

A. G. (No. 3)

v.

WHO

138th Session

Judgment No. 4866

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms C. A. A. G. against the World Health Organization (WHO) on 4 May 2020, WHO's reply of 10 August 2020, the complainant's rejoinder of 27 October 2020 and WHO's surrejoinder of 1 February 2021;

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 Adviser, Human Rights and Law, 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, Human Rights and Law, at grade P-5, for which a vacancy announcement was published internally and externally on 26 January 2018. She was shortlisted and took part in a selection test, after which she was interviewed on 23 May 2018. On 27 February 2019, she was informed by email that another candidate had been offered the position. On 28 February, 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. She received those documents on 12 March. The following day, she requested the table of signatures or email confirmations of the MRC members who had approved the selection decision. She also requested the text of agenda item 1 in the Note for the Record on the MRC meeting of 20 June 2018, allegedly pertaining to staff selection processes.

On 14 March 2019, 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; that the former Executive Director, the ultimate decision-maker, had not adhered to UNAIDS' recruitment/selection procedures; and that the Human Resources Department (HRM) had failed to provide technical, legal and policy advice to the MRC.

On 3 May 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 or procedural flaw in the relevant provisions of the UNAIDS Recruitment Policy and Guidelines and/or the MRC terms of reference". On 12 June 2019, the complainant lodged an appeal with the Global Board of Appeal (GBA).

After requesting and receiving additional information from the Administration, the GBA issued its report on 24 January 2020, concluding that the selection process was consistent with the established procedure with the panel properly composed, and that the decision to recommend an external candidate for the position was taken within the SAP's authority, and reasoned appropriately; that the MRC procedures were followed, and had taken into consideration all relevant factors when approving the selection process results.

On 27 March 2020, the Executive Director, accepting the conclusions of the GBA, 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, Human Rights and Law, with full retroactive effect and moral damages for the irregularities in the selection process, 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 procedures for the contested post, the Tribunal recalls its case law which states, in consideration 7 of Judgment 3652, for example, 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 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. 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. 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.

2. The complainant requests the joinder of this complaint with her second complaint. The Global Board of Appeal (GBA) had rejected a similar request when she made it in the internal appeal procedure. She had argued that the underlying appeals to these complaints should be joined because they are both essentially related to the same set of facts and the same issues of law. Indeed, in the Tribunal's case law, ordinarily, the joinder of complaints to render a single judgment will be granted where the complaints involve the same or similar facts and raise the same or similar legal issues (see, for example, Judgment 4144, consideration 2). In rejecting that request, the GBA stated that, upon review of the request pursuant to Rule 370 of its Rules of Procedure, its Chair had decided that joining them was not warranted given the different factual and legal elements of each appeal. The two complaints challenge two separate selection processes for two different positions and therefore do not involve the same factual circumstances. Moreover, although, as is evidenced in consideration 6 of this judgment, the complainant in some instances advanced similar grounds to challenge each impugned decision, the issues she raises and the arguments she presents to support them are not all the same. The request for the joinder of this complaint with the complainant's second complaint is therefore rejected.

3. 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.

4. The complainant's request for oral proceedings is also 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.

5. 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).

6. In seeking to set aside the impugned decision the complainant advances six grounds of challenge. She submits that (1) the Executive Director's impugned 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 Regulations 4.2 and 4.4, Staff Rule 410.1 and paragraph 42 of UNAIDS' recruitment policy; (5) the Mobility and Reassignment Committee (MRC) failed to abide by its own terms of reference; and (6) there were various failures in the GBA's process, including its refusal to disclose a specific document, which she had requested. The other issues the complainant raises in this last ground (save to impeach the GBA's refusal to join the two internal appeals that was considered in consideration 2 of this judgment) are related to issues raised in the second, third, fourth and fifth grounds and will be dealt with in the course of this judgment.

7. 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 however submits that, in the present case, the Executive Director should have motivated the impugned decision. The complainant argues that had she done so, a careful consideration of the GBA's report would have revealed serious

legal flaws in its conclusion that the complainant “did not demonstrate a breach of the procedure when advertising the position”. Whilst this is a view the complainant holds, it does not engage the Tribunal’s case law which states, for example, 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. Certainly this is so if the appeal body’s reasons were adequate. The first ground is therefore unfounded.

8. The Tribunal finds it convenient to consider at this juncture the issue, raised in the sixth ground, whether the GBA erred by failing to order the disclosure of the specific document the complainant had requested. The case law states that the failure of an international organization to disclose, during the internal appeals procedure, materials on the basis of which the challenged decision was made, may render the appeals body’s examination of the case incomplete, with the result that the final decision accepting the appeals body’s opinion may breach due process, the organization’s duty of care and the principle of equality of arms, which would warrant setting it aside (see, for example, Judgment 3586, considerations 17 and 20).

9. The GBA had, at the complainant’s request, ordered UNAIDS to disclose additional documents and information in the internal appeals procedure. It did not, however, grant the complainant’s request to disclose to her the text of agenda item 1 in the Note for the Record on the MRC meeting. Given the Administration’s reluctance to disclose that item to the complainant, the GBA asked the Administration to disclose the document to it (the GBA). The Administration did so, however asking the GBA not to disclose it to the complainant because it was not related to the selection for the subject position and was confidential. Having reviewed the document, the GBA decided that it was “not related at all to the selection [for the contested post]” and decided not to disclose it to the complainant. She submits that the GBA was wrong and requests the Tribunal to order the disclosure of the document to her.

10. The Tribunal has consistently stated that a staff member must, as a general rule, have access to all evidence on which an authority bases (or intends to base) its decision against her or him and that under normal circumstances such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. The GBA's decision not to disclose the text of agenda item 1 in the Note for the Record on the MRC meeting to the complainant was justified having regard to the GBA's conclusion that it did not relate at all to the non-selection of the complainant and was not relied upon by it in assessing the merits of the complainant's case. Accordingly, the complainant's submission that the GBA's decision not to order the disclosure of the subject document to her was flawed is unfounded.

11. As the complainant's arguments supporting her contention in the second ground (that UNAIDS failed to comply with its own recruitment policy) are entwined with her arguments supporting her contention in the third ground (that the rationale for requesting simultaneous internal/external advertising of the post is unfounded and flawed), the Tribunal finds it convenient to consider these grounds together.

12. To support the second ground, the complainant relies on paragraph 23 of the Recruitment Policy contained in Information Note HRM/IN 2015-4 (the Recruitment Policy), which relevantly provides that vacancies for internationally recruited positions at Headquarters are normally published internally for a period of two weeks. She also refers to paragraph 24 of the Recruitment Policy, which relevantly provides that approval from the Director, Human Resources Department (HRM), can be requested in writing by the Hiring Manager, to advertise vacant positions in 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. Indeed, the Tribunal notes that, under paragraph 26 of the Recruitment Policy, the Director, HRM, must approve the publication of all vacancies.

13. The complainant states that the requirement of paragraph 23 of the Recruitment Policy that “[v]acancies for internationally-recruited positions” are to be “normally published internally for a period of two weeks” is part of a two-stage recruitment process and in which the norm is for such positions to be first advertised internally. They may then be advertised externally if there were no suitable internal candidates. This, she states, accords with what UNAIDS intended when paragraph 23 was included in the Recruitment Policy in 2015: to support career development of qualified internal staff by giving them priority consideration. She submits that since in the present case the contested post was not first advertised internally in accordance with paragraph 23, the organization thereby, in breach of the principle of *tu patere legem quam ipse fecisti*, ignored the policy which it had itself defined, and, as held in consideration 18 of Judgment 3177, “this alone is sufficient to set aside the competition decision” as it amounted to a procedural irregularity. This submission is unfounded.

14. The complainant’s reliance on the above-mentioned statement in consideration 18 of Judgment 3177 is misplaced. It overlooks that it was made in the context of the Tribunal’s prior finding, in consideration 17 of Judgment 3177, that the specific procedure for the authorisation of simultaneous external/internal advertising 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. HRM was then required by the applicable rule to make a recommendation to the Director-General who was to authorise the simultaneous external/internal advertisement for the post, but HRM had failed to make a recommendation. The Administration thereby failed to adhere to its own procedure, thereby breaching the principle of *tu patere legem quam ipse fecisti*. It was for this failure that the Tribunal set aside the selection decision (and the impugned decision). In the Tribunal’s view, it may be deduced from consideration 18 of Judgment 3177 that if the requirements of a provision like paragraph 24 that permits, as an exception to the general rule, simultaneous internal/external publication of a vacancy are not complied with, the publication and concomitant

selection will be unlawful. It was also important, as the GBA observed, that the UNESCO provision referred to in Judgment 3177, which was similar to paragraph 24, allowed external publication only in “specific cases”, which is not provided in paragraph 24.

15. The complainant observes that paragraph 24 of the Recruitment Policy provides for the possibility of advertising vacancies on a simultaneous internal and external basis for a period of three weeks, if the Director, HRM, approves a request for that procedure presented to her or him with a rationale. She states that whilst she does not disagree that under these provisions there is a discretion whether to advertise vacant posts either first internally and then externally or internally/externally simultaneously, that discretionary power is not unfettered and there has to be a valid reason for advertising a post internally/externally simultaneously. She submits that UNAIDS’ failure to advance any credible reason to explain its decision not to advertise the contested post internally only first, shows that the powers vested in the Organization’s executive head were exercised in an arbitrary manner, which in itself renders the selection decision unlawful and warrants setting it aside. On the other hand, the Organization submits that the decision was lawful under paragraph 24 of the Recruitment Policy.

16. As the GBA concluded, the steps required in paragraph 24 of the Recruitment Policy to authorise the simultaneous external and internal publication of the contested post were followed. The distinguishing feature is that the similar provision considered in Judgment 3177 had not been followed, as the Tribunal determined in that case. In the present case, pursuant to paragraph 24, by memorandum dated 16 January 2018, the Hiring Manager requested the approval of the Director, HRM, to publish the contested post simultaneously externally and internally. The stated rationale was that “[f]ollowing the Cabinet approval of the 2018 mobility list, I would appreciate your assistance in advertising the above mentioned post as [sic] your earliest convenience to ensure that the post is filled in time to coincide with the departure of the current incumbent, due to be reassigned through this

year's mobility exercise". The Director, HRM, approved the request meeting the requirements of paragraph 24 for the simultaneous advertisement of the contested post internally and externally. Accordingly, all of the complainant's submissions supporting the second ground, which centrally focus on the application of paragraph 23 are misplaced. It also follows that the complainant's submission, in the sixth ground, that the GBA's conclusion in relation to the application of Judgment 3177 is flawed is unfounded.

17. It also follows from the foregoing analysis that the complainant's submission, in support of the third ground, that the selection process was flawed because paragraph 23 of the Recruitment Policy states that a vacant post should "normally" be first published internally, is unfounded. The complainant submits, also in support of the third ground, that the rationale for requesting the publication of the contested post simultaneously externally and internally was flawed because the rationale did not disclose any credible reason, justifiable urgency or any unique aspects of the post to permit such publication. It is not the Tribunal's role ordinarily to assess the merits of the rationale. Moreover, the selection process was not unlawful, as the complainant seems to suggest, because the memorandum of 16 January 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. The Tribunal observes that the disclosure of the document to the complainant is in keeping with its case law. In the foregoing premises, the second and third grounds are unfounded. In light of the foregoing analysis, the complainant's submission, in the sixth ground, that the GBA's conclusion in relation to the rationale for simultaneous internal/external advertising of the contested post was flawed is also unfounded.

18. In the sixth ground, the complainant also submits that the GBA's finding as to the effect of the word "normally" in paragraph 23 of the Recruitment Policy was wrong. In paragraph 31 of its report, the GBA stated, correctly, in the Tribunal's view, that it "observed that the

word ‘normally’ in the Recruitment Policy is not equivalent to ‘mandatory’ and allows more flexibility in advertising vacancies”. This finding, as well as the GBA’s further statement that “[t]here is no requirement to advertise a vacancy internally before it is advertised externally”, were accurate given the provisions of paragraph 23 of the Recruitment Policy. The complainant’s submission herein on this aspect of the sixth ground is therefore unfounded.

19. The complainant cites WHO Staff Regulations 4.2 and 4.4, Staff Rule 410.1 and paragraph 42 of the Recruitment Policy to support her case on the fourth ground.

Staff Regulation 4.2 states, in effect, that the paramount consideration in the appointment, transfer, 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 level 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 42 of the Recruitment Policy 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 contracts in priority over other internal candidates and over external candidates.

20. The complainant submits, in effect, that with a minimal 0.5 point difference in the overall score between her and the selected external candidate and having scored the same as the selected candidate on the written test, it cannot be denied that they were equally qualified. This submission is fallacious given the clear words of paragraph 42 of

the Recruitment Policy that an internal candidate would be given priority over an external candidate if they were “assessed to be equally qualified”. They were not so assessed as the selected candidate obtained an overall score that was 0.5 point above the complainant. The complainant’s further submission that her performance reviews consistently demonstrated throughout her service in UNAIDS the highest standards of efficiency, competence and integrity does not change that fact. Her further submission that UNAIDS downplayed her qualifications, experience and competence in preference to those of the external candidate, and the SAP’s assessment and scoring is flawed is not supported by the record. The fourth ground is therefore unfounded.

21. Regarding the fifth ground, the provisions which govern the MRC’s role in the selection process are paragraphs 5, 8 and 13 of 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 Tribunal also notes 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.”

22. The complainant correctly states that, under these provisions, the MRC's terms of reference and role of verifying compliance with the provisions related to recruitment constitute it as not merely to rubber stamp the report of the SAP, but one of monitoring and oversight to ensure that the recruitment/selection process has complied with the relevant UNAIDS' policies, with a view to giving an advisory opinion and submitting a recommendation to the Executive Director for her or his decision. However, the complainant's submissions that there is nothing in the report of the MRC to the Executive Director that indicates due consideration was given to the minimal difference in scoring; nor to paragraph 23 of the Recruitment Policy as to why the subject vacancy was not first published internally, with so many qualified internal candidates; or to request the rationale for not having done so; or, by reference to paragraph 42 of the Recruitment Policy, as to why the complainant was not given priority as an internal qualified candidate; or with reference to the provisions of Staff Regulations 4.2 and 4.4, are plainly unsustainable, in light of the Tribunal's findings concerning these issues in this judgment. The fifth ground of the complaint is therefore unfounded.

23. In the sixth ground, the complainant additionally states that she finds most concerning the GBA's closing comment that she had raised no objection at the time to the simultaneous internal and external publication of the contested position. The complainant wonders whether she should interpret that statement to mean that this precluded her from objecting subsequently. These statements seemingly overlook the fact that the GBA adjudicated her central claim and concluded that the simultaneous internal and external publication of the contested position was lawful under paragraph 24 of the Recruitment Policy. The complainant however states that at no time did she formally waive her right to challenge the validity of the selection decision, and there being no evidence of an express waiver, a waiver cannot be implied on the facts. On this basis, she submits that the members of the GBA were apparently influenced by assumptions which had no legal bases amounting to bias, which tainted the rest of their reasoning, thereby vitiating its report (and the impugned decision which accepted it). The

submission is unfounded. In the first place, the issue of waiver was raised on an obviously baseless assumption by the complainant. Moreover, the above-mentioned statements upon which the complainant relies do not provide any basis upon which to find bias that vitiates the GBA's report. The sixth ground of the complaint is therefore also unfounded.

24. Based on the foregoing findings, the complaint is unfounded and 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