Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2933**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. D. against the World Health Organization (WHO) on 10 October 2008, the Organization's reply of 16 January 2009, the complainant's rejoinder of 25 March and WHO's surrejoinder dated 24 June 2009;

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 and the pleadings may be summed up as follows:

A. The complainant, a Senegalese national born in 1953, is a former staff member of WHO. He joined the Organization on 15 October 2001 as a Project Manager in the Family and Community Health Cluster (FCH) at grade D.1. His initial two-year fixed-term contract was extended twice. As from 5 January 2004 he was reassigned with his post to the Evidence and Information for Policy Cluster (EIP).

By a memorandum dated 27 May 2005 the Assistant Director-General for EIP informed the Director-General that due to financial difficulties there was no funding for the complainant's post beyond 31 December 2005 and that he therefore proposed to abolish it with

effect from 1 January 2006. The Director-General agreed with this proposal and the complainant was notified by letter of 13 October 2005 that the post to which he was assigned would be abolished on 31 December 2005, but that this did not necessarily mean the termination of his appointment, and that efforts would be made to reassign him through a formal process conducted by a Global Reassignment Committee, in accordance with Staff Rule 1050.2 and paragraphs II.9.250 to II.9.370 of the WHO Manual. The letter also informed the complainant that, if no reassignment decision was taken during the reassignment period, he would hear from the Organization in April 2006. The process was extended for another six months and on 5 October 2006 the complainant received and signed a form which indicated that his appointment would be coming to an end on 12 January 2007.

By a letter dated 26 October 2006 the complainant was informed that the Global Reassignment Committee had not been able to identify a suitable alternative assignment for him and that the reassignment process would come to an end on 31 October 2006. Consequently, his appointment would terminate on 31 January 2007 in accordance with Staff Rule 1050.2.9.

On 4 December 2006 the complainant lodged an appeal with the Headquarters Board of Appeal, challenging the decisions of the Director-General to refuse to extend his appointment, to fail to reassign him to a post carrying responsibilities commensurate with his grade, training and experience, and to terminate his appointment. According to him, these decisions resulted from personal prejudice, incomplete consideration of the facts and failure on the part of the Administration to observe and apply correctly the Staff Rules and Regulations and the terms of his contract. The complainant separated from service on 31 January 2007.

In its report to the Director-General dated 17 December 2007, the Board recommended that the complainant's appeal and all his claims for redress be rejected. It found that the decision to abolish his post contained in the letter of 13 October 2005 had not been challenged by the complainant within the sixty-day time limit, in accordance with the

Staff Rules, and that his appeal was therefore time-barred in this respect. The Board considered that in any case the complainant had failed to provide any evidence that the said decision had been taken for any reason other than budgetary or programmatic reasons. It also found that the complainant had not challenged the reassignment process "at the appropriate time" but had fully participated in the process, that he had no right to a Reduction-In-Force (RIF) procedure and that all reasonable efforts had been made by the Global Reassignment Committee.

By a letter dated 26 August 2008 the Director-General informed the complainant that she agreed with the Headquarters Board of Appeal that the matter of the abolition of his post was not receivable, that he did not have a right to participate in a RIF procedure and that the reassignment process had been carried out in accordance with the rules and relevant procedures. She therefore dismissed his requests for redress. Nevertheless, she decided to award him compensation in the amount of 2,500 United States dollars in view of the time taken to consider the Board's report. That is the impugned decision.

B. The complainant contends that the decision to terminate his appointment was vitiated by errors of law and fact in that the Organization failed to observe the requirements of the reassignment process set out in Staff Rule 1050.2. He considers in particular that the process lacked transparency and he takes issue with the Director-General's competence to appoint members of reassignment committees. In addition, he submits that he applied for 14 positions with WHO but received only four opportunities to be interviewed. In his view, as the incumbent of a post which was to be abolished, he ought to have been given preference for vacancies in accordance with Staff Rule 1050.2.7. Thus, the selection processes should have been suspended and the Global Reassignment Committee should have recommended that he be assigned directly to one of the vacant positions for which he had applied. He also contends that during the reassignment process he was neither provided with nor recommended for any training, and that he was never informed of the reassignment

options which the Global Reassignment Committee had identified for him.

The complainant alleges that the "final notice of termination" that he received on 5 October 2006 was signed by an unauthorised official and was thus *ultra vires* and void. He further submits that the Organization failed to demonstrate an organisational need for the abolition of his post and that the decision not to renew his contract "flowed inexorably" from this illegal abolition. In his view, he had an acquired right to the former RIF procedure pursuant to the 1989 version of Staff Rule 1050.2, in view of the terms of the first extension of contract which he accepted in October 2003. The failure to give him the benefit of this right vitiates the abolition of his post as well as the later decision not to extend his contract.

The complainant asks the Tribunal: to quash the "decision dated 5 October 2006", which was confirmed by the impugned decision; to order his retroactive reinstatement in his post or in a post of commensurate responsibility, grade and step level; that the former RIF procedure be employed before the Administration is allowed to abolish his post, or in the alternative that his case be sent back to the Global Reassignment Committee and that proper procedure be followed. He seeks a recommendation that no retaliatory action be taken against him, and he claims 100,000 dollars for moral damages, 15,000 dollars for costs and expenses, and interest on all amounts awarded. The complainant requests the Tribunal to order the production of various documents relating to the impugned decision, the decision to abolish his post, the reassignment process and the selection processes in which he took part, and to hold a public hearing.

C. In its reply WHO submits that the complaint is partly irreceivable because the complainant was notified of the decision to abolish his post and to include him in the reassignment process on 13 October 2005 and he failed to challenge such decision within the statutory time limit of sixty days. It therefore considers that the arguments and claims related to the legality of this decision are time-barred.

On the merits, the Organization holds that the complaint is unfounded because the abolition of the complainant's post was clearly justified by both programmatic and budgetary reasons and was carried out in accordance with the relevant Staff Rules and Staff Regulations. Citing Judgment 2696, it contends that the complainant's argument of an alleged acquired right to the RIF procedure is unfounded because this procedure was replaced in July 2002 by the reassignment process. It observes that the offer of appointment which the complainant signed on 15 October 2001 stated that "[t]he appointment is subject to revision and adaptation to bring it into line with any subsequent amendment to the Staff Regulations or Staff Rules", which included changes to the rules regarding the modalities of the reassignment mechanism. The Organization also points out that the complainant fully participated in the reassignment process until its conclusion, without requesting that the RIF procedure be applied.

Regarding the alleged irregularities in the application of the reassignment process, it submits in particular that that process was extended to its maximum possible duration in order to allow for full consideration of all possible reassignment options and that it was in all respects properly carried out. The Global Reassignment Committee met several times to consider the complainant's case, and in October 2006 it recommended that the complainant be reassigned to a post for which he had applied; however, in the event, he was not successful in the selection process.

Lastly, WHO denies that the form which the complainant received on 5 October 2006 contained a final decision. It points out that the decision to terminate his appointment was taken on 20 October 2006 by the Acting Director-General and notified to him by the letter of 26 October. Thus, it was taken by an authorised official and in full compliance with the applicable rules. It holds that the complainant's request for document discovery should be dismissed because all relevant documentation has already been provided to the Tribunal, as should his request for a public hearing as the complainant requested that his initial appeal be examined *in camera*.

D. In his rejoinder the complainant asserts that he challenged both the decision to abolish his post and the non-renewal of his appointment within the applicable time limits. He submits that the Organization did not provide any actual proof of the need to abolish his post. He also challenges the decision to abolish his post on the grounds that it was not for the Assistant Director-General responsible for EIP to take such a decision. Rather, the decision should have been taken by a Competence Review and Strategic Orientation Committee. He argues that he maintained his right to the RIF procedure when he accepted his extension of contract in October 2003 and never waived it. Regarding the reassignment process, he explains that he had little choice but to participate.

E. In its surrejoinder WHO reiterates its position. It states that the Assistant Director-General responsible for EIP was fully competent to propose the abolition of the complainant's post. It also points out that the budgetary reasons for that decision are evidenced by the Financial Report presented to the World Health Assembly in May 2006, which shows that there was a net decrease in the programme budget for EIP.

CONSIDERATIONS

1. The complainant joined WHO on 15 October 2001 as a Project Manager in the FCH Cluster, at grade D.1. He was recruited on a two-year fixed-term contract which was subsequently extended twice for one-year periods beginning on 14 October 2003 and 15 October 2004 respectively. On 5 January 2004 he was temporarily reassigned to the Evidence and Information for Policy Cluster (EIP) to act as Adviser to the Department of Human Resources for Health. He was then officially assigned to this position on 1 January 2005.

2. By a letter of 13 October 2005 the complainant was informed that his post would be abolished on 31 December. This letter also advised him that the reassignment process provided for in Staff Rule 1050.2 would be implemented. Paragraphs II.9.250 to II.9.370 of the WHO Manual explain how to implement this process, the purpose of

which is to permit possible reassignment to another post by a reassignment committee in the event that a post is abolished.

3. Although this procedure, which is normally of six months' duration, was in this case extended to 12 months, it proved to be fruitless. The complainant's appointment was therefore finally terminated on 31 January 2007 by a decision of the Acting Director-General, of which the complainant was notified in a letter dated 26 October 2006.

4. The complainant then lodged an appeal against this decision with the Headquarters Board of Appeal. In accordance with the Board's recommendation, the Director-General dismissed the complainant's appeal by a decision of 26 August 2008 and awarded him compensation of only 2,500 dollars for the abnormal length of time taken to consider his appeal.

5. That is the decision which the complainant impugns before the Tribunal. He requests, inter alia, the quashing of this decision, reinstatement at WHO and an award of compensation for the injury which he considers he has suffered.

6. The complainant has asked that the Organization be ordered to provide various documents relating to the facts of the case and has further requested a public hearing. In view of the sufficient clarity of the written submissions and items of evidence produced by the parties, the Tribunal considers that it has been fully informed about the case and does not therefore consider it necessary to accede to these requests.

7. In support of his complaint, the complainant first disputes the lawfulness of the Director-General's decision to abolish his post, of which he was informed on 13 October 2005. In particular, he submits that there was no real justification for this measure with regard to the Organization's interests.

8. However, as WHO rightly contends, the complainant failed to submit an appeal against the decision in question to the Headquarters Board of Appeal within sixty days of being notified thereof, this being the time limit stipulated by Staff Rule 1230.8.3. This decision has therefore become final, with the result that the complainant may not challenge its legality in these proceedings in order to impugn the subsequent decision to terminate his appointment.

9. Moreover, the arguments on which the complainant relies in order to contest the decision to abolish his post are completely unfounded.

10. According to firm precedent, decisions concerning the restructuring of an international organisation's services, such as a decision to abolish a post, may be taken at the discretion of its executive head and are consequently subject to only limited review. For this reason, while it is incumbent upon the Tribunal to ascertain whether such a decision has been taken in accordance with the rules on competence, form or procedure, whether it rests on a mistake of fact or of law, or whether it constituted abuse of authority, it may not rule on its appropriateness, since it may not supplant an organisation's view with its own (see, for example, Judgments 1131, under 5, or 2510, under 10).

11. Nevertheless, there must be objective grounds for any decision to abolish a post (see Judgments 1231, under 26, or 1729, under 11). In the instant case, it is however clear from the evidence, in particular from the memorandum of 27 May 2005 of the Assistant Director-General responsible for EIP, that the abolition of the complainant's post stemmed from a need for cost-saving measures and from the acknowledgement that this post was redundant. This decision therefore rested on objective grounds. As stated above, it is not for the Tribunal to say whether or not it was fitting.

12. Moreover, the complainant's criticism regarding the lawfulness of the procedure followed before the abolition of his post

is equally unfounded. As he had been officially assigned to EIP as of 1 January 2005 and remunerated from the funding allotted to that cluster, it was up to the Assistant Director-General responsible for EIP and not, as the complainant seems to suggest, the officials in charge of FCH, to propose, if necessary, the abolition of the post in question. Lastly, none of the provisions of the Staff Rules or Staff Regulations suggests that the power to make such a proposal had been transferred from these authorities to any Competence Review and Strategic Orientation Committee established by the Organization.

13. The complainant further submits that in his case it was wrong to apply the reassignment procedure introduced on 1 July 2002 under the current version of the above-mentioned Staff Rule 1050.2, since he holds that he had an acquired right to the application of the RIF procedure which had been in force prior to that date. Under the RIF procedure, the abolition of an official's post led to a competition among holders of similar posts, which could result in someone other than the person concerned having his or her appointment terminated.

14. However, in Judgment 2696, concerning complaints filed by officials of the Pan American Health Organization when the latter's Staff Rules were amended along similar lines to those of WHO, the Tribunal held that staff members recruited before the introduction of the current reassignment procedure had no acquired right to the application of the former RIF procedure. On that occasion it drew attention to the principle set forth in Judgments 61, 832 and 1330, that the amendment of a staff rule or regulation to an official's detriment amounts to a breach of an acquired right only when the structure of the contract of appointment is disturbed or if there is impairment of any fundamental term of employment in consideration of which the official accepted appointment. Given in particular the remote and contingent nature of the positive aspects of the RIF procedure and the benefits flowing from the new reassignment procedure, which provides officials with a greater overall degree of protection, the Tribunal considered that no acquired right to the former arrangements could be held to exist on the basis of the criteria established by the case law.

15. The conclusion reached in Judgment 2696 must also apply, for the same reasons, in this case.

16. In the instant case, the complainant further submits that he retained the personal right to benefit from the RIF procedure. In this connection he contends that when his contract was extended in October 2003, the Organization required him to sign an agreement still containing a reference to that procedure. But the fact that, on that occasion, WHO mistakenly used an old form pre-dating the amendment of Staff Rule 1050.2 on 1 July 2002 is plainly not sufficient to confer such an acquired right on the complainant. Moreover, as the Tribunal indicated in Judgment 2696, there would be no sense in applying the former procedure to a given official on an individual basis. Since the other staff members are no longer subject to this procedure, it would be impracticable to hold a competition between the complainant and the other officials in the same category under that procedure.

17. The complainant submits that even if the current reassignment procedure did apply to him – a hypothesis which has been confirmed – it was not properly implemented in several respects.

18. The Tribunal will not dwell on the complainant's general criticism of Staff Rule 1050.2.1, which states that "the reassignment process shall be coordinated by a Reassignment Committee established by the Director-General". Contrary to his submissions, this provision cannot be seen as providing the executive head of the Organization with "unilateral power" incompatible with the transparent operation of the reassignment process. In particular, the fact that the chair and some members of reassignment committees are appointed by the Director-General in no way undermines the independence and impartiality required of the persons concerned. Furthermore, the fact that the WHO Staff Association provisionally withdrew from these committees in November 2006, in protest against what it regarded as the unsatisfactory implementation of the

reassignment procedure, does not in itself prove that the examination of the complainant's particular case was affected by any flaws.

19. Nor has he any grounds for asserting that Staff Rule 1050.2.7, stating that "staff members shall be given due preference for vacancies during the reassignment period", was ignored as far as he was concerned. This provision expressly states that such preference must be exercised "within the context of Rule 1050.2.2", according to which "the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned". Contrary to the argument put forward in the complaint, the purpose of the preference given to an official covered by a reassignment process is not to guarantee the automatic assignment of a post to that person by departing from normal selection procedures. It gives that person priority over the other candidates for the same post only within the limits defined by these provisions. In the instant case, the evidence on file does not show that the failure to reassign the complainant to one of the posts for which he applied amounts to a breach of his right to preferential treatment, as defined above.

20. The complainant taxes the Global Reassignment Committee with failing to avail itself of the possibility offered by Manual paragraph II.9.315 to suspend the selection processes of candidates for some of the posts for which he was qualified. Not only did this body have no obligation to do so, but the Tribunal finds that this plea also has no factual basis. Indeed, the Organization's assertion that this possibility was used four times has not been validly contradicted, and it has produced evidence of the fact that this step was taken in respect of the last post for which the complainant applied.

21. The complainant also takes the Global Reassignment Committee to task for not making use of Staff Rule 1050.2.5, according to which "during the reassignment period, the staff member may be provided with training to enhance specific existing

qualifications". But this Committee was not duty-bound to propose such training for him, since this is merely an option which is left to its discretion. In the instant case, the Committee appears to have had good grounds for not resorting to this possibility, bearing in mind the complainant's high grade and level of qualification.

22. The complainant submits more generally that neither the Global Reassignment Committee nor the Organization itself made any real effort to ensure his reassignment. However, it is clear from the parties' submissions that the complainant was interviewed on four occasions with a view to his assignment to posts for which he had applied. Furthermore, it must be emphasised that, as stated earlier, the Director-General had taken the step of extending the duration of the reassignment procedure from six months to one year, the maximum extension permitted by Staff Rule 1050.2.4. Lastly, the Committee, which sent the Director-General three successive progress reports on this procedure and which ultimately recommended that the complainant be reassigned to a post for which he had applied, in no way neglected its task. If the complainant was not reassigned to this post, it was only because his application was rejected at the end of the selection process. In these circumstances, the Tribunal considers that the Organization must be deemed to have done enough to further the complainant's reassignment and to have honoured its obligation under Staff Rule 1050.2 to make "reasonable efforts".

23. The complainant also complains about a dearth of information during the reassignment process, but the aptness of this criticism is not borne out by the written submissions, from which it can be seen that, during that period of time, he had several contacts with the Global Reassignment Committee or with the Human Resources Services Department. Moreover, as WHO rightly comments, a reassignment committee is under no obligation to inform staff members participating in a reassignment process of every step taken to reassign them, which would sometimes have the disadvantage of arousing false hopes among the persons concerned.

24. The complainant likewise taxes the Organization with refusing to provide him with information regarding the candidate selected for the last post for which he had applied. However, the Administration was right to refuse this request on the grounds that data in the personal file of the person in question was confidential and could not therefore be disclosed to another official. On this point the complainant seems to believe that he can rely on Judgment 1323, in which the Tribunal held that WHO had no right to withhold information of this nature from the Headquarters Board of Appeal and the Tribunal. But in the instant case, the Organization has not baulked at sending the information in question to these bodies and has merely refused to give it to the complainant, a position which on the contrary was justified, as has just been said.

25. Lastly, the complainant submits that the decision terminating his appointment was taken by an unauthorised official. In this connection he asserts that the form extending his contract for the last time until 12 January 2007 was signed by the Assistant Director-General responsible for EIP and not by the Director-General himself. According to the wording of this form, which he received on 5 October 2006, normally the Director-General alone would have been competent to authorise, by his or her signature, such a measure when it concerned an official who – like the complainant – had a grade at the P.6 level or above.

26. The point made by the complainant is correct and the Tribunal observes that the absence of the Director-General's signature in fact contravenes not only the plain instructions on a form – which in itself would be a minor error – but also a rule. The requirement that the form in question, namely WHO form 80.1, be signed by this authority in the case of an official at the P.6 level or above is expressly provided for in paragraph II.9.20 of the WHO Manual, the content of which is echoed by the wording of the form itself.

27. However, the complainant is mistaken as to both the scope of the document in question and the nature of the decision terminating his

appointment. While the nature of the WHO 80.1 form might seem somewhat ambiguous, it specifies that its sole purpose is to forward a proposal relating to the extension or expiry of a contract. This document should not therefore be interpreted as itself constituting a termination decision. In fact, the written submissions show that the decision to terminate the complainant's appointment was taken on 20 October 2006, after his last application for reassignment to a post had been rejected by the Acting Director-General. This is the decision of which the complainant was notified in the aforementioned letter of 26 October 2006 and it is not directly linked to the proposal provisionally to extend his contract contained in form WHO 80.1, which was drawn up on 29 August 2006 pending the outcome of the reassignment process. Moreover, the Tribunal notes that the letter of 26 October 2006 gives 31 January 2007 as the date for the complainant's last day in service, that is to say a different date to that mentioned in the form. Hence the decision terminating the complainant's appointment was not taken without authority, and the breach on which the complainant relies does not afford grounds for setting it aside.

28. Since the impugned decision cannot be criticised, the complaint must be dismissed in its entirety. Furthermore, the Tribunal points out that one of the claims contained in it, namely that a recommendation be made to the Organization, is beyond the competence of the Tribunal (see, for example, Judgment 2594, under 11).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 April 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President,

and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet