

EIGHTY-EIGHTH SESSION

In re Merciai

Judgment 1928

The Administrative Tribunal,

Considering the complaint filed by Ms Annalisa Merciai against the World Health Organization (WHO) on 21 September 1998 and corrected on 9 November 1998, the WHO's reply of 10 February 1999, the complainant's rejoinder of 19 April and the Organization's surrejoinder of 15 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

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

A. The complainant, of Italian nationality and born in 1961, entered the service of the WHO on 16 March 1991 as a technical officer at grade P.4 in the Human Resources and Fellowships Unit in the Regional Office for Africa in Brazzaville, in the Congo. She was responsible for the fellowships programme. Her initial appointment was for two years and it was twice extended for the same period.

Her supervision of the fellowships programme ended in August 1995. Following a discussion with the complainant the Director of Administration and Finance wrote to her on 21 August 1995 confirming that her post was one of those which would be abolished at the end of the year and that she could choose between separation by mutual agreement under Staff Rule 1015 or the application of the reduction-in-force procedure under Rule 1050. The acting personnel officer at the Regional Office told her in a memorandum which she received on 26 October 1995 that her post was to be abolished on 31 March 1996 and that, as no opportunity for reassignment had materialised, she would be separated by mutual agreement with an enhanced indemnity but "without prejudice to [her] rights for a Reduction-in-Force procedure". In a reply of 21 November 1995 she said that she had decided against separation by mutual agreement and asked to be considered for reassignment worldwide under the reduction-in-force procedure. The Reduction-in-Force Committee studied her case and, being unable to offer her a post in her occupational group, allowed her to compete for a post in other groups.

On 15 March 1996 the Director of the Division of Personnel informed the complainant about a P.3 post which was vacant in Kigali, Rwanda. She did not apply for it at that time. On 29 April the Director wrote to her again to let her know that, after examining her case the Committee had not found her to be "better suited for retention than other candidates with whom she was compared". He gave her three months' notice that her appointment would end on 31 July 1996.

In a memorandum of 28 May 1996 she said she would agree to take six months' leave without pay to allow the Organization time to reassign her and it was granted to her from 1 August in lieu of separation under Staff Rule 655.1. On 12 August she expressed interest in the P.3 post in Kigali. She was told on 2 October that her reassignment to that post had been approved by the Regional Director, and she took up that appointment on 12 November.

In two memoranda to the complainant dated 19 July and 15 November, which she received after her arrival in Rwanda, the Regional Director criticised her performance in her previous post. He pursued the matter in a further memorandum of 2 December. On 31 December 1996 she indicated that she would not seek the renewal of her contract when it expired on 31 March 1997. The Regional Director asked her to reconsider that decision in his memorandum of 27 January 1997. On 1 March 1997 he offered her a P.2 post in the Regional Office on the understanding that she would keep her current grade of P.3. She nonetheless left the employ of the Organization on 31 March 1997.

The complainant had meanwhile, in June 1996, appealed to the regional Board of Appeal against the decision to abolish her former post and to terminate her appointment. In its report of 14 March 1997 the Board recommended (1) reintegration on a suitable post and (2) the removal of memoranda dated 15 November and 2 December 1996 from her personal files. The Regional Director accepted those recommendations, but informed her that the first one had already been implemented. She then appealed to the headquarters Board of Appeal and while, in its report of 14 April 1998, it expressed the opinion that the reduction-in-force procedure had been correctly carried out, it concluded that the failure to provide suitable reassignment for the complainant and the decision to end her employment were tainted with prejudice. It reported that she "had not been treated in the same way as other staff members in the same situation" and recommended allowing the complainant to choose between reinstatement on a post "truly commensurate" with her experience, or compensation. In a letter of 12 June 1998, which the complainant impugns, the Director-General informed her that he did not accept that recommendation.

B. The complainant has five pleas. The first is that the decision to abolish her post and separate her from the Organization stemmed from the "personal prejudice, ill will, and malice" of the Regional Director towards her. Her responsibility for the fellowships programme came to an abrupt halt on 1 August 1995 and she was never again given duties with the same level of responsibility. There was further ill will on the part of the Administration in that it refused to provide her with the performance appraisal due in March 1996 despite her requests. She also protests that she was sent to one of the most "demanding and dangerous duty stations". Secondly, there were irregularities in the reduction-in-force procedure. It was not carried out objectively or fairly and the WHO failed to make her a reasonable offer of reassignment as required by Rule 1050.2.5. It did not immediately notify her of her rights and obligations as required by Manual paragraph II.9.280 or give her the reasons why she was not selected for a post. At the Reduction-in-Force Committee meeting of 28 August 1995 it was proposed that the complainant could be considered for four vacant posts in the Regional Office for Africa, one being in the Fellowships Unit. However, having been swayed by representatives of the Administration, the Committee rejected the suggestion.

Thirdly, she argues that she should have been allowed "personal input" in the reduction-in-force procedure.

Fourthly, she claims that her post was not abolished as it was "reconstituted" at grade P.5.

Lastly, she submits that three memoranda of 19 July, 15 November and 2 December 1996, which questioned for the first time her performance in the Fellowships Unit, were at odds with her satisfactory appraisal reports. They formed part of a campaign to discredit her in the wake of her internal appeal, constituted defamation of character and, since they were put in her personal files, caused her moral injury. At the Administration's instigation four WHO country representatives unjustly criticised in writing her performance as supervisor of the Fellowships Unit sixteen months after the duties of that post had been taken away from her.

She claims the following relief: (1) the quashing of the impugned decision of 12 June 1998; (2) the setting aside of the notice of termination dated 29 April 1996 by which her appointment was to end at 31 July 1996, with reinstatement on a P.4 post commensurate with her experience and payment of salary and benefits at that grade from 31 July 1997, less any sums paid to her after July 1996; (3) the quashing of all the decisions taken by the WHO during April 1996 as a result of the reduction-in-force procedure, including those terminating her appointment and placing her on special leave without pay; (4) removal from her personal files of the offending memoranda of 19 July, 15 November and 2 December 1996 and proof of such action; (5) an apology in writing from the Regional Director for the "wrongful treatment" from May 1995 onwards to be "published throughout the entire WHO organisation"; (6) an award of 100,000 Swiss francs in moral injury; (7) interest at 10 per cent per annum from 31 July 1996 on all sums awarded to her to "the date of complete satisfaction of any judgment hereunder"; (8) the sum of 15,000 francs in costs; and (9) such other relief as the Tribunal sees fit.

If reinstatement is not possible, she claims additional damages equal to five years of her final salary and allowances at P.4 level. She also asks the WHO to produce copies for the Tribunal, and for her, of numerous documents, mainly relating to the reduction-in-force procedure.

C. In its reply the Organization contends that the complainant's claims are without merit. The Regional Director's concerns about certain aspects of her performance played no part in the decision to abolish her

post, and the complainant's allegations that he was prejudiced towards her are "speculative". The decision to abolish the complainant's post was taken for objective reasons resulting from budgetary constraints in 1995 and 1996 and programme priorities at the Regional Office. The WHO rejects the complainant's suggestion that there were irregularities during the procedure that led to the abolition of her post: it explains that on 13 October 1995 the Reduction-in-Force Committee recommended the abolition of 20 professional posts, including the complainant's whose duties in the fellowships programme had already been redistributed in August 1995. The minutes of the Regional Office's Reduction-in-Force Committee meeting of 28 August 1995 do not corroborate the complainant's view that there was any interference by "the Administration" to prevent her from being considered for vacant posts in the region.

Moreover, she was fully informed of her rights in the reduction-in-force procedure. Initially an administrative instruction dated 10 August 1995 relating to measures involved in the reduction procedure was sent to all staff in the region and she was kept informed about the procedure by the Division of Personnel on several occasions in 1996. As regards her desire to state her case to the Reduction-in-Force Committee, no candidates for retention were heard in person and appearing before the Committee is not prescribed in the rules.

Her former post was abolished for financial reasons and was not "reconstituted": her previous duties were redistributed to other staff. The Organization lists details of attempts made to reassign the complainant in other Regional Offices and at WHO headquarters before, during and after the reduction-in-force procedure. Contrary to what the headquarters Board of Appeal had indicated, she could not have been offered the Kigali post in 1995: it was a new post, scheduled to be established in February 1996. It was a grade lower than her previous one, which is permitted under Rule 570.1.3; however, she benefited from an increased salary through being placed on the highest step in her new grade. It should not be overlooked that the complainant was offered and accepted reassignment and the termination of her appointment was never put into effect. The complainant resigned even when offered an assignment back in the Regional Office. She is in effect asking the Tribunal to 'undo' her own decision.

The deliberations of the Reduction-in-Force Committee are confidential, but at the request of the Tribunal the Organization would make available to it copies of information on posts for which the complainant was considered and which it released to the headquarters Board. It declines to make them, or the numerous other documents she has asked for, available to the complainant.

It points out that it has removed the copies of the offending memoranda from her personal files. The Regional Director did ask WHO representatives in 1996 to formulate in writing views they had expressed at an earlier stage about the running of the fellowships programme, but they were not fabricated views and were not part of a "smear campaign" against her. The complainant knew of the concerns in question and in any event they have no bearing on the present complaint relating to the decision to abolish the complainant's post under the reduction-in-force procedure, a decision which was taken before those memoranda were sent.

The headquarters Board erred in thinking that the complainant's post had been singled out for "immediate termination" and therefore that the complainant "had not been treated in the same way as other staff members". Her post was scheduled to end on 31 March 1996 and she had been allowed more than five months' notice.

D. In her rejoinder the complainant presses her claims and enlarges on her pleas. She regrets the Organization's refusal to allow her access to the documents she asked to see. In so doing it has limited her ability to adequately preserve her rights as an international civil servant.

She observes that she is not challenging the need for a reduction-in-force procedure in 1996, she is affirming that the decision to abolish her post was tainted with malice, an allegation not rebutted by the Organization in its reply. There was interference by the Administration in the Reduction-in-Force Committee proceedings. Evidence to that effect was provided by members of the Committee when called upon to testify before the regional Board of Appeal. It was the prejudiced attitude of the Organization towards her which prevented her reassignment to Kigali from taking place in March 1996. It did not make "diligent" efforts to reassign her, causing her the loss of some three-and-a-half months' pay.

She submits that she did not resign, but rather allowed her contract to expire without seeking its renewal.

E. In its surrejoinder the WHO insists that the decision to abolish her post was taken by an independent Reduction-in-Force Committee which included staff representatives. According to the relevant minutes neither the member mentioned by the complainant, nor anybody else on the Committee dissented. There was no mention therein of blocked efforts to reassign the complainant.

CONSIDERATIONS

- 1. A decision was taken by the WHO in June 1995 to implement an Organization-wide reduction-in-force exercise. The staff members whose posts were abolished were given the choice of a mutually agreed separation or participation in a reduction-in-force exercise. The complainant chose the latter.**
- 2. On 29 April 1996, the Director of the Division of Personnel told the complainant that she had been unsuccessful in the reduction-in-force exercise and that her appointment would, therefore, be terminated on 31 July 1996.**
- 3. The complainant was, however, reassigned to a P.3 post in Kigali. In a letter dated 31 December 1996 she said she did not wish her contract to be renewed beyond 31 March 1997 when it was due to expire unless she was reinstated by the Tribunal. She complained about two memoranda dated 19 July and 15 November 1996 raising "unacceptable allegations about [her] performance, work relationship and temper". Those allegations were also maintained in a memorandum of 2 December 1996.**
- 4. Following the complainant's appeal the regional Board recommended in a report dated 14 March 1997 to the Regional Director that:
 - (a) the complainant be reintegrated into the Organization and a post commensurate with her qualifications, training and experience offered to her;**
 - (b) the memoranda dated 15 November and 2 December 1996 be removed from all her personal files.****
- 5. On 25 March 1997 the Regional Director informed the complainant that he had accepted the Board's recommendations and that the first one had already been implemented.**
- 6. Not having accepted the offer of a P.2 post in the Regional Office, the complainant's contract came to an end on 31 March 1997. She appealed to the headquarters Board against the decision of the Regional Director. It concluded that the abolition of the complainant's post was justified and that the reduction-in-force procedure had been correctly carried out. It said, inter alia, that the failure to provide the complainant with a suitable reassignment and the decision to terminate her appointment were "tainted with prejudice". The Board recommended in particular that she be allowed to choose between reinstatement or compensation, that the memoranda dated 19 July and 15 November 1996 should be removed from the complainant's personal files and an explanatory note inserted, that she receive 10,000 Swiss francs for moral injury and 2,500 francs for legal expenses with interest on all sums awarded.**
- 7. In his decision dated 12 June 1998 - the one impugned - the Director-General stated that the memoranda of 19 July and 15 November 1996 had been removed from her files. He did not accept inserting an explanatory note since this would only draw attention to documents that were no longer part of her files. He agreed to an award of 1,500 francs for certifiable legal expenses, but did not accept the recommendations for reinstatement, compensation for moral injury or interest. He said:

"Your appointment was not terminated by the Organization. It was your decision to resign from the Organization effective 1 April 1997. Therefore, I do not consider there is a basis for either your reinstatement or granting you compensation of a sum equivalent to two years' salary. The fact is that you accepted a reassignment to Kigali following a period of three and a half months of leave without pay. Had you not had reservations regarding the post in Kigali when Director, Personnel brought it to your attention in his letter of 15 March 1996, your reassignment would have been effected much earlier thus avoiding the leave without pay. Furthermore, even if the Kigali post was at one grade lower than what you had held before, you were placed at step 15 of grade P.3 in order to protect your salary at the P.4 level, which in fact provided slightly higher earnings. Therefore, your reassignment to Kigali did not represent a loss in salary."**
- 8. In her pleadings the complainant raises many matters. She refers to the original appeal to the regional Board impugning the decision to terminate her appointment pursuant to the "flawed" reduction-in-force**

procedure, the failure to place her elsewhere after the abolition of her post, the personal prejudice towards her of the Director of the Regional Office for Africa, the WHO's failure to follow its own procedures, the Organization's attempt to "reconstitute" her abolished post with another title under a different post number, discriminatory action towards her on the basis of her gender and origin, and unjust treatment of her.

9. The Administration responded at length and in detail to the complainant's arguments, even those it considered immaterial to the complaint. It claims that the decision to abolish the complainant's post was taken for objective purposes; it made efforts to reassign her and ultimately she accepted an offer; termination was never carried out; and the allegations of personal prejudice are unfounded.

10. In the opinion of the Tribunal the complaint is directed towards quashing a decision of termination which was never implemented. After submitting her internal complaint, the complainant accepted of her own free will a reassignment to another post. Her appointment was never terminated. Her contract of employment came to a natural end on 31 March 1997 and at her request was not renewed.

11. While the complainant afterwards regretted opting for reassignment, that does not alter the fact that this complaint requests redress for a decision which was never implemented and which has long since ceased to have any relevance since it was superseded by her reassignment. The quashing of that decision is therefore without purpose.

12. The complainant is therefore not entitled to have either the impugned decision, dated 12 June 1998, or the decision of termination of 29 April 1996, set aside. Her subsidiary claims set out at B above for reinstatement, damages and consequential relief also fail. Her other claims for relief did not form part of the original internal appeal: since they are neither subsidiary nor consequential they must also fail as being irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet