely declared the decision not to extend her appointment to be lawful under the Staff Regulations and Staff Rules: he failed to answer the points raised by the headquarters Board of Inquiry and Appeal. The Director-General's misappraisal of the facts is clear: in the two years since the termination of her appointment the WHO has had to replace her with a full-time secretary, and the funds for that were found. As regards her claim for an indemnity, she maintains that the grounds for the decision are unsound since all she is claiming is compensation for the wrong she has suffered because of the mistaken decision she is impugning.

C. In her claims for relief the complainant asks the Tribunal to award her costs, compensation for "personal wear and tear during the past 18 months", payment of salary from 1 January 1978 to the date of the decision, compensation for loss of pension rights and damages for prejudice to her future career.

D. In its reply the WHO points out that the complainant's post was always a temporary one and dependent on the availability of funds. Further to a decision (resolution WHA 29.48) by the World Health Assembly in 1976 to reduce expenditure, it was decided to abolish the complainant's post on the expiry of her appointment. The material provision is therefore Staff Rule 1040 (formerly 940), which relates to the completion of temporary appointments, not Staff Rule 1050.1 (formerly 950.1), which relates to termination of appointment before its expiry date if the post is abolished. On 17 August 1973 the complainant was informed that her appointment would not be extended, i.e. she was given the notice prescribed in Staff Rule 1040. Manual provision II.9.370, on which the complainant relies, is applicable where a member of project staff has his post abolished: the WHO is under a duty to make every effort to employ the staff member on some other project. But that is not the complainant's position at all. In reply to her allegation that three essential facts were overlooked, the WHO contends that she is not competent to judge whether the abolition of her post would seriously damage the project, nor to assess the connection between the project and the campaign for the eradication of smallpox, nor again to question the allocation of WHO funds for one programme or another. These are matters of policy reserved for the Director-General and his staff. As for the vacant post for which she unsuccessfully applied, the matter is irrelevant to the complaint. In any event appointments, too, are a matter for the Director-General's discretion. The complainant had no right to any kind of preference. Nor is it true to say that the WHO replaced her immediately after she had left. The project she was working on was for "epidemiological surveillance", and although it is true that a stenographer - an official at a lower grade - was employed for short renewable periods in the office of the WHO Programme Co-ordinator, the latter had no connection with the project. Since the impugned decision was taken in the WHO's interests and in full conformity with the rules, the WHO invites the Tribunal to declare the complaint unfounded.

E. In her rejoinder the complainant states that she was given no help in preparing her appeal. Some documents were withheld from her, others were actually destroyed. Not to appoint her forthwith to post IRP/IMM/019, which was vacant at the time when her own post was abolished, was discriminatory and a breach of Staff Regulations 4.3 and 4.4 and Staff Rule 410.1, which provide that the only relevant considerations in the selection of staff are competence, integrity and geographical representation. The last was utterly ignored in filling the vacancy. The impugned decision was also in breach of Section 5 of the Staff Rules, particularly Staff Rule 570.1.3, which provides for reassignment to a post of lower grade as an alternative to termination in a reduction in force, and of Section 10, which sets out the principles of be respected in the event of abolition of a post of indefinite duration, according to those principles, says the complainant, it is quite wrong for the WHO to assign to her work Miss Fernandes - someone who was taken on barely a month before the end of her appointment. Lastly, according to Manual provision II.9.250 a post may be abolished for want of funds or work or in the event of reorganisation. None of those three grounds was material. There was also breach of Manual provision II.9.260, which relates, among other things, to the re-employment of staff in the event of abolition of post. Turning to questions of fact, the complainant observes that the WHO does not dispute that the abolition of her post was the sole reason for the decision not to extend her appointment. The reason for the termination was therefore the abolition of her post (Staff Rule 1050), not the expiry of her contract of appointment (Staff Rule 1040). The improprieties were due to abuse of authority and prejudice on the part of the WHO Representative in Nairobi, who stood in the way of her application for the vacancy (IRP/IMM/019). Since most appointments are now for two years, to allow the WHO's arguments would mean that any staff member could be got rid of by abolishing the post, and that would do away with all the guarantees in the Staff Regulations and Staff Rules. Moreover, the post may have been abolished, but the duties pertaining to it are in fact still being performed, although by someone at a lower grade. The WHO is mistaken in what it says about the post of the clerk-stenographer in the office of the Programme Co-ordinator, formerly known as the WHO Representative. The complainant's replacement is not the holder of that post, Mrs. Ng'ang'a, but Miss Fernandes, who is now performing the very same duties and working in the same branch as did the complainant. That indeed was the finding of the headquarters Board of Inquiry and Appeal; "... evidence shows that Mrs. Halliwell's functions remained and were performed by a temporary clerk-stenographer for over ten months, though at a lower grade. The Board considers that Mrs. Halliwell should at least have been offered that temporary assignment". By the date when the complaint was lodged the clerk-stenographer had been performing the complainant's duties not just for ten months, but for 21. In the complainant's view all this goes to show that the real reason for the decision not to extend her appointment is quite different: it is the WHO Representative's prejudice towards her prompted by action she took over the handling of accounts and his preference for employing officials of the same ethnic origin as himself.

F. In amended claims for relief appended to her rejoinder the complainant asks the Tribunal: (a) to order the WHO to award compensation as provided under the reduction-in-force procedures; (b) to order such financial compensation as the Tribunal may assess for the Organization's failure to apply the Staff Regulations and Staff

Rules in force for the competition for post IRP/IMM/019; (c) to compensate her for the personal prejudice shown by her supervisor; (d) to compensate her for loss of pension rights and the loss of her career; and (e) to award her costs.

G. In its surrejoinder the WHO states that the complainant could have obtained the papers she wanted by making an official written request. It denies her allegations of abuse of authority and personal prejudice. In any case she ought to have put that argument to the Board of Inquiry and Appeal and included it in her original memorandum of complaint. She did put it to the Regional Board of Inquiry and Appeal but then withdrew it in her letter of 11 October 1977: "I no longer wish to proceed with the charge that there has been personal prejudice on the part of a supervisor or of any other responsible official". As for Miss Fernandes, she has been seconded from the Kenyan Ministry of Health, which finances her appointment. In reply to the allegations in the rejoinder about the filling of vacant post IRP/IMM/019, the WHO maintains that that is a different grievance altogether, the subject of the complaint being the decision not to extend the complainant's appointment. Not having been referred to the internal boards, that grievance is irreceivable. In her earlier submissions to the boards of inquiry and appeal and in her complaint the complainant did mention that vacancy, but merely to contend that she had been denied the benefit of the measures of redeployment provided for in Manual provision II.9.370. But she never challenged the procedure for the examination and selection of applicants. The WHO therefore asks the Tribunal to dismiss the complaint as unfounded and the complainant's new grievance as irreceivable.

H. In reply to a request from the Tribunal for further information about the complainant's application for post IRP/IMM/019, the WHO confirms that it regards the relevant claim, which the complainant adds in her rejoinder, as irreceivable: that claim was submitted neither to the Regional Board of Inquiry and Appeal nor to the headquarters Board, and is mentioned neither in the impugned decision nor in the list of claims in the original complaint. The WHO states, however, that it is willing to argue on the merits if the Tribunal so wishes. The complainant disputes the WHO's reasoning. She contends that the objection to receivability is time-barred and that in any event it is deplorable for the WHO to raise such an objection and take advantage of her inexperience of the law to refuse to argue the merits. The only reason why she filed her complaint is that her application for the post was rejected. Her application therefore forms part of her complaint, the more so since what she is impugning is not the termination of the appointment she held at the time of her separation but the termination of her employment in general. Lastly, she states that the matter was in fact raised in the Regional Board of Inquiry and Appeal. She therefore presses the claims for relief in her rejoinder.

CONSIDERATIONS:

1. Staff Rule 1040 provides as follows:

"Fixed-term appointments terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof at least one month and normally three months before the date of expiry of the contract."

Thus the rule speaks of a decision not to reappoint and requires it to be notified at least a month before the expiry date. Such a decision falls within the Director-General's discretionary authority. Hence the Tribunal will interfere with that decision only if it was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if the decision is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the dossier.

2. When applying this general principle to a case such as the present one of the essential facts to be taken into consideration is that an adverse decision does not interfere with a contractual right but merely disappoints an expectation. If the job which the official is doing is being continued, the Director-General must have some reason which seems good to him for making a change and which cannot be faulted an arbitrary or illegal. But, subject to this, he must obviously have a very wide discretion, the sort of discretion he exercises when he makes a new appointment. If as here the post is being abolished, it does not necessarily mean that the contract can be terminated without any further consideration. The Director-General must still consider whether there is any other work which the official can usefully do and which it is in the interests of the Organization that he should do. In this connection he must bear in mind Staff Regulation 4.4 which provides: "Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside".

3. The complainant criticises the decision impugned on many and various grounds. It is necessary to consider only one of them and this is that during the period between 17 August 1977 when notice of termination was given to the complainant and 31 December when it took effect, there were in the Organization to be filled two posts for both of which the complainant was well suited. The complainant contends that the Regional Director, when he decided to terminate her contract, paid no regard to this situation, ignoring it for the wrong and illegal reason that he had decided to reserve both positions for nationals of Kenya; and that he had furthermore decided that in any event he would not renew the complainant's contract because she was not a national of Kenya, but an expatriate. The policy of getting rid of expatriates had been advocated in 1976 by the WHO Representative at Nairobi, who on 30 August 1977 wrote to the Regional Director that it would "meet the wishes of the Government of Kenya that expatriate secretaries should be replaced by nationals as soon as possible, and is also in line with Afro policy to give preference to nationals for such posts".

4. The first vacancy for which the complainant was not considered was advertised in July 1977. It was for a post very similar to the post she was then holding and it is not disputed that she was well qualified for it. Nor is it disputed that, although the complainant applied for the post on 25 July she was not even considered for it. A memorandum written on behalf of the Regional Director to the chief of personnel and dated 16 September stated that the Regional Director's policy of filling posts by recruiting nationals was rigidly applied and requested the chief "to insist and ensure that a Kenyan is recruited".

5. The second post for which the complainant was not considered was one for which she was certainly well qualified; it was created to cover all or much of the work pertaining to the complainant's post which was being abolished. The decision to abolish her post was taken on paper in July 1976 following a resolution of the 29th World Health Assembly requesting the Director-General to cut down expenditure and streamline the Professional and administratives cadres. But it is clear that when 12 months later the time came for the axe to fall it was not found possible to eliminate the work which the complainant had been doing. The Board of Inquiry and Appeal found that "Mrs. Halliwell's functions remained and were performed by a temporary clerk/stenographer for over 12 months, though at a lower grade". The stenographer, Miss Fernandes, was in fact appointed one month before the complainant's contract expired and the evidence is that she was still being employed full time nearly two years later in November 1979. It is said that her salary was paid by the Kenya Government but the Organization has not rebutted the complainant's evidence that the source of her salary lay in funds from WHO. The Organization has had ample time since this finding of the Board in November 1978 to clear up the position by providing documentary evidence showing exactly why and how Miss Fernandes was appointed, what she does and how she is paid, but it has not done so. The Tribunal draws the inference that the continuation of her own work was not offered to the complainant (who would have accepted it, although at a lower grade) with the consequent renewal of her contract, because a decision had already been taken not to extend her contract on the grounds of her nationality.

6. In evidence given to the Board of Inquiry and Appeal the chief of personnel said that, while there was not in the Staff Regulations any formal requirement to recruit nationals in their own country for General Service posts, it was "a widespread practice" and "reflects explicitly expressed desires of certain host countries" and is "entirely consistent with the policies of promoting self-reliance and the development of national manpower which are supported by the Health Assembly". Needless to say, it is not within the province of the Tribunal either to criticise or to approve these sentiments. Nor does the Tribunal find it necessary to consider whether such a policy is or is not consistent with the principle that "selection of staff members shall be without regard to race, creed or sex"; Staff Regulation 4.3. But where a preference is expressed in the Staff Regulations for "persons already in the service", it is not open to a Regional Director or to the Director-General to substitute for that preference one derived from a widespread, and maybe laudable, practice. To do so is beyond his lawful powers. Consequently, the Regional Director in deciding not to extend the complainant's contract on the ground that her post was abolished, failed to take into consideration the other posts that were or should have been open to her and for which she should have been given preference.

7. The complainant therefore is entitled to compensation, but it cannot consist, as she requests, of restitution of salary and pension rights. As pointed out above, she has not been deprived of any contractual rights to salary or pension, but only of expectation of further employment. The Tribunal considers that the appropriate award of compensation is 8,000

Swiss francs. She has had to spend considerable time and effort in the preparation of her case and in obtaining information and should therefore be awarded some reimbursement of costs.

DECISION:

For the above reasons,

The decision of the Director-General of 20 December 1978 is quashed and it is ordered

1. That the complainant should be paid 8,000 Swiss francs as compensation with interest thereon at 15 per cent from 1 January 1978 until payment; and

2. 2,000 Swiss francs in reimbursement of costs.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

André Grisel
Devlin
H. Armbruster

Bernard Spy

Updated by PFR. Approved by CC. Last update: 7 July 2000.