

A. G. (No. 2)

v.

WHO

138th Session

Judgment No. 4865

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms C. A. A. G. against the World Health Organization (WHO) on 7 April 2020, WHO's reply of 20 July 2020, the complainant's rejoinder of 27 August 2020 and WHO's surrejoinder of 30 November 2020;

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

Having examined the written submissions;

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

The complainant challenges the decision not to select her for the post of Senior Advisor, Gender Equality, following a competitive recruitment process.

The complainant joined UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO – in July 2011 in the Gender Equality and Diversity Division. Having initially served under temporary appointments, she obtained a fixed-term appointment in August 2012. In December 2014, she was appointed as Executive Officer, at grade P-4, in the office of the UNAIDS Deputy Executive Director, Management and Governance.

The complainant subsequently applied for the post of Senior Adviser, Gender Equality, at grade P-5, for which a vacancy announcement was published internally and externally on 16 February 2018. She was shortlisted and took part in a selection test, after which she was interviewed on 6 July 2018. On 22 August and again on 15 November 2018, the complainant wrote to the Director, Human Resources Department (HRM), requesting an update on the recruitment process. On 16 November 2018, she was informed that “the first recommended candidate [had] accepted the position”. On 20 November, the complainant requested disclosure of the redacted report of the selection panel as well as that of the Mobility and Reassignment Committee (MRC), including its recommendations, and the resulting decision taken by the Executive Director. On 29 November, she was notified by email that another candidate had been recommended and had been offered the position. That same day, the complainant received the documents she had requested.

On 15 December 2018, the complainant submitted a request for administrative review, challenging the lawfulness of the selection process. She contended, in particular, that it did not comply with UNAIDS’ recruitment policy regarding internal and external advertising of vacancies; that the Selection Advisory Panel (SAP) had not fully considered her qualifications, experience, competencies and proven performance as a long-serving UNAIDS staff member; that the MRC members had failed to take action on the acknowledged breaches of UNAIDS’ recruitment policy; and that the former Executive Director, the ultimate decision-maker, had not adhered to UNAIDS’ recruitment/selection procedures.

By a letter of 7 February 2019, the complainant was informed that her request for administrative review had been rejected, as a review of the selection process had “reveal[ed] no breach of the provisions of the Staff Regulations and Staff Rules, and no material flaw in the relevant provisions of the Recruitment Policy and Guidelines and the MRC terms of reference”. Annexed to that letter was a copy of a memorandum dated 14 February 2018, sent by the Hiring Manager to the Director, HRM, setting out the rationale for the request for

simultaneous external and internal advertising of the subject post, namely, that the post needed to be advertised as soon as possible “[i]n order to ensure continued country support on gender issues, and particularly the gender assessments currently under way”. On 8 March 2019, the complainant lodged an appeal against the decision of 7 February 2019 with the Global Board of Appeal (GBA).

The GBA issued its report on 18 November 2019, in which the majority of the three-member panel concluded that the selection process was consistent with the established procedure, and that the decision to recommend an external candidate for the position was supported by the SAP’s assessment of the candidates’ qualifications and experience and was taken within its authority. The two GBA members forming the majority found no evidence of a serious defect in the selection process which had an impact on the consideration of the complainant’s candidature. The third member, however, concluded that the selection process was flawed and that the complainant had lost an opportunity to be appointed to the post, because the vacancy had not first been advertised internally and because the weighting of the written test, in which she had achieved the highest score, had been too low for a P-5 level position. The GBA concluded that bias and prejudice were not established. The majority thus recommended that the appeal be dismissed, while the dissenting member recommended that it be allowed in part, that the complainant be awarded material and moral damages and costs, and that she be considered on a priority basis for other appropriate positions at the P-5 level. The GBA recommended that the selection procedures be reviewed to ensure consistency with regard to requests for internal versus simultaneous internal and external advertising. It also recommended that the Administration consider streamlining the MRC procedures.

On 17 January 2020, the UNAIDS Executive Director issued her final decision, in which she accepted the conclusions of the GBA majority and decided to dismiss the appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. She also seeks direct appointment to the position of Senior Adviser, Gender Equality, with full retroactive effect and moral damages for the irregularities in the selection process, as recognized by the dissenting GBA member, in an amount of not less than 50,000 Swiss francs. In addition, she seeks reimbursement of all legal fees in an amount not less than 12,000 Swiss francs as well as interest on all amounts awarded at the rate of 5 per cent per annum from 29 October 2018.

WHO asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. As the complainant challenges the administrative selection process for the P-5 post for which she had applied (the contested post), the Tribunal recalls its case law which states as follows, in consideration 7 of Judgment 3652:

“The Tribunal’s case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, [consideration] 10). Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, inter alia, Judgment 2163, [consideration] 1, and the case law cited therein, and Judgment 3209, [consideration] 11). It was also stated that an organisation must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3130, [consideration] 10 and 11).”

2. As it is not within the Tribunal's competence to order an international organisation to make an appointment (see, for example, Judgments 4100, consideration 5, and 2299, consideration 7), the complainant's request to the Tribunal to appoint her directly to the post with full retroactive effect is rejected.

3. The complainant's request for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and the relevant evidence.

4. The complainant's request to be awarded such other relief as the Tribunal deems necessary, just and fair is too vague to be receivable (see, for example, Judgment 4602, consideration 8).

5. In seeking to set aside the impugned decision the complainant advances five grounds of challenge. She submits that (1) the Executive Director's decision was not properly motivated or explained; (2) UNAIDS failed to comply with its own recruitment policy; (3) the rationale for requesting simultaneous internal/external advertising of the post is unfounded and flawed; (4) the Selection Advisory Panel (SAP) failed to abide by Staff Regulation 4, Staff Rule 410.1 and paragraph 42 of UNAIDS' recruitment policy; and (5) the Mobility and Reassignment Committee (MRC) failed to abide by its own terms of reference.

6. Regarding the first ground, the complainant states that she is aware that when an executive head of an international organization agrees with the recommendation of the internal review body, she or he is not obliged to motivate her or his decision. She cites consideration 14 of Judgment 2347, where the Tribunal stated the settled principle that the rationale for requiring decisions to be motivated is to allow the affected staff member to know why she or he had received an unfavourable decision and to make an informed decision whether or not she or he should have recourse to the Tribunal.

In Judgment 2347, the Tribunal set aside an impugned decision on the basis that the Director General of the organization did not explain why he had rejected the conclusion of the Appeals Board that the appellant had proved her case of prejudice, discrimination and preferential treatment and its recommendation to pay her moral damages, costs and expenses incurred in attending the proceedings before the Board. The Director General had relevantly stated that after careful consideration of the Board's report and examination of the entire appeal dossier, he decided not to accept the Board's recommendations on the grounds that they were legally unfounded.

7. In the present case, the complainant argues that the impugned decision should be set aside because there was a dissenting opinion by a member of the Global Board of Appeal (GBA) who found that there was a breach of the selection procedure, but the Executive Director accepted the opinion of the majority of the GBA without explaining why she rejected the dissenting member's recommendation. The argument is unfounded. In the case leading to Judgment 2347, the author of the impugned decision did not adequately explain why he rejected the Appeals Board's recommendations. As a result, the complainant in that case was not in a position to make an informed decision whether or not to have recourse to the Tribunal and of the bases for challenging the impugned decision. In the present case, however, the Director General accepted the conclusions and recommendation of the majority of the GBA, and the reasons on which the majority reached those conclusions were fully explained in its report, thereby enabling the complainant to make the informed decision. This aligns with the Tribunal's statement in consideration 10 of Judgment 4147 that when the executive head of an organisation accepts and adopts the recommendations of an internal appeal body, she or he is under no obligation to give any further reasons in her or his decision than those given by the appeal body itself. There is no authority that requires an executive head of an organization having accepted the opinion of the majority of an internal appeal body to motivate or explain the reasons for rejecting the opinion of the minority. Even assuming that there was case law requiring that to be done, on the facts of this case, there was

no need for the Executive Director to explain why she rejected the conclusions of the minority. It was clearly implicit in her acceptance of the opinion of the majority.

8. The applicable regulatory provisions on which the second, third and fourth grounds are based are WHO Staff Regulation 4.2, which is complemented by Staff Rule 410.1; Staff Regulation 4.4 and paragraphs 23, 24, 26, 29(a) and 42 of the Recruitment Policy contained in UNAIDS Information Note HRM/IN 2015-4 (the Recruitment Policy).

9. Staff Regulation 4.2 states, in effect, that the paramount consideration in the appointment, transfer, reassignment or promotion of staff members shall be the necessity of securing the highest standards of efficiency, competence and integrity, paying due regard to the importance of recruiting the staff on as wide a geographical basis as possible. Staff Rule 410.1 essentially repeats this provision but adds that for posts in the Professional category and above, geographical representation shall also be given full consideration and that such representation is not a consideration in appointments to posts subject to local recruitment. Staff Regulation 4.4 relevantly states that without prejudice to the inflow of fresh talent, posts shall be filled by reassignment of staff members, as defined by, and under conditions established by, the Director General, in preference to other persons.

Paragraph 23 of the Recruitment Policy relevantly provides that vacancies for internationally recruited positions at Headquarters are normally published internally for a period of two weeks, whilst paragraph 24 relevantly provides that approval from the Director, Human Resources Department (HRM), can be requested in writing by the Hiring Manager, to advertise vacant positions at Headquarters on an internal and external basis. Such requests must include the rationale for advertising the post on that basis and, if approved, the vacancy is to be published internally and externally for a period of three weeks. Paragraph 26 provides that the publication of all vacancies must be approved by the Director, HRM, whilst paragraph 29(a) states that the status of internal candidate is recognized for UNAIDS staff members

serving on fixed-term appointments (as the complainant was at the material time). Paragraph 42 relevantly provides that when candidates meeting all of the minimum essential requirements of the position are assessed to be equally qualified, consideration shall be provided to internal candidates of UNAIDS serving on fixed-term appointments in priority over other internal candidates and over external candidates.

10. In its report to the Executive Director, the GBA noted the complainant's submission that the contested post should first have been advertised internally and that no clear rationale was provided for advertising it simultaneously internally and externally. Referring to paragraphs 23, 24 and 26 of the Recruitment Policy, the majority of the GBA noted that the acting Director, Community Support, Social Justice and Inclusion (who was the Hiring Manager) had requested the approval of the Director, HRM, to advertise the contested post simultaneously internally and externally. Indeed, the Tribunal notes the 14 February 2018 memorandum the Hiring Manager sent to the Director, HRM, making that request. It relevantly states, under the heading "Background/Rationale", that "[i]n order to ensure continued country support on gender issues, and particularly the gender assessments currently under way, we would appreciate that this post be advertised as soon as possible". The Director, HRM, approved the simultaneous internal and external advertising of the post on 16 February 2018. The post was so advertised on that same date. The Tribunal determines that these steps complied with paragraph 24 of the Recruitment Policy and rejects the complainant's argument that "no clear rationale was given for advertising internally and externally" in light of the rationale stated in the Hiring Manager's request.

11. The complainant's reliance on Judgment 3177, and, in particular, consideration 18, is misplaced. In that consideration, the Tribunal relevantly stated, in effect, that the rationale for the two-stage selection process was to support the career development of internal staff members by giving them priority consideration and only seeking candidates externally when none were available internally. Although for the competition at issue only three of the 238 candidates were

internal candidates, that did not justify the Administration's failure to adhere to its own procedure established for the benefit of internal staff. Indeed, the principle of *tu patere legem quam ipse fecisti* forbade the Administration from ignoring the rules it had itself defined, which alone was sufficient to set aside the competition decision and the impugned decision.

12. Importantly, however, this statement in consideration 18 was made in the context of the Tribunal's prior finding, in consideration 17, that the specific procedure for the authorisation of simultaneous external/internal advertisement of a vacancy in the organization required the Assistant Director-General for the Communication and Information Sector to send the authorization request to HRM with reasons for the request; that HRM was then required by the applicable rule to make a recommendation to the Director-General who was to authorise simultaneous external/internal advertisement, but that HRM had failed to make a recommendation. It was for this failure that the Tribunal set aside the selection decision (and the impugned decision). The Administration had thereby failed to adhere to its own procedure established for the benefit of internal staff thus breaching the principle of *tu patere legem quam ipse fecisti*.

13. In the present case, however, the issue centrally turns on whether the steps required in paragraph 24 of the Recruitment Policy to authorise the simultaneous external and internal advertising of the contested post were followed. They were, as the majority of the GBA appears to have concluded. Accordingly, the complainant's arguments which centrally focus on the application of paragraph 23 are misplaced. This result is not negated because, as the complainant argues, the memorandum of 14 February 2018 from the Hiring Manager to the Director, HRM, was not disclosed to her as part of the selection documentation and was only made available to her as an annex to the reply to her request for administrative review. In the foregoing premises, the second and third grounds of the complaint are unfounded.

14. It follows from the reasoning in the foregoing considerations that the complainant's argument based on Staff Regulation 4.4, which provides that posts shall be filled by reassignment of staff members, is unfounded. So too is her reliance on paragraph 42 of the Recruitment Policy to argue that, in view of her superior score on the test and a minimal difference in the overall score, she should have been given priority over the successful candidate who was an external candidate. The fallacy in this argument is apparent in the foregoing statement itself. It is also apparent from the complainant's statements: that following the successful results of the written test and interview, she was the second candidate recommended for the position; that both herself and the successful candidate met the minimum essential requirements, and they were both equally qualified; that furthermore, her performance reviews consistently demonstrate throughout her service in UNAIDS the highest standards of efficiency, competence and integrity, each of which explicitly commends her expertise and work on gender issues. These statements, in themselves, show that paragraph 42 was not engaged to permit the complainant to be given priority over the successful candidate as the complainant and the successful candidate were not "assessed to be equally qualified". The GBA correctly so concluded, when it noted that "there was a significant difference of 3.25 points between the [complainant] and the first recommended candidate". The fourth ground is accordingly unfounded.

15. In challenging the impugned decision on the fifth ground, the complainant refers to paragraphs 5, 8 and 13 of the MRC's terms of reference contained in Information Note HRM/IN 2014-5, which state as follows:

"5. The MRC operates as an advisory body and submits its recommendations to the Executive Director, or his delegate, for decision.

[...]

8. The key functions of the MRC for appointments include:

- a. considering the selection process;
- b. verifying compliance with the provisions related to recruitment (Staff Regulations Article IV and Staff Rule 410).

[...]

13. Members are required to understand and operate within the context of the WHO Staff Regulations and Staff Rules, adjusted, as necessary, to take into account special needs of UNAIDS. UNAIDS policies, including, but not limited to, UNAIDS Mobility Policy and Procedures (HRM/IN 2014-4), and UNAIDS Reassignment Process (HRM/IN 2013-10).”

The complainant also refers to paragraph 11 of the Recruitment Policy, which states:

- “11. The work of the MRC is supported by HRM, which provides technical, legal, and policy advice and administrative assistance to the Committee.”

16. The arguments the complainant advances to support her submission that the MRC failed to abide by its own terms of reference as an advisory body considering the selection process, and verifying compliance with relevant provisions related to selection for vacant posts are centrally premised on what she alleges was the MRC’s failure to advise the Executive Director that the procedure for the contested post was flawed because the Administration simultaneously advertised the contested post internally and externally thereby denying her, as a well-qualified internal candidate, the possibility of career advancement. According to her, the members of the MRC were all made aware of discrepancies in the recruitment and selection process, allegedly because of a high incidence of simultaneous internal/external advertising of vacant posts, which was first brought to their attention by the Chair of the UNAIDS Staff Association who requested a face-to-face discussion. She further states that the Chair raised the point that this instance was similar to other recent recruitment processes discussed by the MRC where an external candidate was recommended over a well-qualified internal candidate. Similarly, the Chair of the MRC and the complainant’s supervisor at the material time, also agreed on this and the need for consistency between advertising vacant posts internally and internally/externally. The complainant argues that not only did the MRC fail to bring this “procedural irregularity” to the Executive Director’s attention, but HRM also failed in its obligation under paragraph 11 of the Recruitment Policy to draw it to the MRC’s attention.

17. The arguments stated in the foregoing consideration are unfounded, premised, as they are, on an alleged breach of paragraph 23 of the Recruitment Policy. This is given the Tribunal's finding that paragraph 23 was not engaged and that the post was properly advertised internally/externally simultaneously pursuant to paragraph 24 of the Recruitment Policy. The discussions and the meeting between various parties (referred to in consideration 16 of this judgment) are matters of internal administration which have no bearing on the legality of the decision to advertise the contested post simultaneously internally and externally.

18. Based on the foregoing findings, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 24 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER