NINETY-THIRD SESSION

Judgment No. 2142

The Administrative Tribunal,

Considering the complaints filed by Ms P. B., Mrs A. P. and Mrs V. R. against the World Health Organization (WHO) on 23 March 2001 and corrected on 9 July, the WHO's reply of 17 October 2001, the complainants' rejoinder of 21 January 2002, and the Organization's surrejoinder of 10 April 2002;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. At the material time the complainants were all holders of career service appointments and worked in one of the Management Support Units (MSU) at WHO headquarters. Two of the complainants have now taken early retirement.

On 8 September 1999 Cluster Note 99/31 was issued by the Office of the Executive Director of General Management announcing the Director-General's decision to implement a mutually agreed separation (hereinafter MAS) exercise in accordance with Staff Rule 1015. It explained the objectives, general guidelines and the process for the exercise; interested staff were invited to submit "expressions of interest" by 27 September. It also stated that:

"Although staff members are invited to express their interest, there is no right to receive an agreed separation and the Organization may refuse applications. Expressions of interest will be evaluated and decisions taken in the best interest of WHO in light of the Objectives stated [in this Cluster Note]. A staff member's decision to volunteer or not to volunteer will have no future repercussions on staff members remaining with the Organization."

The complainants submitted their expressions of interest.

On 19 October Cluster Note 99/41 was issued informing staff of the progress made thus far in the exercise and of additional factors that would come under consideration, and providing staff with a revised time-line for the remainder of the exercise. It was indicated that formal notifications and the conclusion of agreements would take place in the first half of December. It also set out the criteria to be considered for each application.

The Director-General announced on 9 December to all staff that she had agreed to 224 separations and had refused 71 on the grounds that it would not be in the interest of the Organization to let them go. On 13 December 1999 each complainant was informed by the Director of the Human Resources Services Department (HRS) of the Director-General's decision to defer consideration of their applications "pending the outcome of reviews on the structure and resourcing of MSUs" and that their applications would be reviewed again between February and May 2000.

On 17 April 2000 the Director of HRS sent each complainant a letter stating that the Director-General had decided that it was "in the interests of the Organization" to retain their services and thus did not agree to their separation from WHO at that time. The complainants appealed against this decision to the Headquarters Board of Appeal on 15 June. In its report dated 20 December 2000, the Board found that there had been no breach of the Organization's rules, nor did it consider the decisions taken regarding the mutually agreed separation exercise to be arbitrary or prejudiced. Based on these findings, it recommended rejecting the appeal.

On 16 February 2001 the Director-General informed the complainants that their appeal had been rejected. That is the impugned decision.

B. The complainants contend that the WHO failed to implement the MAS exercise in an objective manner. Additionally, they submit that there was an inordinate delay by the Administration in responding to their requests for mutual separation.

By not according the complainants a voluntary separation the Administration abused its discretion and authority. Furthermore, the WHO's evaluation of their applications was arbitrary and capricious. As an example they mention the grant of the MAS exercise to staff employed by the Pan American Health Organization (PAHO) without using that Organization's funds. Even if the WHO was under no obligation to grant a mutually agreed separation to all those who applied, such discretionary decisions should have been taken in an objective, even-handed, and transparent manner. They cite the Tribunal's case law to support their arguments.

The complainants were informed that their separation would not be "in the interests of the Organization", but the WHO has been unable to satisfactorily define what this phrase means. They contend that such a criterion is vague and over-broad. In addition, the Organization has not given them valid reasons for why it granted some staff members separations and not others. They also submit that there was breach of equal treatment because no reasonable differences have been objectively demonstrated to exist between those accorded a mutual separation and those that were denied one. According to them, the unequal treatment was "confirmed and clearly corroborated" by the Board of Appeal.

Lastly, they assert that the Administration's "unjustified and invalid" denial of their request caused them moral injury. They contend that they satisfied the conditions for a mutually agreed separation. Therefore, they expected to be granted one and began making plans for the future. To be refused a separation, without a valid reason and in violation of the principles of international civil service law, has caused each complainant psychological and emotional harm.

The complainants ask the Tribunal to order the production of several documents. They request that they be granted a mutually agreed separation pursuant to Cluster Note 99/31 and that they be paid the salary, benefits and other emoluments that they would have been entitled to if they had been granted separation on 1 January 2000, plus 10 per cent interest per annum from that date. They claim moral damages in the amount of 30,000 United States dollars per complainant, plus costs. They also claim any other relief that the Tribunal deems necessary, just and proper.

C. The WHO replies that the decisions not to grant the complainants a mutually agreed separation was neither arbitrary nor in breach of the principle of equal treatment.

It explains in detail the global MAS exercise. It was clearly stated in Cluster Note 99/31 that there was no right to receive a mutually agreed separation and that the Organization could refuse applications. Decisions on applications were taken in the best interest of the WHO and in accordance with the objectives set out for the exercise. The MAS Steering Committee, having consulted the Executive Director of each respective cluster and other relevant officials made recommendations to the Director-General regarding expressions of interest from staff. Recommendations took into account the criteria set out for the exercise. The Director-General carefully reviewed the recommendations before taking her decisions, which included her decision to defer final decisions on staff working in MSUs. After further review and consultation, she decided to offer a mutually agreed separation to only two of eleven MSU staff, and each individual was personally informed of the Director-General's decision on 17 April 2000. In the case of the complainants she decided, upon the recommendation of the Steering Committee, that a mutually agreed separation would not be in the interests of the WHO.

The Board of Appeal had found no flaws in the individual decisions contested, nor had any of the Organization's rules been breached; based on these findings the Director-General rejected the appeal. The WHO points out that the decisions at issue are discretionary, and are therefore subject to only limited review by the Tribunal. It contends that in the complainants' case the decisions were taken in proper exercise of discretionary authority and were not flawed; the complainants have offered no proof to the contrary.

The WHO argues that the case law cited by the complainants is not relevant here, as it differs in all critical aspects from the case at hand. It also distinguishes the complainants situation from that of other staff members, arguing that it differed in fact and in law; it rejects the argument concerning the PAHO staff as irrelevant. It contends that the entire process was designed to "ensure consistency" and there was no breach of equal treatment. It maintains that it

did not discriminate between individuals or groups.

The Organization denies that the complainants have suffered any moral injury. They were fully informed from the outset that the WHO could refuse applications for a mutually agreed separation, thus it would have been "unreasonable" for them to make plans before any decision was taken. Additionally, it states that the complainants' claim for moral damages is irreceivable: as they had only claimed moral damages of one dollar in their appeal they cannot now expand upon their claims. Regarding the complainants' request for the production of documents, it notes that these documents are confidential but would make them available to the Tribunal if the latter so requested.

D. In their rejoinder the complainants press their pleas and their claims. They submit that they have "clearly and succinctly demonstrated the Administration's arbitrary and deliberate breach of the principle of equal treatment". Furthermore, the Organization has still not provided "substantive reasons" for why it refused to grant them a mutually agreed separation. It has only provided vague references to "the interests of the Organization". The case law states that a discretionary decision must be taken objectively, and in this case such objectivity has been lacking. They also submit that the decisions were taken in a haphazard manner.

The complainants maintain that the criteria defined by Cluster Note 99/41 do not provide the requisite details for a proper decision. The criteria are unclear and confusing, have been inconsistently applied, do not support the objective of the MAS exercise, and do not define "in the best interest of the WHO". They allege that numerous candidates who did not fulfil the criteria set out for the exercise were nonetheless granted separations.

They contest the Organization's assertion that they have modified their claims from those submitted in the internal appeal. They had already made a claim for moral damages in their appeal; it is only the amount that changed in the claim for relief before the Tribunal.

E. In its surrejoinder the Organization refutes the complainants' allegations and observes that they have failed to prove them. Not only did Cluster Note 99/41 set out criteria relating to the retention or abolition of post that needed to be satisfied in order to grant a separation, but it also stated that a separation would not be allowed if it was in the WHO's interest "to retain that staff member's particular skills and experience"; the complainants' skills and experience were such that it was deemed important to the Organization to retain their services. The decisions were neither arbitrary nor capricious; they were taken in the proper exercise of discretionary authority in the light of the stated objectives and criteria for the MAS exercise.

The Organization recalls the Tribunal's case law that one official may not rely on the unjust enrichment of another, as equality in law does not embrace equality in the breach of it. In any event, the complainants' situations are distinguishable from the staff members they mention as having been granted separations even though they did not satisfy the criteria set out for the exercise.

As for the alleged failure to give reasons, the WHO says that these were set out in the letter informing the complainants of the refusal. If they had any doubts, they could have requested a "formal explanation" at that time. Nevertheless, the Administration's submissions to the Board of Appeal provided them with supplementary information on the reasons for the refusal.

CONSIDERATIONS

1. At the material time, all three complainants had been staff members of the WHO for nearly thirty years and worked in one of the MSUs. The creation of MSUs at the WHO's headquarters was part of a restructuring initiative that took place in 1998.

2. In 1999, the Director-General decided to implement a MAS exercise pursuant to Staff Rule 1015, which states:

"SEPARATION BY MUTUAL AGREEMENT

The Director-General may terminate the appointment of a staff member who holds an appointment for one year or more if such action would be in the interest of the Organization and in accordance with the standards outlined in the Staff Regulations, provided that the action is not contested by the staff member concerned."

3. The MAS exercise was announced to all staff members by Cluster Note 99/31, dated 8 September 1999. The following extracts of that Note are relevant for the purposes of this case:

"OBJECTIVES

In order to respond to the request of the World Health Assembly, the Director-General is seeking budgetary efficiencies for the next biennium in the order of 50 million US dollars. To help achieve this, the Director-General has decided to implement a Voluntary Separation by Mutual Agreement exercise pursuant to Staff Rule 1015. The exercise will also seek to achieve a better match of staff and their skills and abilities to new organizational structures and programme goals, and to facilitate improved organizational design (reduction of teams and units, combinations of programmes, etc.). It may also permit greater mobility for those staff members who remain. The exercise applies to all staff in the Organization (HQ and the regions). ...

Although staff members are invited to express their interest, there is no right to receive an agreed separation and the Organization may refuse applications. Expressions of interest will be evaluated and decisions taken in the best interest of WHO in light of the Objectives stated above. A staff member's decision to volunteer or not to volunteer will have no future repercussions on staff members remaining with the Organization.

GENERAL GUIDELINES

...

6. Any staff member who accepts the MAS cannot seek employment with the Organization for a period of three years; any use of such staff shall be at the Director General's discretion.

7. This exercise does not establish a precedent for the future.

PROCESS

...

... The deadline for initial expressions of interest from staff in regions, field and HQ is 27 September 1999.

Expressions of interest together with the recommendations of all the Support Teams will be forwarded to a Steering Committee at HQ consisting of Director HRS, an MSU Manager, the Coordinator of the HQ Support Team, a Director of Administration and Finance from a region, and a staff representative, which will review the recommendations, taking into account the interest of the Organization, consistency, and equity across the Organization."

Staff members were asked to make a firm commitment by 15 October 1999 and final agreement could be anticipated by 15 November 1999. The Cluster Note also included various attachments all of which were designed to provide further and better information to staff.

4. The implementation of the MAS exercise gave rise to another announcement: Cluster Note 99/41, dated 19 October 1999, which indicated that the exercise was proceeding smoothly but that more time was needed. The timetable was, therefore, extended and final agreements were accordingly expected to be signed before 15 December 1999. Most importantly, however, the following information was attached to that Cluster Note:

"CRITERIA FOR CONSIDERING APPLICATIONS FOR MUTUAL SEPARATION

A. The overriding criterion is that the separation must be in the best interest of WHO. In applying that criterion the following will be taken into account:

1. The staff member's post would be proposed for abolition upon being vacated.

2. Through restructuring another post would be proposed for abolition upon being vacated.

3. If a staff member on an extra-budgetary post is allowed to leave it should be possible to reassign another staff member, without change in grade, from a regular budget post; the latter post would be proposed for abolition upon

being vacated.

4. Separation is in the overall interests of WHO whether or not savings will ensue.

B. A staff member would not be allowed to separate if it is in WHO's interest to retain that staff member's particular skills and experience."

MAS Support Teams were available to answer questions from staff members who were interested in the agreed separation exercise and they also prepared personalised information sheets with detailed pension calculations and other benefits.

5. Expressions of interest submitted by staff were then forwarded to the Executive Director of each respective cluster. The Executive Directors then expressed their views as to whether, based on the stated objectives of the exercise, it would be in the best interest of the Organization to offer an agreed separation to a particular staff member. In reaching their conclusions, Executive Directors consulted with other relevant officials.

6. The Executive Directors' recommendations were then passed to the MAS Support Teams and thereafter to the MAS Steering Committee for further consideration and recommendations. The Steering Committee's mandate, as set out in Cluster Note 99/31, was to "review the recommendations, taking into account the interest of the Organization, consistency, and equity across the Organization".

7. On 24 November 1999 the MAS Steering Committee submitted its recommendations to the Director-General. It categorised each application with reference to the criteria set out in Cluster Note 99/41 under A1, A2, A3, A4, and B. It also provided detailed information on the applications and the expected costs and savings in the event that the recommendations were accepted.

8. The Director-General then asked the Director of HRS further to review applications in the A4 category; that is, where separation was in the overall interest of the WHO whether or not savings would ensue. This included asking Executive Directors how the departure of these staff members would meet the objectives of the MAS exercise, including savings to the WHO and a better match of skills to new organisational structures and programme goals. The Director-General, therefore, received yet another set of recommendations.

9. By e-mail of 9 December 1999, the Director-General announced that she had accepted 224 separations and had refused 71 on the grounds that it would not be in the interest of the Organization to let those staff members go. However, she deferred her decision with respect to virtually all staff members in MSUs until the following year for further study and subsequent recommendations.

10. During this time, the Office of Internal Audit and Oversight was also conducting a review of the structure and staffing of the MSUs with a view to comparing the performance of this new system with that of the previous one. A report on the issue was to be submitted to the Executive Board at its January 2000 session. The complainants, therefore, had received a letter dated 13 December 1999 which stated that the Director-General had decided to defer the consideration of their applications pending the outcome of reviews on the structure and resources of MSUs. Their applications were expected to be reviewed again between February and May 2000.

11. On 22 March 2000 the MAS Steering Committee revisited the expressions of interest submitted by MSUs staff members with the appropriate Executive Directors, who were asked to reconsider their recommendations. The following day the MAS Steering Committee submitted its revised recommendations regarding these applications to the Director-General. Again, further recommendations were sought with respect to staff members who were in the A4 category. The Director-General eventually offered a mutually agreed separation to two of the eleven MSUs staff who had expressed an interest. The Director-General's final decision was communicated to each staff member in April 2000.

12. The three complainants had all expressed an interest in the MAS exercise from the outset and their applications were considered in the manner described above. Each of them received a letter dated 17 April 2000 from the Director of HRS, which said that: "after careful consideration, the Director-General has decided that it is in the interests of the Organization to retain your services and thus not to agree to your separation from WHO at this time".

13. They appealed against these decisions to the Headquarters Board of Appeal which, at their request, examined a

large number of documents relating to their own MAS applications and those of other staff members, particularly those in the MSUs.

14. The Board found that the Organization had adhered to the spirit of Staff Rule 1015 by assessing each expression of interest individually, and concluded as follows:

"The Board found no flaws in the individual decisions contested, and concluded that none of the Organization's rules had been violated. Furthermore, none of the decisions taken individually, could be qualified as arbitrary or prejudiced. Under Staff Rule 1015 comparisons between individual staff were invalid, ... and the general questions of equity raised by the Appellants were not relevant to the present context.

The Board concluded that the differences in treatment which they had noted, arose from the differing environments in the various clusters. The Board further concluded that the simultaneous implementation of Rule 1015 to a large number of staff, based on input from the [Executive Directors] in their various clusters, made differential treatment inevitable. However, this did not constitute grounds to overturn the decisions taken, because of the purely individual application of Staff Rule 1015."

It also said that real and serious attempts had been made by the officials concerned at every level to apply the established criteria in an even-handed way. The differences that arose were largely caused by the importance that was placed on the recommendations from the Executive Directors of individual clusters.

15. By a letter dated 16 February 2001, the Director-General noted the Board's findings that none of the Organization's rules had been violated and that the complainants' applications had been carefully considered. She upheld the Board's recommendation and rejected their appeal. That is the impugned decision.

16. While the complainants concede that they have no absolute right to a mutually agreed separation and that the Director-General's decision is entirely a matter of discretion, they nonetheless maintain that the decision is flawed because it was made arbitrarily, was tainted by personal prejudice, did not follow the prescribed procedure, and was discriminatory. They also maintain that no valid reasons were given and that they suffered an inordinate delay. They suggest that a number of staff members who were granted a mutually agreed separation should not have been entitled to benefit from the exercise. Beyond assertion, however, the complainants offer no evidence to support their arguments. They presented substantially the same points before the Board of Appeal, which examined a number of the specific instances that they had cited and yet found no flaws in the process. The complainants request that the Tribunal itself undertake a complete examination of all documents relative to the MAS selection process or, alternatively, that they themselves, or their representative, be allowed to examine the documents.

17. The Tribunal will not make an order of the type sought. The documents of the MAS exercise, to the extent that they apply to other staff members, are confidential and the complainants' representative enjoys no privileged position in this regard. Without some evidence to support the complainants' unfounded allegations - and it will be recalled that the Board of Appeal failed to find any - the Tribunal will not sanction, or itself undertake, a wholesale "fishing expedition" based on nothing more than the possibility that something may turn up.

18. To support their arguments the complainants cite Judgments 2004, 792 and 767. Those decisions are of no assistance to them. Judgment 2004 was a case of selection for a post which involves entirely different considerations from this one: in a selection for a post, the most worthy candidates are selected "in", i.e. to become members of staff, whereas in a mutually agreed separation exercise these are the very people who are most likely to be selected "out" i.e. not to be released, in accordance with the requirements of the service. The interest of the organisation, which is paramount in each case, requires that the best candidates be employed and promoted in the first instance, and that they be retained in the organisation's service in the second. There is simply no merit to the complainants' contention that "in the interests of the Organization" is too vague a standard to serve as a basis for selection in circumstances such as these. The stated objective of the MAS exercise was financial savings and it clearly required an individual assessment of each applicant in the light of his or her performance in the position then occupied, and of the importance and value to the Organization of that position. As the Board of Appeal correctly noted, this was bound to involve a certain degree of subjectivity but that was not fatal to the MAS exercise.

19. Furthermore, in Judgments 2004 and 767, the complainant had produced evidence that amply justified the Tribunal in ordering a further examination. Such evidence in each case went well beyond mere suspicion or

speculation, which is all that the present complainants have to offer.

In Judgments 767 and 792 the Organization had been applying the relevant rule (similar in scope and intent to Staff Rule 1015 above) over a number of years in an uneven and haphazard fashion and with no stated policy or criteria. That is in stark contrast to the detailed process and careful criteria laid down by the WHO and actually followed in this case. The Tribunal found in Judgment 792 that the over-liberal and longstanding practice of granting a "golden handshake" to employees whose claims were less meritorious than the complainant (and some of whom had already actually resigned) constituted a breach of fairness:

"8. In answer to the Tribunal's query about policy in 1981-85 the Director of the Personnel Department explains that fewer were paid off from the last quarter of 1984 on because the Organisation could afford to be 'more selective', having found 'some relief from the kind of financial pressure which had led it in earlier years to encourage even productive officials who wanted to leave to do so in order that others might be able to hold onto their jobs'. That, says the ILO, is why it put out the circular to remind the staff of the wording of 11.16 and point out that only the Director-General might take the initiative, and for the sake of efficiency. The circular - the argument runs - did not breed any new right but merely reported a practice brought in a few months earlier.

None of this helps the Organisation's case. As was said in Judgment 767, it may change its construction of a rule provided it does not offend against any provision of the Staff Regulations. But the change must be properly made known and may not be retroactive. The Organisation cites no official announcement of a change by February 1985, when the complainant was refused the indemnity. Her plea that the refusal was wrongful is a sound one."

20. The existence of detailed criteria in the present case is also a complete answer to the complainants' argument that there were no reasons given for the decision not to grant them a mutually agreed separation. In such circumstances, none of them could have been in any doubt as to why their applications had been refused.

21. Lastly, the complainants' submissions to the effect that they have somehow suffered from undue delay or from the fact that the MAS exercise included some of the PAHO staff members are simply irrelevant. Even assuming that the necessary facts were proven, there is no indication of how the complainants could have suffered damage as a result. Equally irrelevant is their claim that there was something unfair in the WHO's having offered short-term contracts to a few former employees who had benefited from the MAS exercise: the terms of Cluster Note 99/31, quoted above, make it abundantly clear that while such former employees could not seek re-employment with the WHO, the Organization was at liberty to re-employ them.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet