

The Administrative Tribunal,

Considering the complaint filed by Mrs R. B.-M. against the World Health Organization (WHO) on 5 February 2001 and corrected on 16 May, the WHO's reply of 14 August, the complainant's rejoinder of 16 November 2001, and the Organization's surrejoinder of 15 February 2002;

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

Having examined the written submissions, and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, an Italian citizen born in 1964, joined the WHO on 25 October 1992 as an Associate Professional Officer, at grade P.2, under an agreement between the Organization and the Government of Italy. Her initial contract, which was for two years, was subsequently extended for one more year. Following the end of that contract the complainant remained at the WHO under a series of short-term contracts, as a Scientist at grade P.3.

On 18 June 1999 the WHO issued Vacancy Notice No. 99/HTP/83, for the post of Technical Officer at grade P.3 in the Quality Assurance and Safety: Medicines (QSM) team, in the Department of Essential Drugs and Other Medicines (EDM) within the Health Technology and Pharmaceuticals Cluster. The complainant applied for the post on 8 July but was not placed on the short list. By a letter of 20 December 1999 she was informed by a personnel officer in the Cluster's Management Support Unit that she had not been selected for the post. On 20 February 2000 she notified the Headquarters Board of Appeal of her intention to appeal against that decision. In its report dated 20 October the Board recommended dismissing her appeal. The Director-General did so in a letter sent to the complainant on 9 November 2000. That is the impugned decision.

On 31 January 2001 the complainant was offered a two-year fixed-term appointment for a P.4 post of Technical Officer in QSM. She confirmed her acceptance of this offer on 29 March and took up the post on 2 April 2001.

B. The complainant argues that the WHO's failure to place her on the short list for the P.3 post amounts to an abuse of discretionary authority. It should have included her on the list as a matter of course. By not doing so it contravened the Organization's selection and recruitment policies and practices. It also failed to give her any reason for the omission. She submits that she was qualified for the post and that it is the practice and policy of the WHO to short-list all qualified candidates. However, due to "pre-selection bias", she was excluded from the short list. She contends that other, less qualified, candidates were short-listed and alleges that the criterion "working knowledge of German" was added to the vacancy notice in order to improve a German colleague's chances of being selected; the supervisor of the post is German and the complainant believes that the former had promised the post to a fellow national. That requirement, while preventing the complainant from being short-listed, was not a valid criterion: the selected candidate did not have a working knowledge of German. The Board of Appeal erred in finding that all candidates had received equal and fair consideration.

She also contests her classification as a short-term professional. She argues that such a classification represents a legal fiction and that it was inconsistent with her continuous employment with the WHO. Furthermore, the consequence of this has been to deprive her of procedural guarantees, rights and benefits accorded to fixed-term staff members. It also meant that, compared with fixed-term internal candidates, she was at a disadvantage in the selection process. Her status subjected her to "Administration-imposed unpaid contract breaks" which included two unpaid maternity leaves. Furthermore, the nature of the work she carried out makes it impossible to ascertain any difference between her functions and status and those of a fixed-term staff member.

The complainant makes several claims for relief. She requests that the selected candidate's appointment be quashed, that the selection process be held again and that she be placed on the short list for the post. She also seeks: reclassification as a fixed-term staff member "for 5 years in arrears" and payment of the monetary equivalent of all benefits and protection she would have received over that period; a five-year fixed-term contract from the date of delivery of the present judgment; a ruling that the WHO Administration be ordered to investigate the reasons why she was not short-listed and to take disciplinary action against the staff members concerned if it is found that her exclusion resulted from "misconduct or other improper behaviour" on their part; 100,000 United States dollars in moral damages; reimbursement of legal fees and costs in the amount of 15,000 dollars; and interest at 10 per cent per annum on all amounts awarded, calculated from 23 December 1999 until the judgment is executed. Lastly, she makes a general claim for an award of any other relief that the Tribunal finds to be equitable, fair and justified. She also asks for oral hearings and the production by the Administration of all pertinent documents.

C. In its reply, without disputing the complainant's right under the Staff Rules to appeal against her non-selection to the post in question, the WHO questions her interest in doing so since she now holds a fixed-term appointment at a higher grade. Nevertheless, the decision was taken under the proper exercise of discretionary authority. Furthermore, it submits that some of her claims are irreceivable because they were not made in her internal appeal.

The Organization submits that the complainant was not short-listed because she did not meet the essential requirements of the post and more specifically the required professional experience. It states that "working knowledge of German" was listed only as an "asset" for the post and has been in the post description since 1988 because it can be useful in the performance of the duties of the post. It was not a "requirement" for the post, nor was it added to the vacancy notice just to facilitate the chances of another candidate, as alleged by the complainant. Her allegation that she did not receive equal and fair consideration is unfounded: her application was the only one reviewed twice by the Selection Panel, and all members of the Panel unanimously agreed on the recommendation of the selected candidate. The Organization followed all applicable texts governing selection and there was no breach of the complainant's rights. Her argument that the process was flawed because she was not given valid reasons is without merit. She had indeed been informed of the reason why she was not selected.

On the issue of her short-term contracts, the WHO argues that the complainant freely accepted her short-term contracts. Her contention that they represent a "legal fiction" is neither supported by the Staff Rules, the terms of the contracts themselves, nor by the Tribunal's case law. The parties' intention with respect to the terms of the short-term contracts was clear and accurately expressed in the signed contracts. The stability of legal relationships requires that these terms be inviolate.

The Organization considers that the Tribunal has ample evidence before it and that oral hearings would be unnecessary.

It adds that the selected candidate was given the opportunity to comment on the complaint. She gives details of her qualifications for the post in question and offers to provide the Tribunal with a copy of her curriculum vitae.

D. In her rejoinder the complainant maintains that she still has an interest in having the impugned selection process quashed and a new selection process carried out. When she initiated the appeal procedure she had not been offered the post she presently holds and she would still welcome the opportunity to hold the post in question for "career development reasons"; grade level is only one variable in assessing the desirability of a post. Furthermore, as an elected member of the WHO Staff Association she has the right to pursue this matter to protect - for herself and the staff members she represents - the fundamental principles breached by the Organization.

She contests the WHO's assertion that she was given timely and complete reasons as to why she had not been selected. She rejects the comments provided by the selected candidate and states that the latter has a vested interest in supporting the Organization's selection. She asserts that on the strength of her qualifications she should have been placed on the short list. She presses her other pleas.

E. In its surrejoinder the Organization maintains that the complainant did not fulfil the minimum requirements for the post; it is for that reason that she was not short-listed. By contrast, the selected candidate did fulfil the requirements. It reiterates that there was no bias against the complainant and her lack of knowledge of the German language played no part in her non-selection for the short list.

CONSIDERATIONS

1. The complainant was not placed on the short list for a P.3 post and she seeks the quashing of the selected candidate's appointment. She argues: that the selection procedure was flawed; that the final decision was taken in violation of the WHO's Constitution as well as its Staff Regulations and Rules; that the Headquarters Board of Appeal erred in finding that all applications had received equal and fair consideration; that the WHO failed to follow its practice and established policy since despite being a woman and an internal candidate she was not put on the short list; that the decision amounted to an actionable abuse of discretionary authority; and that her classification as a short-term professional has deprived her of all the procedural guarantees, rights, and benefits accorded to WHO staff members. She requests the disclosure of documents relating to the selection procedure and makes various claims for relief.
2. The WHO submits that there was no error in the selection procedure and that the complainant was not short-listed because she did not meet the essential requirements of the post and did not fulfil the professional experience requirement. It denies that she was subjected to any personal prejudice. Given the fact that she was subsequently offered a fixed-term post at P.4, it questions the complainant's interest in continuing a complaint impugning her non-selection for a P.3 post. On the issue of her short-term contracts, it submits that she freely accepted and signed all contracts as offered to her and cannot now ask the Tribunal to retroactively revise her contractual situation.
3. The Tribunal has many times repeated that its function on a complaint relating to a contested selection is limited to reviewing the legality of the impugned decision, not its correctness. With the exception of a very limited list of reviewable errors, the Tribunal will not interfere with the exercise of discretion by an organisation in the selection of the candidate it believes to be best suited for a post. Recognising the difficulty he faces, counsel for the complainant, besides asserting that his client did in fact meet the minimum qualifications for the post, raises a number of arguments presumably designed to bolster his position. Many of these are irrelevant: if the complainant was qualified for the post she should not have been excluded from the short list; on the other hand, if she was not qualified, it matters nothing that she may not have benefited from the WHO's announced intention to actively promote the candidacy of women, that she was on a short-term contract instead of a fixed-term contract, or that the WHO has a binding practice of placing all qualified applicants on the short list. Whether any of these submissions has any foundation in fact, and the Tribunal declines to make any finding on the point, it can have no impact on the outcome. The Tribunal will not consider them further.
4. Other of the complainant's arguments are so implausible and frivolous in the light of the admitted facts as to be not worthy of further investigation. It is said that a member of the Selection Panel favoured the appointment of another candidate, but that candidate did not get chosen for the post and the successful candidate was the unanimous selection of the Panel. It is said that there was prejudice against the complainant, but she was, prior to the filing of the present complaint, offered an appointment to a fixed-term P.4 post - a grade higher than the P.3 one for which she applied, and reporting to the same supervisor; she has since accepted that appointment. It is said that the inclusion of working knowledge of German as a desirable (but not essential) qualification was done expressly for the purpose of favouring another candidate and disadvantaging the complainant; not only was her lack of German not a reason for not short-listing her, but the Organization has shown that knowledge of German as a desirable qualification had been part of the post description since at least 1988.
5. The complainant's procedural points are equally fragile: the fact that the staff representative missed the second meeting of the Selection Panel at which her application was reconsidered (a fact which would not in any event normally affect the validity of the proceedings) is rendered wholly anodyne by the fact that the same representative signed the Panel's final report without dissent. The allegation that the reasons for the complainant's non-inclusion on the short list were not fully explained to her when she first asked for the reasons (and again the Tribunal makes no finding as to whether this was the case) becomes irrelevant in light of the undoubted fact that such reasons were fully and adequately given during the internal appeal procedure.
6. Once the irrelevant and frivolous arguments advanced by counsel have been stripped away, there remain only two issues: did the complainant meet the minimum requirements for the post and was she entitled to be treated as a fixed-term rather than a short-term employee?
7. On the first of these questions, the advertised post required "[c]onsiderable experience in laboratory work, chemical or pharmaceutical analysis, with experience in stability of pharmaceutical preparations". The complainant's earlier work experience largely related to clinical pharmacology, drug utilisation, epidemiology and

clinical trials. While at the WHO, the complainant's work consisted mostly of training drug regulatory officers in developing countries in the use of WHO software tools in relation to drug regulatory work.

8. In the opinion of the Selection Panel, confirmed by both the Headquarters Board of Appeal and the Director-General, this field of experience differed from the "[c]onsiderable experience in laboratory work, chemical or pharmaceutical analysis, with experience in stability of pharmaceutical preparations" required for the post. According to the WHO, the definition of pharmacology is "the science of action of drugs on the body". It covers essentially both what the body does to the drug and what the drug does to the body. In further explanation it states that the duties of the post do not relate to pharmacology but to analytical chemistry, that is, "a scientific discipline that develops and applies analytical methods, instruments and strategies to obtain information on the composition, nature and purity of drugs". Pharmaceutical analysis includes "qualitative and quantitative analysis of active pharmaceutical ingredients and finished dosage forms". Analytical chemistry laboratory work includes "the development and validation of methods using a large variety of techniques". Pharmacology and analytical chemistry are, in the WHO's view, different branches of science requiring different skills and approaches.

9. It is likewise with the complainant's "broad experience in pharmacoepidemiology" that is alleged, supposedly as a new argument, in her rejoinder. Pharmacoepidemiology is defined by the WHO as the study of the utilisation and effects of drugs in large numbers of people. The duties of the post do not relate to pharmacoepidemiology but, as indicated, to analytical chemistry.

10. The foregoing is a good illustration of the reasons underlying the Tribunal's deference in matters of selection: while the complainant does not agree with the WHO's views, she is unable to dispute them in a manner which carries conviction. Both parties have produced contradictory statements by former Directors of the division in which the subject post is situated in support of their respective positions regarding the qualifications required for the post. The Tribunal can only say that the arguments presented by the WHO appear to be reasonable and have not been refuted. In the circumstances, and given that the complainant has the burden of proof, the plea fails.

11. The second question turns on the complainant's allegation that - notwithstanding that her appointments with the WHO, prior to her present one, were short-term contracts granted without competition - her status as a short-term staff member was a mere sham and she should in reality be treated as though she had held a fixed-term contract. The Tribunal dealt with very similar arguments in Judgments 2097 and 2107. In the latter case the Tribunal said as follows:

"10. The complainant's claim that he should be considered as a fixed-term staff member cannot be sustained. The complainant was recruited as a short-term staff member, without having to go through a competition process; he accepted several contract renewals. It was within the discretionary authority of the Director-General to decide during the years that the complainant was with the Organization whether to renew each short-term contract or offer him a fixed-term contract. There is no basis on which the complainant can claim to be treated retroactively as if he had a fixed-term contract. He was at all times a short-term staff member."

12. The material in the file being sufficient to allow the Tribunal to rule on the case, the complainant's request for the production of documents is denied.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.