

NINETY-SECOND SESSION

In re Fiala

Judgment No. 2093

The Administrative Tribunal,

Considering the complaint filed by Mr Paul Fiala against the World Health Organization (WHO) on 9 November 2000 and corrected on 8 December 2000, the WHO's reply of 14 March 2001, the complainant's rejoinder of 18 April, the Organization's surrejoinder of 20 July, the complainant's further submissions of 6 August and the WHO's observations thereon of 14 August 2001;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant was born in 1945 and holds French and British nationality. He entered the service of the WHO in 1981 as a messenger at grade G.2. As from 1982, he was a clerk at the same grade. After being transferred to the Division of Conference and General Services and promoted to grade G.3, he was reassigned to a post as clerk in the Records Management Section (hereinafter the "Registry") in the above Division. He was then promoted to grade G.4.

The material facts are largely the same as those set out in Judgment 2076 (*in re* Trambelland), delivered on 12 July 2001. As indicated in that judgment, as from January 1996 the work of the Registry was reorganised. A computerised system of records management was introduced and the nature of the complainant's duties changed. A generic post description for several posts in the Registry was only finalised in 1999. In October 1999, the complainant's post of clerk was reclassified to grade G.5 and he was promoted to that grade with effect from 1 October 1999.

On 9 December 1999 the complainant appealed to the Headquarters Board of Appeal against the effective date of the reclassification of his post and hence of his promotion. He argued that he had been discharging the same duties since 1 September 1996 and that his promotion should therefore have been effective from that date.

In its report of 15 May 2000 the Board considered that the earliest date at which the Administration could have drawn up a new post description was January 1997 and, consequently, an outcome from the reclassification process could have been expected by September 1997. It recommended paying him a sum equivalent to the difference between his actual earnings for the period from 1 September 1997 to 30 September 1999 and the amount he would have received had he been promoted to grade G.5 on 1 September 1997, and placing him forthwith on the salary step he would have reached had he been promoted with effect from that date. In a letter of 15 August 2000, which is the impugned decision, the Director-General accepted the Board's recommendation regarding the compensation to be paid to the complainant, but did not concur with the recommendation regarding his step. The complainant was paid compensation in the sum of 14,230 Swiss francs.

B. The complainant contends that the principle of equal pay for work of equal value, as set out in WHO Manual paragraph II.1.30.1, was breached. He also claims that the WHO failed to comply with paragraph 30.2, under the terms of which "posts of approximately equal difficulty and responsibility should be placed in the same grade". He says that from 1 September 1996 up to 1999 he performed duties that were identical to those of certain colleagues in his section whose posts were classified at grade G.5 or G.6 over the same period. Moreover, he alleges

discrimination on the grounds that two of his colleagues performing the same duties as him on a half-time basis became full-time staff members at grade G.5 without any vacancy notice being published.

The complainant also asserts that the WHO failed to comply with Manual paragraph II.1.210, which provides that if a staff member is assigned new duties not included in the post description, for a period exceeding ninety days, a "new post description should be established and a classification review undertaken ... to determine the grade of the post". In practice, he was assigned new duties as from 1 September 1996 and did not receive a post description until October 1999. What is more, it did not have retroactive effect. There was also excessive delay by the Organization in preparing this document, despite the complainant's repeated requests.

He adds that, in breach of Staff Rule 530.2, no annual performance evaluation report was made for him for over three years. It was only in June 1999 that such a report was drawn up.

The complainant asks the Tribunal to quash the impugned decision. He also wants the reclassification of his post to take effect from 1 September 1996 and claims interest of 8 per cent a year on the amounts due from the Organization. Finally, he seeks compensation for moral injury, and costs.

C. In its reply the WHO states that, since the filing of the complaint, it has decided on an exceptional basis to grant the complainant promotion with retroactive effect as from 1 September 1997. Any claim in this respect therefore no longer shows any cause of action.

Citing the Tribunal's case law, the Organization points out that the sole criteria that are decisive in grading posts are "the duties and responsibilities of the post". It adds that the complainant's allegations concerning the delay in issuing his performance appraisal reports are devoid of merit. The delay in preparing the post description was the result of a series of circumstances, and did not in any way amount to discrimination against the complainant. Furthermore, if the latter intended to challenge the appointment of certain colleagues, he should have taken action within the time limits, but failed to do so.

In the view of the WHO, the complainant's claim that the reclassification of his post should have taken effect as from 1 September 1996 has no basis in law or fact. Indeed, the selection of this date is in breach of Staff Rule 380.3.1. According to that Rule the date on which the complainant was entitled to an increase in salary was "the first of the month nearest the date of final approval". As the reclassification decision was taken on 23 September 1999, the promotion should have been effective from 1 October 1999. The Administration has therefore already made an exception to the rule by granting him promotion retroactively from 1 September 1997. The choice of 1 September 1996 also goes against Manual paragraph II.1.210, which gives no indication of the date on which a reclassification should come into effect. Moreover, the complainant's new duties had not yet been determined on that date and his post description could not be drawn up in isolation.

According to the WHO, the complainant suffered no moral injury and his allegations of discrimination are unfounded. It also refuses to pay him interest since it has already made an exception to the rule by deciding to grant his promotion with effect from 1 September 1997, which was the most favourable decision in the circumstances.

D. In his rejoinder the complainant presses his allegations of discrimination. He contends that the refusal to pay him interest runs counter to the decision to grant him promotion with retroactive effect. He presses his request for the promotion to take effect as from 1 September 1996. He adds that he drew up a draft post description himself which, plus or minus a few details, was subsequently adopted.

E. In its surrejoinder dated 20 July 2001 the Organization refers to Judgment 2076, delivered a few days earlier. It asserts that while in that judgment the Tribunal regarded the delay in reclassifying the post as inordinate, it did say that in view of the structural changes and the resulting difficulties the Organization was right to have waited for the situation to settle down before drawing up new job descriptions. The Tribunal deemed that "the Administration should have been in a position to prepare a new job description as from January 1997 and to take the necessary decisions by September 1997 at the latest". The complainant's case being identical to that of Mr Trambelland on the merits, the WHO argues that the claim that the post reclassification should have taken effect from a date prior to 1 September 1997 must fail.

In the view of the Organization, the delay in reclassifying the complainant's post has already been taken into

account in the measures it has taken. It emphasises that in the above judgment the Tribunal dismissed the pleas that Manual paragraphs II.1.30 and II.1.210 had been breached, as well as the allegation of discrimination.

In the light of Judgment 2076, the Organization decided, on an exceptional basis, to pay interest on the amounts paid pursuant to the Director-General's decision of 15 August 2000, as modified by the decision to grant the complainant his promotion with retroactive effect from 1 September 1997. So, it will grant this interest at the rate of 8 per cent a year on the salary paid on each monthly due date until payment has been settled. The complainant's claim in this respect has therefore been met.

F. In his further submissions the complainant argues that the WHO's proposed settlement does not provide a basis for withdrawing his complaint, as it has not offered to pay costs. He contends that his case is not identical to that of Mr Trambelland and says that he has succeeded in proving that he was discriminated against. He repeats that he drew up his post description himself in April 1998. In these circumstances, he argues that the Tribunal cannot therefore find, as it did in Judgment 2076, that the Organization was right to wait for the situation to settle down as a justification for the delay in drawing up the post description.

G. In its observations the Organization explains that it agreed in good faith to pay the complainant interest and that it is for the Tribunal to judge any remaining issues. It adds that, even if it had requested the complainant to draw up a post description in 1996, it would have been necessary to wait for the situation to settle down before finalising it and re-examining the job classification. Judgment 2076 is therefore still pertinent on this point.

CONSIDERATIONS

1. The complainant, who has been employed by the WHO since 1981, first worked as a messenger and later as a clerk. He was then assigned to the Records Management Section (the "Registry") in the Division of Conference and General Services, in which far-reaching structural changes were made, including computerisation as from 1 January 1996. The complainant's duties at grade G.4 were modified and he repeatedly requested a new job description and the upgrading of his job to G.5. But it was not until October 1999 that he received a copy of a memorandum announcing the reclassification of his post to grade G.5 as from 1 October 1999. On 9 December 1999 he appealed to the Headquarters Board of Appeal against the effective date of his promotion.

2. In its report of 15 May 2000, the Board noted the slowness of the reclassification procedure, particularly between January 1997 and July 1998. It concluded that a new post description should have been prepared and submitted for reclassification as from January 1997, and that September 1997 would have been a reasonable deadline for a decision to be taken. It added that the complainant had done "all that could reasonably be expected of him to comply with the WHO's rules on annual performance reports and the description and regrading of his post" and that, in view of serious breaches of the rules, for which the Organization alone was to blame, he was entitled to compensation in an amount equal to the difference between his earnings for the period from 1 September 1997 to 30 September 1999 and the amount that he would have received had he been promoted to G.5 as from 1 September 1997. The Headquarters Board of Appeal also recommended that the complainant should be granted forthwith the within-grade step that he would have attained had he been promoted to G.5 on 1 September 1997, and that he should be reimbursed his lawyer's fees up to an amount of 2,500 Swiss francs upon submission of the bills.

3. By a decision of 15 August 2000, "in the light of all the evidence and particularly the delay in processing the request for post reclassification", the Director-General endorsed the Board's recommendation to pay the complainant compensation and reimburse his legal fees. However, she refused to grant him the within-grade step he would have reached had he been upgraded as from 1 September 1997; or in other words she did not agree to the rebuilding of his career with retroactive effect.

4. Dissatisfied with that decision, the complainant has come to the Tribunal pleading inadequate redress. In his submission he is entitled to promotion with retroactive effect, and not simply compensation equal to the difference between the amount he ought to have been paid at grade G.5 and what he was actually paid up to 30 September 1999. Furthermore, he says that the promotion should have taken effect as from 1 September 1996. He seeks compensation for the moral prejudice suffered, interest on the amounts due from the Organization and costs.

5. Since the filing of the complaint, the Director-General has decided to make 1 September 1997 the effective date

for the reclassification of his post, thereby granting him promotion to grade G.5 as from that date.

6. That decision means that the complainant's main claims are partly without purpose. However, they still show cause of action insofar as the complainant has only been granted promotion as from 1 September 1997, whereas he contends that his reclassification should have taken effect as from 1 September 1996 as should his promotion to grade G.5.

7. The Organization has also decided, as it indicates in its surrejoinder, to pay the complainant interest at the rate of 8 per cent a year on the amounts paid pursuant to the decision to grant his promotion with retroactive effect from 1 September 1997. His claims to the payment of interest are therefore devoid of purpose for the period after that date.

8. In support of his plea that the Organization is wrong to persist in denying him promotion as from 1 September 1996, the complainant seeks to show that the duties he actually performed from that date until 1999 were identical to those of some of his colleagues whose posts were graded G.5, or even G.6, and that he was entitled to have the same grade and pay as they did. In this respect, he alleges discrimination and refers to the principle of equality set out in Manual paragraphs II.1.30.1 and 30.2, as well as in Article 23(2) of the Universal Declaration of Human Rights. He also cites his performance appraisal reports of June 1996 and June 1999 which, he says, show that he discharged, to the satisfaction of his supervisors, duties similar to those of some of his colleagues at higher grades. He asserts that the delays in processing his application for reclassification were not attributable to him, as he had drawn up his own post description in April 1998, but to the Organization, which breached the provisions of the Manual respecting post classification, and particularly Manual paragraph II.1.210, which says:

"A staff member may be assigned new duties not included in the post description on a full-time basis for a temporary period not exceeding 90 days. If the period exceeds 90 days, a new post description should be established and a classification review undertaken ... to determine the grade of the post."

Lastly, the complainant argues that the Tribunal's case law requires that his reclassification should be fully retroactive and he recalls that no performance appraisal was made for him for three years, in violation of Staff Rule 530.2, which requires annual performance evaluation.

9. The Tribunal concurs with the view of the Headquarters Board of Appeal that there was an inordinate delay in processing the complainant's request for upgrading, but that the Organization was right, before drawing up new job descriptions, to wait for the situation to settle down following the structural changes and the resulting difficulties: the installation of a new computerised system, a changing situation and the evolving nature of staff duties. As *in re* Trambelland, which led to Judgment 2076, the Tribunal, in the light of all the material circumstances, sees no reason to question the Board's conclusion that the Administration should have been in a position to prepare a new job description as from January 1997 and to take the necessary decisions by September 1997 at the latest. The complainant was entitled to claim reclassification under Manual paragraph II.1.210, more than ninety days having elapsed since his duties changed on 1 September 1996. However, that rule on its own lays no obligation on the Administration to prepare a new post description immediately, as the WHO observes. It must, nonetheless, do so within a reasonable period. Although it did not, the measures it eventually took on the basis of the Board's recommendation afforded the complainant redress for the injustice done.

The case law cited by the complainant cannot have for effect a reclassification coming into force before the date on which the job description could have been completed. It is immaterial in this respect that the complainant himself prepared his own job description and submitted it to his supervisor in April 1998. As in the case of Mr Trambelland, the Administration was lawfully able to set 1 September 1997 as the date on which the complainant's retroactive promotion became effective. Nor does the complainant produce proof, in view of the latest decision in his favour, that he suffered discrimination in relation to his colleagues, who were in different situations of law and fact from his own.

10. The claim for compensation for moral injury arising out of the alleged discrimination against the complainant cannot succeed. But he is right to complain that no evaluation of his performance was carried out for three years and that he received no reply to his repeated requests, and to claim "compensation, however symbolic" under this head. On this point the Organization did not comply with Staff Regulation 530.2, which states that "evaluation shall be made at such intervals as the work situation or the individual's performance requires but in no case less frequently than once a year". The WHO shall therefore pay the complainant compensation of 500 Swiss francs.

11. The complainant is entitled to costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim to the quashing of the Director-General's decision insofar as it did not grant him promotion with retroactive effect or payment of interest on the amounts due as from 1 September 1997.
2. The WHO shall pay the complainant 500 Swiss francs in compensation.
3. It shall pay him 5,000 francs in costs.
4. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet