NINETY-EIGHTH SESSION

Judgment No. 2382

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms B. F. against the World Health Organization (WHO) on 20 August 2003, the WHO's reply of 18 November, the complainant's rejoinder of 26 December 2003, the Organization's surrejoinder of 22 April 2004, the complainant's further submissions of 12 May and the WHO's final comments of 2 July 2004;

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

Having examined the written submissions and decided not to allow 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, a Swiss national born in 1939, was employed in different departments of the WHO on various short-term assignments as a secretary or administrative assistant between 1980 and 2002.

In mid-September 2002, a technical officer in the Access to Technologies unit of the Vaccines and Biologicals Department verbally suggested to her a possible two-week appointment as a secretary at grade G.3, subject to a decision from the Management

Support Unit (MSU). The complainant came to work on 19 September. After a discussion with the MSU, the technical officer informed the complainant at noon that she would not be offered a contract. She was paid for half a day's work. In a letter of 19 September to the Director of Human Resources Services, the complainant enquired about an alleged adverse note in her personal file. The Director replied by a letter of 9 October 2002 denying the existence of any such note.

The Human Resources Advisor to the Executive Director of the Noncommunicable Diseases and Mental Health Cluster (NMH) met with the complainant at her request during the last week of September 2002 with a view to explaining the reasons for not employing her.

On 13 November 2002 the complainant filed a notification of intention to appeal against the decision to "revoke" her contract. The Organization objected to the receivability of her appeal and stated that the reasons for not ultimately offering her a contract had been given to her. On 2 April 2003 the Headquarters Board of Appeal recommended dismissing the appeal as irreceivable on the ground that the complainant was not a WHO staff member at the time of the decision under challenge and, consequently, did not have a right to the Organization's internal appeal mechanisms. On 23 May 2003 the Director-General accepted this recommendation and dismissed the appeal. She added that the complainant had no cause of action as the reasons for not giving her a contract had been given to her. That is the impugned decision.

B. The complainant contends that her internal appeal was receivable. She considers that she was indeed a staff member and that on numerous occasions in the past she had started working before signing a contract. She states that the essential terms of the contract had been agreed upon, that funds had been made available and that she had been requested to start working. She regards the fact that she was paid for her work as proof of the existence of a valid and binding contract according to the Tribunal's case law.

The complainant submits that this case concerns the "second contract broken by WHO in less than six months". She says that on

2 May 2002 she presented herself at the Eastern Mediterranean Liaison Office (EML) for an interview and was offered a contract for three to six months. She was assured of a contract and started working, but on 7 May the Director of the EML Office, after receipt of information concerning her, decided not to offer her the appointment. She was paid at the established rate for the hours she worked. Neither in May nor in September was she informed of the reasons why she was asked to stop working shortly after having started, despite several requests she made for explanations. She adds that she was subsequently banned from entering the WHO premises and that a letter intended to prevent her from finding work in other international organisations was circulated, which constitutes discrimination. The Organization's actions affected her career prospects, causing her material injury.

She claims she was denied legal rights and natural justice. Having not been given a proper explanation, she has been precluded from her right to respond to any possible accusations. She states that the Organization did not provide her with a certificate of service and refused to give her access to electronic and hard copy of the Staff Rules and Regulations, circulars and instructions that she needed to consult in order to prepare her case.

Lastly, the complainant believes that the Board of Appeal does not constitute an independent and impartial entity as all its members are "subordinates of the WHO Administration" and therefore she was not allowed a fair hearing.

The complainant seeks the quashing of the impugned decision. She asks the Tribunal to order the WHO to: give her access to the relevant documents; remove all discriminatory restrictions imposed on her including the ban on her working for the WHO or entering the WHO premises; and reintegrate her into the WHO system with full retroactive effect and pay her the salary and emoluments she would have been entitled to had her contract been rightfully respected. She seeks compensation for moral and material injury, with interest, and claims costs. Alternatively, should the Tribunal decide to uphold the WHO's claim of irreceivability, she asks it to order the lifting

of the WHO's diplomatic immunity to make it possible for her to submit her case to a "public tribunal". In addition, she wants the WHO to provide her with a certificate of service. She submits three appendices with her complaint in which she asks the Organization to reply to various "written interrogatories"; admit or deny various "assertions of fact"; and produce various documents.

C. In its reply the WHO contends that the complaint is irreceivable – any appeal relating to the possible EML assignment in May 2002 being time-barred. Furthermore, it submits that the complainant has no cause of action in respect of the "second contract" as the reasons for her non-employment had been given to her in clear terms. As an example of her improper conduct, the WHO raises the issue of several letters the complainant had sent to the then Director-General in 1989-90 to his home address, which amounted to harassment.

On the merits, the WHO asserts that there was no binding contract with the complainant as not all of the essential terms of the contract had been agreed upon. The technical officer in the Access to Technologies unit expressly stated to the complainant that an offer of appointment was subject to a decision by the MSU: there was no unconditional agreement. The WHO notes that the complainant has produced no evidence of the existence of the letter purportedly sent to other international organisations preventing her from obtaining work. It states that no instruction preventing her from entering the WHO building was ever issued, although it was discussed. Security measures have been tightened in recent years and they were applicable to all. Since the complainant is no longer a staff member, she has no automatic right of access to the premises. The WHO did not find any failure on the part of the Board of Appeal to take any fact into consideration.

In the absence of an order by the Tribunal, the WHO refuses to reply to the complainant's list of interrogatories or to "admit or deny" her various "assertions of fact". The Organization considers that, as concluded by the Board, all the necessary documents were provided to the complainant and her request for the production of documents is therefore unfounded. Furthermore, hearings are not necessary as the

Tribunal has before it evidence and extensive submissions from both parties.

The Organization rebuts all her claims for relief. On her request for access to the Staff Rules and Regulations and other documents, it says she was provided with copies of the relevant documents. Although she is over the age limit of 62, the complainant is free to apply for employment again but she has "no right to employment by the WHO". As there was no binding contract between the parties, which in any case would not have been for longer than two weeks, the complainant is not entitled to "reintegration", payment of salary or emoluments related to the contract. The decision was made objectively and in the interest of the WHO; it denies having caused her any injury warranting an award of moral damages. No notification was sent to other international organisations, nor has any interference from the WHO taken place in her search for employment; thus the alleged harm to the complainant's career does not exist. Lastly, the WHO considers that the complainant's request for the lifting of its diplomatic immunity falls outside the Tribunal's competence.

D. In her rejoinder the complainant contends that if the Tribunal maintains the Board's opinion that her case is not receivable, she would be left in a legal vacuum and should be permitted to take her case "before an outside legal entity".

On the merits, she alleges that the Organization's arguments are misleading and that it still does not provide a "rational explanation for breaking two valid contracts in less than six months". The WHO has made deliberately incorrect statements in particular regarding the contract of May 2002 – which, in any case, was only mentioned as a precedent – without any written deposition by the officials involved. Nor has the WHO provided concrete examples of the alleged problems her employment with the Organization would have created. She considers that the WHO's allegations regarding the letters she purportedly sent to the Director-General at his home address in 1989-90 are not related to the present complaint and are in any case undocumented. The complainant reiterates that she held a valid contract.

E. In its surrejoinder the WHO presses its pleas. There was no binding contract and the complainant was clearly informed of the reasons for her non-employment; she therefore has no cause of action and her complaint is irreceivable. As annexes to its surrejoinder the Organization produces statements by three WHO officials which confirm the accuracy of comments it made in its reply.

F. In further submissions the complainant considers that the production at such a late stage of annexes containing previously undisclosed information is a breach of her right to due process as it precluded her from responding and correctly preparing her complaint. She contends that the Administration tried to create a "legal *lacuna*" and did not act fairly. She contests the content or validity of the new annexes and observes that the defendant has not provided statements from crucial witnesses. She presses her request for oral proceedings.

G. In final comments the WHO points out that the complainant was not precluded from responding to the three new statements because the Tribunal allowed her to enter further submissions. In fact, those new annexes were provided to the Tribunal because in her rejoinder she faulted the Organization for not obtaining written depositions and for making undocumented allegations.

CONSIDERATIONS

1. The complainant is a former staff member of the WHO and had served the Organization intermittently over a period of years in secretarial or administrative positions. She filed her fourth complaint against the WHO as on two occasions – in May and in September 2002 – the Organization asked her to start work and then immediately denied her a contract. She admits that the first occasion is not part of this complaint. Having filed an internal appeal against the decision to "revoke" her contract, she is challenging a final decision of 23 May 2003 rejecting her appeal. In that decision the Director-General stated that she agreed with the Headquarters Board of Appeal's recommendation that the complainant's internal appeal should be

declared irreceivable. However, the Director-General also considered that the complainant had no cause of action, because despite her allegations to the contrary, she had been provided with the reasons for the WHO's action; furthermore, she had no right to employment by the WHO.

2. The Tribunal notes that in her notification of intention to appeal of 13 November 2002, the complainant stated that her main reason for the appeal was "to find out the origin and reason for such drastic action", referring to her non-appointment. It has been proved that the Human Resources Advisor to the Executive Director of NMH, on behalf of the Administration, explained verbally to the complainant, and in writing, the reasons for the decision of the WHO.

3. As regards the issue of whether there was a contract between the Organization and the complainant, precedent has it that: "A contract is concluded only if both parties have shown contractual intent, all the essential terms are worked out and agreed on, and all that may remain is a formality of a kind requiring no further agreement." (See Judgment 621, under 1.)

4. In this case, the complainant was expressly informed that it was up to the MSU to decide whether or not she would be offered an appointment and if so, at what grade. There was no "unquestioned and unqualified concordance of will on all terms of the relationship" (see Judgment 621, under 1).

5. Although a contract may be binding even if not written, here there was no demonstrable intent on the part of the Organization to employ her; hence, there was nothing for her to accept.

6. There being no valid and binding contract of employment, the complainant was not a staff member of the WHO at the material time. That being so, she was not entitled to avail herself of the internal mechanism of appeal in the WHO, or appeal to the Tribunal.

7. As regards the “alternative remedy” of ordering the lifting of the diplomatic immunity of the WHO, this does not lie within the competence of the Tribunal.

8. In view of the above considerations, the complaint must be dismissed as irreceivable; therefore the Tribunal need not go into the merits.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet