

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
WHO

136th Session

Judgment No. 4688

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. S. against the World Health Organization (WHO) on 25 August 2020 and corrected on 9 October 2020, WHO's reply of 25 January 2021, the complainant's rejoinder of 26 April 2021, WHO's surrejoinder of 2 August 2021, WHO's additional submissions of 27 February 2023 and the complainant's final comments thereon of 23 March 2023;

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 a developmental assignment.

The complainant is a WHO staff member. At the time of the events giving rise to the present complaint, she held the position of Human Resources Specialist, at grade P.4.

On 7 September 2018, the Human Resources Department (HRD) advertised on the WHO internal digital platform a "short-term developmental assignment" for the position of Management Officer, at grade P.5, in the Cluster for Noncommunicable Diseases and Mental Health (NMH) at WHO Headquarters. The complainant applied for this assignment on 16 September.

By a memorandum of 24 September 2018, the Assistant Director-General, NMH, informed the Regional Director of the Western Pacific Regional Office (WPRO) that preliminary discussions had taken place with Mr P., a staff member of WPRO, who had confirmed his continued interest in the developmental assignment, as well as with that staff member's supervisor, the Director of Administration and Finance, WPRO, whose agreement had been obtained. The Assistant Director-General, NMH, requested the Regional Director's support for Mr P.'s release on a full-time basis, starting on 20 October 2018 and for an initial period of four months, while the position was advertised. On 26 September 2018, the Regional Director approved Mr P.'s developmental assignment and, by a memorandum of 2 October 2018, HRD relevantly informed Mr P. and provided him with the Terms and Conditions and Terms of Reference for the assignment.

Mr P.'s four-month developmental assignment began on 20 October 2018 and, on 26 February 2019, it was extended for an additional month, i.e. until the end of March 2019. In a memorandum of 19 February 2019, requesting the support of the Regional Director, WPRO, and the Director of Administration, WPRO, for the extension of Mr P.'s developmental assignment until the end of March, the Assistant Director-General, NMH, indicated that the selection process for the position of Management Officer, NMH, would be finalised by that time. In the event, Mr P.'s extension of 26 February 2019 was cut short because, effective 1 March 2019, he was appointed to a position in the Office of the Director-General.

Prior to that, on 4 October 2018, the complainant received a system-generated email informing her that she had not been selected for the developmental assignment. That same day, she asked HRD to inform her of the reasons she was not considered for said assignment. On 10 October 2018, after having received oral feedback, she requested HRD to provide her with a detailed written response on specific questions regarding the process followed to determine that the subject post should be filled through a developmental assignment, and the process and criteria used to determine the candidates' suitability. HRD provided a response on 18 October 2018.

On 22 October 2018, and again on 16 November, the complainant wrote to the Assistant Director-General, NMH, to request concrete feedback on her application for the developmental assignment, including on the specific questions she had previously addressed to HRD. Having received a response from NMH on 21 November, she wrote to HRD on 26 November 2018, stating her disappointment with NMH's response and her intention to appeal the decision not to select her for the developmental assignment.

On 30 November 2018, the complainant requested an administrative review of her non-selection decision, notified to her on 4 October 2018, but this request was rejected on 28 January 2019. On 25 April 2019, she lodged an appeal with the Global Board of Appeal (GBA) which, in its report of 14 November 2019, recommended that the appeal be dismissed. By a letter of 27 May 2020, the Director-General informed the complainant that he had decided to accept the GBA's recommendation to reject her appeal and all requests for redress. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to cancel Mr P.'s developmental assignment to the post of Manager Officer, NMH, retroactively from 20 October 2018. She also asks the Tribunal to order WHO to reassign her, under a short-term developmental assignment, either to another vacant post of Manager Officer, with the same conditions as those announced in the Vacancy Notice for the P.5 post of Management Officer, NMH, or to a similar P.5 post. She claims moral damages in the amount of 50,000 United States dollars for WHO impeding her expected career progression. Although the complainant originally claimed legal costs in an amount to be confirmed at the end of the procedure, this was not further developed in the rejoinder. She claimed interest at the rate of 5 per cent per annum on all amounts awarded by the Tribunal from October 2018 through the date all such amounts are paid in full, and such other relief as the Tribunal may deem necessary, just and fair.

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

CONSIDERATIONS

1. At relevant times, the complainant was a member of staff of WHO. In late 2018 and 2019, a scheme existed whereby staff members could take up, temporarily, another position within the Organization. The process involved what was described as “short term developmental assignments”, governed by a document entitled “Short term developmental assignments: Policy and procedures” (the Policy), promulgated by the Human Resources Department (HRD) on 1 March 2018. The complainant applied for such an assignment in September 2018 but was not selected. She sought an administrative review of her non-selection but was unsuccessful. She lodged an internal appeal with the Global Board of Appeal (GBA) which, by a report dated 14 November 2019, recommended her appeal be rejected. It was, by a decision of the Director-General of 27 May 2020, which is the decision impugned in these proceedings.

2. The complainant requests oral proceedings. However, the briefs and the evidence submitted by the parties are sufficient to enable the Tribunal to reach an informed decision. The complainant’s application for oral proceedings is therefore rejected.

3. In her brief, the complainant advances her pleas under five headings. The first is that the developmental assignment was an abuse of authority. The second is that the developmental assignment violated the applicable WHO rules and the third is that the selection decision violated the principle of equal treatment. The fourth is that the selection process was a “*détournement de procédure*” (abuse of process) and violated the rules governing the selection for long-term positions. The fifth plea is that the selection decision was arbitrary, tainted by abuse of authority and bad faith. The first, fourth and fifth pleas are, in substance, repetitive and can be dealt with together.

4. The complainant’s pleas are based, in large part, on a premise which involves a serious allegation that the calling for applications for the developmental assignment was merely a ruse to facilitate the

relocation of the successful applicant, Mr P., from Manila to Geneva for an ulterior purpose, namely, to take up a permanent position, to which he was in fact subsequently appointed, at Headquarters. Necessarily, though this is not said explicitly by the complainant in her pleas, at least some members of staff of WHO involved in the making of the request for the short-term developmental assignment and involved in the selection of Mr P. are likely to have been complicit in the creation and perpetration of this ruse.

5. It is desirable to quote what is said by the complainant in her complaint brief about the assignment process and, by necessary implication, the *bona fide* of some or all of those involved in calling for the application for a developmental assignment and the assessment of the applicants, and whether there was, in effect, a premeditated conspiracy. Under the general heading “The developmental assignment was an abuse of authority”, the complainant says in paragraph 33 of her brief:

“The chronology of events demonstrates that the developmental assignment and the selection of the successful candidate were designed to only serve the personal interests of the selected candidate. The process was nothing but a cynical allusion (sic) intended to make other staff members believe that a developmental assignment was open to them at the P5 level, to enhance their skills and help them with career progression when, in fact, it was planned *ab initio* to transfer a P5 staff member, who also happened to perform at the P6 and D1 levels in the past, to Geneva for purely personal reasons.”

The complainant returns to this general description of what had occurred, in paragraph 44 of her brief:

“One can reasonably conclude that the developmental assignment and its so-called extension only served as a steppingstone for Mr [P.] to be permanently transferred to Geneva for personal reasons. The fabricated extension above and the fact that Mr [P.] never returned to his original post in [Manila] as expected [...], which post was supposed to benefit from his experience in Geneva [...] are clear evidence of the misuse of the developmental assignment tool for improper reasons.”

The reference to a “fabricated extension” was to a month’s extension of the developmental assignment involving Mr P. when it was due to conclude, whereas, in fact, Mr P.’s extension lasted only a few days. By

way of further general comment, the complainant states in paragraph 46 of her brief:

“Based on all the above, the [c]omplainant concludes that the only purpose of the developmental assignment was to ensure the presence of the selected candidate with his family in Geneva and to serve him as a stepping stone for the-long term position he now occupies at the WHO [Headquarters].”

Finally, in paragraph 85 of the brief, the complainant states:

“Based on all the foregoing, the [c]omplainant submits that the developmental assignment was nothing but a fabricated mean to serve the interests of the selected candidate and to transfer him to Geneva on a temporary basis in 2018, pending his assignment to a long term position at the Office of [the] Director-General in 2019, a position that he still occupies at present.”

This contention about abuse of authority and improper purpose is the centrepiece of the complainant’s case.

6. WHO’s reply contains, in particular, a statement of Mr P. which challenges some of the specific facts relied upon by the complainant to justify the general observations just quoted. In her rejoinder the complainant does not repeat, in detail, this thesis about improper purpose or abuse of authority. She does say at the beginning of the rejoinder, however, that she “reiterates all the arguments put forward in the [c]omplaint and refutes the unsupported allegations made by [WHO] in its [r]eply” and later repeats, in paragraph 39, that “the vacancy was merely used to place the selected candidate definitively in Geneva”.

7. The complainant identifies several matters as pointing to a conclusion there was an abuse of authority, though characterised in various ways throughout her pleas, broadly encompassed by her description of “cynical allusion” (sic). However, before addressing these pleas of the complainant, some further background should be mentioned.

8. The request for a developmental assignment had its genesis in a request by an official in the Cluster for Noncommunicable Diseases and Mental Health (NMH) at WHO Headquarters, dated 5 September 2018, asking HRD to prepare a developmental assignment for the

position of Management Officer, at grade P.5, in NMH. The request identified a target start date as 23 September 2018 and the reason for the opportunity (of a short-term developmental assignment) as arising because of a position becoming vacant on 30 September 2018 when the current incumbent (of the Management Officer P.5 position) was separating from the organisation. In that request there was a description of the duties of the assignee, and the language and specific skills required of the assignee. In a section of the request form entitled “Expected benefits”, the benefits to the “receiving office” were described as “[a]ddress temporary needs and deploy staff for emergencies. Develop internal talent through job enrichment and enhancement. Promote and support functional and geographical mobility.” This description simply involved a repetition of the language in the Policy. The benefits to the assignee were described as “[j]ob enhancement and enrichment. Opening up potential future professional and career development opportunities.” The short-term developmental assignment was advertised on 7 September 2018 with a closing date of 16 September 2018.

9. On 17 September 2018, the incumbent, whose position as Management Officer, at grade P.5, was being filled, was invited to review ten candidates’ profiles, out of the original 17 applications. Seven had, by then, been rejected by HRD. In a typed document prepared, it can be inferred, by HRD, comments were made about all of the ten remaining applicants. Mr P. was highly recommended and was the only one recommended in this way. Another was recommended as “[c]ould do the job”. The document also contained comments about the remaining eight applicants, including the complainant. None of those eight were recommended. This included the complainant who was noted as being “[t]oo specialistic” and for whom there would be a “steep learning curve”. It is clear that by 24 September 2018, Mr P. had been selected and informally contacted, agreeing to take up the position as a developmental assignee on 20 October 2018. He was formally advised by HRD of his selection by memorandum dated 2 October 2018.

10. At this point, reference should be made to the Tribunal's case law according to which the party asserting abuse of authority and improper motive must prove it (see, for example, Judgments 4524, consideration 15, 4467, consideration 17, 4146, consideration 10, 3939, consideration 10, 2264, consideration 7(a), and 2163, consideration 11). Similarly, the party asserting the existence of a conspiracy must prove it. In Judgment 2472, consideration 9, the Tribunal said:

“With respect to the allegations of bias and conspiracy, the burden of proving this is on the complainant [...] ‘Mere suspicion and unsupported allegations are clearly not enough, the less so where [...] the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification.’”

11. The complainant's thesis, discussed in consideration 3 above, entails consideration of three phases of the developmental assignment given to Mr P. The first phase concerns the making of the request for the assignment. The second phase concerns the selection of Mr P. The third phase involves the implementation of the assignment and events occurring during its currency, including Mr P.'s appointment to a permanent post at Headquarters.

12. As to the first phase, the complainant argues there was no justification for the short-term developmental assignment by reference to the Policy. As noted by WHO in its pleas, in accordance with Section I of the Policy, in particular paragraphs 4 and 5, the purpose of the Policy is twofold, namely, to benefit both WHO and staff members. Paragraph 5 of the Policy lists expected benefits to both the Organization and staff members.

“Benefits to the Organization:

- a. Possibility to address temporary needs and deploy staff for emergencies, as an alternative to recruiting temporary staff, including to fill-in for positions suddenly left vacant by a staff member;
- b. Development of internal talent through job enrichment and enhancement;
- c. Improvement of processes, development of networks and enhancement of consistency across WHO through the exchange experiences, knowledge and skills between offices;
- d. Promotion of and support to functional and geographical mobility.

Benefits for staff:

- e. Job enhancement and enrichment;
- f. Facilitation of a change of mindset in viewing geographical and functional mobility as an opportunity for growth and development;
- g. Learning and skills enhancement;
- h. Opening up of potential future professional and career development opportunities.”

13. The complainant argues that notwithstanding the references in the Policy to these concepts, there was no urgency, no temporary need, and no position suddenly left vacant. But this involves an unduly narrow and selective reading of the Policy. It is true that one of the benefits to the Organization identified in the Policy is the “[p]ossibility to address temporary needs and deploy staff for emergencies, as an alternative to recruiting temporary staff, including to fill-in for positions suddenly left vacant by a staff member”, which is in part repeated verbatim in the request of 5 September 2018. But there are several other benefits to the Organization identified in the Policy (and identified in the request) and there is no basis for treating each and every benefit spelled out in the Policy as a precondition for opening a short-term developmental assignment. The Policy was plainly intended to have a much broader operation.

14. A more specific argument allied to this is that the impending vacancy for the post, which the assignee would take up, would have been well known well before September 2018 and would not have arisen “suddenly”. The post could have been filled by ordinary means, namely a vacancy announcement for a fixed-term position. Nowhere in the documentation initiating the request for a developmental assignment is there an asserted fact that, specifically, the departure of the incumbent arose suddenly. One cannot avoid, of course, the identification of the benefits to the Organization referred to earlier. But also, as noted earlier, this is a verbatim repetition of what is said in the Policy. The likely import of the identification of the benefits to the Organization as including “address[ing] temporary needs and deploy[ing] staff for emergencies” is that it reflects a bureaucratic predisposition to repeat

verbatim the contents of normative legal documents, rather than evidencing a conspiracy to abuse the developmental assignment process for the purposes described by the complainant. Even more importantly, there is no evidence that might go some way towards establishing, directly or inferentially, that those involved in making the request were acting in bad faith and contriving, probably in a conspiracy, a situation intended to favour Mr P. and what their motives for doing so were.

15. In addition, if the complainant fails to demonstrate, as is the case, there was an abuse of process or an improper purpose attending the making of the request for the developmental assignment, then it makes it difficult to accept that the selection of Mr P., the second phase, was tainted by an abuse of process or an improper purpose. It is inherently extremely unlikely that a *bona fide* request for a developmental assignment subsequently transmogrified into a ruse favouring Mr P. by his selection.

16. As to the second phase, the selection of Mr P., the complainant argues that it is not credible that the selection process would have only taken a few days between 18 and 23 September 2018. But the documentation shows that it did and in circumstances where the target start date was 23 September 2018. A related argument appears to be that it was not credible that it was in WHO's interest that the assignee be paid 50 per cent of the Daily Subsistence Allowance rate of the duty station, namely Geneva, but this argument is unsustainable. That is what paragraph 33 of the Policy says in relation to the first month of the assignment. Moreover, the contention that selecting Mr P. for the assignment and his subsequent appointment to a position in Geneva was to enable him to live with his close family is mainly misconceived. As Mr P.'s statement reveals, he was separated from his wife who worked in Geneva. Again, perhaps even more importantly, there is no evidence that might go some way towards establishing, directly or inferentially, that those involved in selecting Mr P. were acting in bad faith and contriving a situation intended to favour Mr P., or establishing their *mala fide* motives.

17. As to the third phase, there are several threads to the complainant's pleas. Even though the incumbent was to leave on 30 September 2018, Mr P. did not take up the temporary developmental assignment until late October 2018. Thus, the post remained vacant which, according to the complainant, evidences the absence of any need to fill it (at least by a developmental assignment). The developmental assignment should have been designed to benefit the Western Pacific Regional Office (WPRO), upon Mr P.'s return there, after his completion of the developmental assignment, yet Mr P. never returned to WPRO. The assignment was initially for four months. On 19 February 2019, a request was made to extend the assignment by a month, which was approved on 22 February 2019. Yet that extension very shortly thereafter became redundant, as Mr P. was appointed to a position in the Office of the Director-General effective 1 March 2019. But these and other factors pointed to by the complainant do not, *ex post facto*, demonstrate that the original request for a developmental assignment and the selection of Mr P. (and her non-selection) involved an abuse of power and an improper motive. They were all responses to, or consequences of, events as they unfolded.

18. There is a general argument permeating the complainant's pleas that Mr P. was too qualified for the developmental assignment and would not learn anything, contrary to the purpose of the Policy. This is reading the Policy far too narrowly (having regard to the benefits to the staff member identified in the Policy quoted above) and, in any event, there were doubtless things he would learn. The pleas under the first, fourth and fifth headings are unfounded and should be rejected.

19. The pleas under the second heading are that the developmental assignment violated the applicable WHO rules. The arguments are advanced on the premise that the Policy constituted normative rules that needed to be adhered to, and the "violation" of those rules leads to the conclusion that there has been a failure by WHO to abide by its own rules, referring to Judgments 4069, 3868, 3652 and 1973. But the Policy is, in substance, drafted in very general terms and to the extent that it constrained the conduct of WHO, it has to be treated

as conferring great flexibility on the Organization in its implementation. The pleas under this second heading are unfounded and should be rejected.

20. The pleas under the third heading are that the selection decision of Mr P. violated the principle of equal treatment. This plea is misconceived. Having referred to Judgment 2313, the complainant argues that she and Mr P. have been treated alike for the purposes of assessment for the developmental assignment, although their situations and their interests were different. The Policy does not require such a stringent approach to the selection of a person to take up a developmental assignment, unlike the selection for appointment to a post in a competition. It is manifestly intended to operate far more flexibly. This plea is unfounded and should be rejected.

21. The complainant has failed to establish her non-selection for the developmental assignment was flawed in the ways she contends. Accordingly, her complaint should be dismissed.

22. It should be noted that after the written proceedings were closed, the Tribunal asked WHO, in a communication of 20 February 2023, to provide further details about the three phases referred to above, as they arose in this case. WHO responded by providing additional submissions on 27 February 2023. The complainant submitted her final comments to WHO's additional submissions in a memorandum of 23 March 2023. The complainant was critical of WHO's additional submissions arguing that they were, in substance, not responsive to the Tribunal's request. There is force in this contention. However, ultimately, the position remains that the complainant bears the burden of proving her case and, for the reasons already given, she has failed to do so.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 22 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ