

R. C. e S.

v.

WHO

136th Session

Judgment No. 4687

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. R. C. e S. against the World Health Organization (WHO) on 31 October 2019, corrected on 5 December, WHO's reply of 13 March 2020, the complainant's rejoinder of 29 September 2020 and WHO's surrejoinder of 7 January 2021;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to terminate her appointment after she refused two reassignments.

The complainant joined WHO in 1998. After having served in various positions between 2002 and 2014, in September 2015 she was appointed as Director, Communicable Diseases Cluster in the WHO Regional Office in Brazzaville, Republic of the Congo, at the D.1 grade level, a position that she held until her separation from service.

On 5 September 2016, the complainant requested the Regional Director to be considered for a reassignment within the Organization, due to "personal reasons".

On 8 November 2017, the Regional Director wrote to the complainant, following-up on her request for reassignment. The Regional Director explained that at the time of the complainant's request a restructuring of the Communicable Diseases Cluster was ongoing and that her reassignment would have been detrimental to the cluster's activities. However, since the restructuring was now complete, the Regional Director had decided, following a discussion with the Director-General, to reassign the complainant to Tanzania as WHO Representative, "for which [her] skills, experience and profile [were] well suited". On 13 December 2017, the complainant replied that she was "unable to take up" the position of WHO Representative in Tanzania.

On 15 December 2017, the Regional Director wrote to the complainant that her decision to reassign her to Tanzania had been made pursuant to Staff Rule 565 "with the understanding that [the complainant] was seeking a reassignment opportunity" and that "it [was then] in the interest of the organization to fill this critical position with a seasoned professional with the relevant experience and capacity". She stated that the position was "well suited to [the complainant's] professional profile and experience and [was] at the same grade as [her] current position". On 28 December 2017, the complainant reiterated that she was "unable" to move to Tanzania, "for family reasons". She confirmed that she was still looking for a reassignment opportunity and requested the Regional Director and the Director-General to consider an alternative reassignment option to Senegal.

On 12 January 2018, the Regional Director, taking note of the complainant's confirmed interest in reassignment opportunities, informed her that, after having considered other possible reassignments within the region where her experience and skills would best serve the Organization, it had been decided, following consultation with the Director-General, to reassign her to Cameroon as WHO Representative. On 1 February 2018, the complainant reiterated her request to be reassigned to Senegal, stating that being based in Senegal would allow her to benefit from better health care and family support. The Regional Director responded on 9 February 2018 that she had considered the complainant's request but that a reassignment to Cameroon would be

in the best interest of the Organization, in view of the complainant's skills and experience which "would be highly suitable in this country that is fast-tracking the reform of its health system as well as working within a multi-country, multi-partner platform to eradicate polio and respond to outbreaks under complex circumstances, among other priorities". She further observed that Cameroon "has adequate medical services as well as international flights" which would enable the complainant to "follow up with [her] doctors abroad". She concluded by stating that the complainant would soon receive official notification from the Human Resources Department of her reassignment to Cameroon, which should take place prior to 31 March 2018. On 13 February 2018, the complainant informed the Regional Director that she was "unable to accept the offer of reassignment to Cameroon".

On 16 March 2018, the Regional Director, noting that the complainant had declined two reasonable reassignments, notified the complainant of the decision, taken in consultation with the Director-General, to terminate her appointment with three months' notice, in line with Staff Rule 1072.1.

On 3 May 2018, the complainant filed a request for an administrative review of the decision to terminate her appointment.

On the same day, the complainant wrote to the Regional Director, informing her that she had applied for the position of WHO Representative to Senegal and requesting that the termination decision be withdrawn pending finalization of the selection process. On 8 May 2018, the Regional Director advised the complainant that her separation from the Organization was not "subject to [such selection] process" and thus the termination decision would not be withdrawn. She however stated that the position of WHO Representative to Cameroon was still open in case the complainant wished to consider the reassignment. On 16 June 2018, the complainant replied that she was "regrettably not able to take the offer to re-assign to Cameroon, further to [her] request of September 2016". The complainant separated from the Organization on the same day.

After her separation from service, she was notified that her application for the position of WHO Representative to Senegal had been unsuccessful.

On 28 June 2018, the complainant's request for an administrative review was rejected. On 26 September 2018, the complainant lodged an appeal with the WHO's Global Board of Appeal (GBA).

On 3 June 2019, the GBA issued its report to the Director-General, in which it recommended to dismiss the appeal. The GBA found no evidence of mistake of fact or law and concluded that the decision to separate the complainant was taken in accordance with WHO's Staff Regulations and Rules, that it was not arbitrary nor tainted by bad faith or personal prejudice and that it did not constitute retaliation. By memorandum of 2 August 2019, the Director-General endorsed the GBA's conclusions and dismissed the complainant's appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her material damages corresponding to two years of full salary, including post adjustment and pension benefits. She also claims moral damages in the amount of 10,000 United States dollars. Lastly, she claims costs.

WHO asks the Tribunal to reject the complaint as devoid of merit.

CONSIDERATIONS

1. The general circumstances leading to the decision on 16 March 2018 to terminate the complainant's employment with effect from 16 June 2018, and subsequent events, have already been sufficiently described in this judgment. But it is desirable to focus in a little more detail on the proposal that the complainant be reassigned to Cameroon made both before the decision to terminate her appointment was made and still advanced to the complainant after that decision, seemingly on the basis that the decision to terminate would be revoked if the complainant accepted reassignment to Cameroon. It is desirable because this decision to reassign was foundational to one of the pleas of the complainant which is decisive.

2. By an email dated 12 January 2018, the complainant was informed by the Regional Director that “it had been decided to reassign [her] as the WHO representative to Cameroun”. The email referred, in introductory comments, to an earlier proposal to reassign the complainant to Tanzania as the WHO representative which the complainant had by then rejected. At least implicit in this email was an abandonment by the Regional Director of the proposal of a Tanzanian reassignment. Necessarily, deciding to reassign the complainant to Cameroon cannot stand with an earlier decision to reassign her to Tanzania. The former superseded the latter. That a decision had been made to reassign the complainant to Cameroon was repeated in a memorandum from the Regional Director of 9 February 2018. On 13 February 2018, the complainant wrote declining the offer of reassignment to Cameroon. This last-mentioned exchange in February 2018 expressly underpinned the decision to terminate the complainant’s appointment communicated on 16 March 2018 though mention was also made of the earlier refusal to accept reassignment to Tanzania.

3. Of some importance is that on 27 December 2017, WHO published a vacancy announcement calling for expressions of interest by way of applications for a position at the duty station of Yaoundé, the capital of Cameroon, being the position to which the Regional Director decided to reassign the complainant several weeks later. The deadline for responding to the vacancy announcement was identified in the notice as 23 January 2018. There is no evidence that the competitive selection procedure was cancelled before 12 January 2018. Also, it should be noted that not unsurprisingly, the complainant did not apply for the position in response to this vacancy announcement. Thus, she did not become a candidate in the selection procedure.

4. The process triggered by the vacancy announcement was described by WHO in its surrejoinder:

“Whenever a particular position of WHO country representative/head of WHO country office is open for selection, all qualified candidates in the global roster will receive a vacancy notice for that specific position and can express their interest. Applications are first considered at the regional level by a selection committee established by the relevant Regional Office. This

selection committee proposes a short-list of candidates to the Regional Director, who will then propose the name of one candidate to the Director-General. The appointment will proceed when there is agreement between the Regional Director and the Director-General.”

5. The general principles in the Tribunal’s case law concerning decisions to reassign staff have most recently been discussed in consideration 2 of Judgment 4595:

“Consistent precedent has it that an executive head of an international organization has wide discretionary powers to manage the affairs of the organization pursuant to the policy directives and its rules, and that such decisions are consequently subject to only limited review. The Tribunal will ascertain whether a transfer decision is taken in accordance with the relevant rules on competence, form or procedure; whether it rests upon a mistake of fact or law, or whether it amounts to abuse of authority. The Tribunal will not rule on the appropriateness of the decision as it will not substitute the organization’s view with its own (see, for example, Judgment 4427, under 2). An international organization must carefully take into account the interests and dignity of staff members when effecting a transfer to which the staff member concerned is opposed (see, for example, Judgment 4427, under 11). It is incumbent upon an international organization to prove that a procedure which it has put in place has been duly followed, particularly if the implementation thereof is disputed (see, for example, Judgment 3601, under 20). [...]

The Tribunal has also stated that every international organization is bound by a duty of care to treat its staff members with dignity and avoid causing them undue and unnecessary injury (see, for example, Judgment 4253, under 3). While the head of an international organization must take into account the organization’s interests as well as the staff member’s abilities and interests in the exercise of the discretion to transfer a staff member, in cases where the two are at odds, greater weight may be accorded by the decision-maker to the interests of the organization (see Judgment 2635, under 6).”

6. In one argument advanced in her pleas, the complainant focuses on the Tribunal’s case law concerning the obligations of an organisation during a competitive selection procedure and its duties to participants in that competition, noting the observations of the Tribunal in Judgment 4153, consideration 2, that “an organisation must be careful to abide by the rules on selection and, when the process proves to be flawed, the Tribunal will quash any resulting appointment” (see also

Judgment 4524, consideration 8). She also refers, in her rejoinder, to Judgment 4293, consideration 9, and Judgment 2980, consideration 10. In that latter case, two candidates were added to a shortlist after the interviews and evaluation of candidates from the original shortlist, and this lead the Tribunal to observe: “[t]o add candidates to a shortlist after the evaluation process has begun does not comply with the mandatory fairness and transparency of the recruitment process, and could have a prejudicial effect on the outcome of the process as every evaluation is conditioned by the quantity and quality of candidates to be evaluated”.

7. WHO’s response is twofold. Firstly, it points to the fact that the complainant was not a candidate and accordingly considers that the case law concerning an organisation’s duties and obligations to candidates in a competition has no immediate relevance. Secondly, it notes, correctly, that WHO normative legal documents clearly empower the Organization to appoint a person in the position of the complainant to a post by way of reassignment. WHO, again correctly, states that they are distinct processes. On the question of whether a position should be filled via a competitive selection procedure or reassignment of a staff member, Article 4.3 of the Staff Regulations provides that “[s]o far as is practicable, selection shall be made on a competitive basis; however, the foregoing shall not apply to the filling of a position by transfer or reassignment of a staff member without promotion in the interest of the Organization”. Staff Rule 565.3 provides that “[s]o far as practicable [...] vacancies in posts in the professional category [...] shall be filled by the reassignment of staff members”. Staff Rule 1072.1 should also be noted. It provides that: “[i]f a staff member refuses, or fails to take up, a reasonable reassignment, the staff member’s appointment shall be terminated with three months’ notice”.

8. There is plainly an unequivocal bias in the provisions just cited favouring reassignment, rather than competition, to fill a position such as the contentious vacant position in Cameroon. One legal issue presented for consideration by the pleas is whether the power to reassign an official to such a position is in any way conditioned or qualified in circumstances where a competition is on foot to fill the

position. While it is not explicitly put this way by the complainant, it is the import of one of her pleas. There are a number of cases where the Tribunal has considered the direct appointment of a person to a position in circumstances where it denied the complainant “a right to compete” (see generally Judgments 4069, 3742, 3288 and 2959). By parity of reasoning, and notwithstanding the unequivocal bias just referred to, the decision to appoint the complainant, by way of reassignment, to the position in Cameroon deprived those who had entered the competition following the 27 December 2017 vacancy announcement of their right to compete and for each to have their candidature assessed on its merits. Deprivation of that right would involve a breach of WHO’s duty to act in good faith (see Judgments 4619, consideration 8, and 4618, consideration 8) to those who entered the competition. Consistent with the existence of this duty to act in good faith, the power to fill a position by reassignment, should not be interpreted as authorising reassignment to a position when a competition is on foot to fill the very same position. There is an implied limitation on the exercise of the power to reassign. Thus, the decision of 12 January 2018 to reassign the complainant to the position in Cameroon was not lawful. Accordingly, the decision of 16 March 2018 to terminate her employment because she had refused the reassignment, was tainted by the unlawfulness of the reassignment decision and the decision to terminate should be set aside.

9. It is unnecessary to address the other issues raised by the complainant’s pleas. However, the Tribunal notes the Global Board of Appeals (GBA)’s report of 3 June 2019. The GBA concluded that the reassignment procedures were followed (in relation to both Tanzania and Cameroon) and the decisions to reassign were taken with due consideration of the complainant’s skills and personal circumstances and the interests of the Organization. It concluded that the complainant had failed to establish that the reassignment and termination decisions were based on false pretences, amounted to an abuse of authority and bad faith and were retaliatory. Indeed, it stated: “[t]he facts before the Panel suggest there was considerable consultation surrounding the offers made to the [complainant]. As noted above, the reassignments offered were commensurate with the experience and skills of the

[complainant]. There is no evidence that the offers of reassignment and consequent termination decision were improperly motivated as alleged.” The Tribunal agrees with this analysis.

10. The complainant seeks, by way of relief, that the impugned decision be set aside (namely the decision of the Director-General of 2 August 2019 dismissing her internal appeal) and that she be paid material damages in an amount corresponding to two years of full salary including post adjustment and pension benefits, that she be paid moral damages in the sum of 10,000 United States dollars and 15,000 dollars for legal fees. She does not seek reinstatement. She provides no arguments supporting the claim for material damages and thus the rationale for being awarded two years of full salary. It is not in issue that the complainant requested, in September 2016, to be reassigned from her then post in the Republic of the Congo. Thus, from that point on, reassignment to another post was likely, putting aside the delay occasioned by the restructuring of the Communicable Diseases Cluster. She failed in her attempt in 2018, through a competitive process, to secure appointment to her preferred post in Senegal. It cannot be assumed, as appears to be assumed by the complainant, that she would have remained in employment with WHO for a further two years after the date of her termination and would not have faced, much sooner, a lawful decision to reassign her to a post she was not willing to accept, exposing her to dismissal under Staff Rule 1072.1. The Tribunal cannot say with certainty what would have happened had her employment not been terminated in the way it was. But reassignment was certainly possible and, on the facts, reassignment may still have been resisted by the complainant. There is no firm evidentiary foundation (even putting aside the lack of argument) which would warrant the award of material damages in the sum claimed. However, it must be accepted that the complainant did lose the opportunity to remain in employment with WHO by virtue of her unlawful termination. For this she is entitled to a lump sum equivalent to the amount of nine times her last monthly salary, as indicated in her last payslip, without any statutory deductions. No basis is established for moral damages. She has been successful in

these proceedings and is entitled to costs assessed in the sum of 8,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision of 2 August 2019 is set aside as is the termination decision of 16 March 2018.
2. The complainant be paid an amount equivalent to nine months salary at the rate prevailing on 16 June 2018.
3. The complainant be paid 8,000 United States dollars costs.
4. All other claims are 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