

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

R. (No. 2)

v.

WHO

127th Session

Judgment No. 4099

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms V. T. A. R. against the World Health Organization (WHO) on 14 December 2017 and corrected on 7 February 2018, WHO's reply of 23 May and the complainant's letter of 22 June 2018 informing the Registrar of the Tribunal that she would not file a rejoinder;

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 abolish her position.

Facts relevant to this case are to be found in Judgment 3759, delivered in public on 8 February 2017, concerning the first complaint filed by the complainant with the Tribunal. Suffice it to recall that the complainant joined the WHO Office in the Comoros in November 2006 under a two-year fixed-term contract as a grade P.2 Administrative Officer. This contract was extended several times. On 9 June 2010 the complainant was informed that, for budgetary reasons, the grade P.3 Administrative Officer post in Brazzaville (Congo) for which she had been selected had been "frozen *sine die*" and that her reassignment could not therefore take place.

In the context of the financial crisis faced by the Organization in 2011, and in particular further to the deterioration of the financial situation of the WHO Regional Office for Africa (AFRO), the Regional Director notified the Director of Administration and Finance of AFRO, by a memorandum of 9 August 2011, of his decision immediately to abolish several positions, including that of the complainant, to whom this memorandum was forwarded by e-mail. Subsequently, by a memorandum dated 19 August 2011, she was informed that her position had been abolished and that her appointment would be terminated upon the expiry of a three-month notice period.

Before her duties ended, the complainant filed an appeal with the Regional Board of Appeal (RBA) against the decision of 9 August 2011. Her appeal having been dismissed as unfounded, she filed an appeal with the Headquarters Board of Appeal (HBA), which, in its report, identified the decision which was being challenged as that of 9 June 2010 and recommended that the appeal be dismissed as irreceivable, on the grounds that internal means of redress had not been exhausted, and as time-barred. In a letter of 15 August 2014, which constituted the decision impugned in the complainant's first complaint, the Director-General informed the complainant that she had decided to endorse that recommendation.

In Judgment 3759, the Tribunal recognized that the complainant had been clumsy in identifying the decision challenged in the statement of intention to appeal which she had submitted to the HBA. However, it considered that the subsequent full statement of appeal established "without any shadow of doubt"* that the appeal concerned the abolition of her position in the Comoros. It decided to set aside the decision of 15 August 2014 for excessive formalism, to remit the case to the Organization for it to examine the internal appeal filed by the complainant against the abolition of her position and to award her compensation in the amount of 4,000 Swiss francs for the moral injury suffered.

* Registry's translation.

In execution of that judgment, the Global Board of Appeal (GBA) was asked to examine the complainant's internal appeal insofar as it concerned the decision of 9 August 2011. In its report of 7 August 2017, the GBA concluded that the decision to abolish the position was in conformity with the applicable rules and was based on objective criteria, that the complainant was not entitled to be reassigned since she did not fulfil the conditions of Staff Rule 1050 and, lastly, that she had not provided convincing evidence in relation to her allegations of prejudice, discrimination and malicious intent. It recommended that the appeal be dismissed. In accordance with that recommendation, the Director-General dismissed the appeal by a decision of 5 October 2017. That is the decision impugned in this second complaint filed by the complainant.

The complainant asks the Tribunal to declare the impugned decision and that of 9 August 2011 null and void, to order WHO to reinstate her in a grade P.3 post with retroactive effect from 22 April 2010, and to award her damages for the moral injury which she considers she suffered and compensation for the loss of the opportunity to pursue a career within the United Nations system. She also asks the Tribunal to rule that, should the sums awarded be subject to national taxation, she would be entitled to a refund from WHO of the tax paid. In addition, she seeks an order for the disclosure of documents relating to the abolition of her position and the creation of a grade P.3 Administrative Officer post in Brazzaville in July 2008 (post 2.70011) which, according to her, had similar responsibilities to those of the position she occupied, as well as the minutes and records of deliberations relating to the selection process for posts for which she had been shortlisted between 2009 and the date she left the Organization, namely 22 November 2011. She asks the Tribunal to open an administrative investigation regarding post 2.70011 and, in particular, to determine whether to cancel the appointment of the holder of this post. Lastly, she claims costs and requests the removal of any adverse material from her personnel file.

WHO asks the Tribunal to dismiss the complaint in its entirety. It submits that the Tribunal is not competent to conduct the administrative investigation requested by the complainant. Moreover, it asserts that the complainant has not exhausted the internal means of redress with regard

to certain claims and that any challenge to the decision of 9 June 2010 is time-barred and therefore irreceivable.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 5 October 2017 whereby the Director-General of WHO, at the end of the internal appeal procedure resumed pursuant to Judgment 3759, upheld the decision of 9 August 2011 of the Regional Director for Africa abolishing the grade P.2 Administrative Officer post which she held in the WHO Office in the Comoros.

2. The Tribunal notes at the outset that the complainant did not see fit to challenge formally the decision contained in the memorandum of 19 August 2011, announcing the termination of her fixed-term appointment as a result of the abolition of the position. However, in order to give the complainant's claims the scope that she evidently intended, it will accept, as the internal appeal bodies also appear to have done, that the challenge to this termination of appointment must be regarded as being included in that of the above-mentioned decision of 9 August 2011.

3. According to the Tribunal's case law, a decision concerning the restructuring of an international organization's services, including one concerned with the abolition of a position, lies at the discretion of the organization's executive head and is therefore subject to only limited review. The Tribunal must verify whether this decision was taken in accordance with the rules on competence, form or procedure, whether it involves an error of fact or of law, whether it constituted misuse of authority, whether it failed to take account of material facts or whether it draws clearly incorrect conclusions from the evidence. However, it cannot supplant the organization's appraisal with its own (see, for example, Judgments 1131, consideration 5, 2510, consideration 10, 2933, consideration 10, and 3582, consideration 6).

4. In support of her claims, the complainant disputes, firstly, that the abolition of her position really stemmed from the budgetary difficulties cited by the Organization to justify it. She submits that this measure was in fact due to the creation, during the same period, of post 2.70011 for a grade P.3 administrative officer within the Regional Director's office, the responsibilities of which overlapped with those of her own position.

However, the Tribunal is not at all convinced by the arguments put forward in this regard in the complaint.

5. Firstly, the decision of 9 August 2011 was contained in a memorandum from the Regional Director which, far from being concerned only with the complainant's position, envisaged the abolition of administrative posts in 29 countries in the African region and justified this by the "financial crisis the Organization [was then] facing" and the need to anticipate the "significant decrease of the budget for 2012-2013". The aim of this radical measure, which the Regional Director had in fact already announced in messages dated 29 July and 8 August 2011 underlining its urgent nature, was clearly to tackle the consequences of the serious budgetary crisis which WHO faced at the material time, owing to the global financial crisis, and which had a particularly serious impact on the African region.

The reality of these budgetary difficulties is well known and cannot be seriously disputed. It is formally attested to in the submissions, particularly by the final report of the sixty-first session of the WHO Regional Committee for Africa, held from 29 August to 2 September 2011, which indicated, *inter alia*, that there was a serious risk of insufficient funds for the programme budget for the 2010-2011 biennium and that the budget for the 2012-2013 biennium for the African region would be reduced by 13.4 per cent by comparison with the previous budget.

It is therefore quite clear that it was the cuts in budget appropriations for staff pay resulting from this situation which gave rise to the abolition of many positions announced in the above-mentioned memorandum of 9 August 2011 of the Regional Director. Moreover, the submissions show that in 2011 WHO had to abolish a total of

453 positions occupied by the holders of fixed-term contracts, to which more were added in 2012, and that, regarding solely the WHO Office in the Comoros, the budgetary difficulties in question resulted in the loss of two other posts as well as the complainant's at the material time.

6. Secondly, although the complainant insists that the abolition of her position was linked to the creation of the above-mentioned administrative officer post 2.70011, this argument is not supported by an objective analysis of the facts of the case.

The aforementioned post, which is in a technical cooperation and country support unit within the Regional Office for Africa in Brazzaville, could not, by definition, comprise duties similar to the post of administrative officer in the WHO Office in the Comoros, to which the complainant was assigned. Hence, even though the complainant's comparison of the vacancy notices for the two positions shows that they involved tasks relating to common objectives, in one case the latter were to be achieved via a cross-cutting regional support function while in the other case connected projects were to be implemented in the exclusive context of the WHO Office in the Comoros.

Moreover, it should be noted that post 2.70011 had been created in July 2008, that is to say three years before the complainant's position was abolished, and although post 2.70011 was subsequently converted into a fixed-term post after initially being filled by means of a temporary appointment, this conversion did not take place, as alleged by the complainant, at the time of her termination of appointment but only in October 2013, in other words more than two years later – and in a budgetary context which had changed considerably in the meantime. In view of this chronology, it is highly unlikely that there was even an indirect link between the respective events affecting these two positions.

Furthermore, the submissions show that the duties performed by the complainant until her departure were subsequently reassigned to two General Service employees at the WHO Office in the Comoros and not to the holder of post 2.70011.

Lastly, though it is true that the post in question was occupied, at the material time, by a person who held the same nationality as the complainant, nothing in the submissions provides tangible confirmation of the complainant's allegation that this situation played a role in her dismissal, owing to the constraints of "geographical quotas".

7. Since the Tribunal is satisfied that there is no link between the abolition of the complainant's position and the creation of post 2.70011, it will in any case, at this stage of its findings, reject the complainant's request that the Tribunal order an administrative inquiry under its control to verify the lawfulness of the conditions in which the post in question was created, financed and filled. In the absence of the above-mentioned link, such an inquiry would serve no purpose in resolving the present dispute. It may also be observed that, although the complainant further alleges that this post absorbed certain responsibilities connected with another administrative position which she almost took up in 2010, any challenge of the Organization's refusal to appoint her to the latter position is, in any case, irreceivable, as indicated in Judgment 3759, for failure to exhaust the internal means of redress.

The absence of any link between the complainant's position and post 2.70011 also means that the complainant's argument that the Regional Director overstepped his authority in defining the duties of that post and in choosing not to abolish it in August 2011 has no bearing on the lawfulness of the impugned decision. Moreover, this argument is unfounded since, under section II.5.2, paragraph 20.1, of the WHO e-Manual, the authority to establish or abolish positions up to grade P.6 is delegated by the Director-General to Regional Directors within their approved budget allocations.

As regards the appointment of the incumbent of post 2.70011 at that time, the cancellation of which is requested by the complainant, the Tribunal notes that this request is, in any case, irreceivable since this decision has clearly become final, no appeal having been filed against it with the internal appeal bodies within the applicable deadline, and the complainant also has no cause of action to challenge it since, according to WHO's undisputed submission, she did not apply for the post concerned.

8. The complainant further claims that, even on the assumption – which the Tribunal itself is inclined to make – that the abolition of her position stemmed from the need to make savings in the budget, this decision was not justified in terms of WHO’s objective and hence involved a wrongful appraisal.

The complainant argues in this respect that her position was useful to the Organization, that it was not particularly costly and that her performance was deemed satisfactory by her supervisors.

However, none of these arguments can be accepted.

Even though WHO does not dispute the usefulness of the position in question – which was presumably also true of the many other posts abolished at that time since, in principle, they would otherwise never have been created – this consideration clearly did not preclude the loss of the position on account of budgetary constraints, which, by their very nature, are likely to have such negative effects.

Similarly, the fact that this position was not the greatest drain on financial resources, compared to the posts which were maintained, as the complainant asserts with reference to the financial data published by WHO, did not preclude such a measure, in view of the discretionary powers of an organization to determine the structure of its services and the fact that a redistribution of responsibilities between posts may well provide rational justification for abolishing one post, even if, of itself, it is less costly than others.

Lastly, whilst the complainant refers to the favourable assessments of her work in the context of performance evaluations, this argument does not invalidate the reasons for the abolition of her position, since such a decision is an organizational measure which, by its very nature, is unrelated to the individual merits of the holder of the position concerned.

9. The complainant alleges a breach of “acquired rights” in relation to the maintenance of her position which, she claims, derive from the provisions of Staff Rule 1040.1 stipulating that fixed-term contracts normally end on the completion of the agreed period of service. However, Article 9.2 of the Staff Regulations states that “[t]he Director-General may terminate the appointment of a staff member [...]

if the necessities of the service require abolition of the post or reduction of the staff”, and Staff Rule 1050.1 adds that “[t]he fixed-term appointment of a staff member with less than five years of service may be terminated prior to its expiration date if the post he occupies is abolished”. The complainant, who had been appointed by WHO in November 2006 and had therefore completed only some four years and nine months of service at the date of notification of the decision to abolish her position, was therefore not entitled to have her employment relationship maintained.

The complainant seeks to resist this conclusion by referring to an attestation issued by the Organization on 15 June 2010, according to which she held a “fixed-term contract which [was due to] expire [...] on 12 November 2012”. However, apart from the fact that the date indicated in this document contains a material error, as rightly pointed out by WHO, a document of this type is clearly not such as to prevent the application of the above-mentioned provisions of the Staff Regulations and Staff Rules.

Moreover, the complainant was clearly not entitled, as she also contends, to have her employment relationship converted into a continuing appointment, since she would in any case only have been able to avail herself of such a possibility, pursuant to Staff Rule 420.2, after a minimum period of service also set at five years.

10. The complainant submits that, further to the abolition of her position, she ought to have benefited from the reassignment process provided for by Staff Rules 1050.2 *et seq.* But this plea, which can only concern the decision announcing the termination of her appointment and not the decision to abolish the position itself, is unfounded.

This reassignment process, the purpose of which is to propose new employment within WHO to staff members whose positions have been abolished, only applies, under the terms of Staff Rule 1050.2, to the holders of fixed-term appointments “who have completed at least five years of continuous and uninterrupted service”. However, as indicated above, the complainant had not completed this minimum length of service at the date of notification of the decision to abolish her position.

As the Tribunal has previously observed, the terms of the above-mentioned Rule cannot be given a broad interpretation creating eligibility for the reassignment process for employees who do not fulfil that stated condition (see Judgment 3159, consideration 9). Moreover, although the complainant argues that, in Judgment 3582, cited above, and Judgment 3688, the Tribunal rejected the application of the English version of this Rule on the grounds that it was more rigorous than the French version with regard to another point, this case law is not applicable to the present case, given that the complainant does not even fulfil the above-mentioned condition of the minimum length of service, which is common to both versions of the text.

As regards non-compliance with this condition, the Tribunal also cannot accept the complainant's argument that the date of abolition of the disputed position was deliberately chosen in such a way that she could not meet the conditions. Indeed, the fact that the memorandum of 9 August 2011, as stated above, was concerned with numerous other administrative officer posts is sufficient to discard this hypothesis, in view of the highly implausible nature of the complainant's assertion that the Regional Director, for this sole purpose, "disguised her eviction through the abolition of 28 other posts in country offices"

Lastly, since the complainant did not hold a continuing appointment and, precisely, had completed only a relatively limited period of service, she has no grounds for asserting that the Organization was nevertheless obliged to endeavour to reassign her to another post on account of its duty of care towards its officials. Furthermore, the submissions indicate that even though WHO, in view of the large number of positions abolished at the time, by definition only had very limited possibilities for reassignment, it nevertheless took care to provide the dismissed administrative officers, including the complainant, with a career transition programme aimed at facilitating their search for new employment. The Organization was therefore committed to discharging its duty of care towards the persons concerned.

* Registry's translation.

11. The complainant raises numerous grievances against WHO, claiming that she was a victim of collusion between certain officials, unfavourable bias, misuse of authority, discrimination and reprisals.

However, as the Tribunal has stated on many occasions, allegations of this kind can only be accepted if there is sufficient evidence to substantiate them (see, for example, Judgments 1775, consideration 7, 2116, consideration 4(a), 2885, consideration 12, 3380, consideration 9, 3543, consideration 20, or 3914, consideration 7).

In the present case, it must be concluded that these various pleas raised by the complainant are not supported by the slightest evidence.

12. The collusion, bias and misuse of authority denounced by the complainant essentially relate to her allegation that, to her detriment, the Regional Director unduly favoured the holder of the above-mentioned post 2.70011. According to the complainant, the fact that this post was established in the Regional Director's own office also created, in itself, a conflict of interest that adversely affected her.

However, as already stated above, the submissions in fact reveal no link between the abolition of the complainant's position and the creation of the post in question. These arguments will therefore be dismissed.

Moreover, the complainant wrongly detects another conflict of interest in the fact that some members of the RBA were appointed by the Regional Director. This mode of appointment cannot be considered *per se* to compromise the independence of these individuals.

13. The complainant, who gave birth to a child in July 2010, claims that she was the victim of discrimination on account of her status of young mother. But there is nothing to suggest that any consideration related to that status played any part in the decision to abolish her position. Furthermore, the submissions indicate that WHO showed a degree of benevolence towards the complainant at the time of her pregnancy, exceptionally granting her special leave with full pay in addition to her maternity leave.

14. Lastly, even though the complainant claims, referring to WHO's whistleblower protection policy, to have been a victim of reprisals, the Tribunal notes that she does not even specify the initiatives on her part that supposedly provoked such reactions from the Organization. Moreover, although the complainant appears to see excessive delays in the finalization of her performance evaluations as a form of reprisal, it must be said that such delays, regrettable though they are, frequently occur in organizations' administrative practice and hence those observed in the present case cannot be presumed to have involved malicious intent.

15. In more general terms, the Tribunal cannot conclude from its consideration of the submissions that the Organization's choice to include the complainant's position in the list of positions abolished under the memorandum of 9 August 2011 stemmed from any wish to harm the complainant. It will therefore reject all the complainant's arguments based on this assumption.

16. In light of the above, and since there are no grounds for ordering the production of the various documents requested by the complainant, which would have no bearing on the outcome of the case, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered in public in Geneva on 6 February 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ