

K.

v.

WHO

123rd Session

Judgment No. 3753

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. K. against the World Health Organization (WHO) on 21 February 2014 and corrected on 30 June, WHO's reply of 8 October, the complainant's rejoinder of 9 December 2014 and WHO's surrejoinder of 5 March 2015;

Considering Article II, paragraph 5, 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, a former WHO staff member, contests the decision to terminate his fixed-term appointment pursuant to the abolition of his post.

The complainant joined WHO in January 2006 on a temporary appointment as a Technical Officer, at grade P.3, in the Department of Knowledge Management and Sharing (KMS) in the Innovation, Information, Evidence and Research Cluster (IER Cluster). In August 2009 the post he occupied was upgraded to grade P.4 and, in December 2009, his temporary appointment was converted to a fixed-term appointment and he was transferred to the Department of Health Statistics and Informatics (HSI) still within the IER Cluster.

A wide-scale restructuring was initiated at Headquarters in 2011. In January WHO issued Information Note 03/2011 informing staff that

the Director-General had decided to establish a Road Map Review Committee (RMRC) to review proposals for the abolition of a significant number of longer-term positions, and in February it issued Information Note 05/2011 that set out a reprofiling process to be followed in order for staff to be matched to positions in the new structure. It also established an Ad Hoc Review Committee (AHRC) to carry out the reprofiling process.

By a letter of 28 July 2011 the complainant was informed that, following the completion of the reprofiling process, it had not been possible to match him against any of the longer-term positions either at grade or below grade, within the new department structure. His post was abolished and he was given notice of termination of appointment in accordance with applicable Staff Rules. His last day of service was determined as 11 November 2011, but he only separated from service on 31 January 2012 upon the conclusion of his certified sick leave.

Late August 2011 he filed an appeal with the Headquarters Board of Appeal (HBA) contesting the decision of 28 July 2011. He alleged that the reprofiling process lacked transparency and violated his due process rights, that the decision to abolish his post involved abuse of authority and that no reason was given in the decision to abolish his post. He also contended that the position description for the contested new position for which he had applied had been “manipulated” so as to exclude him, that WHO violated his acquired rights and that no proper efforts were made to reassign him.

Having heard the complainant, the HBA issued its report on 11 September 2013. It held that the allegation relating to the manipulation of the position description was founded, noting a “discordance” between the functions of the contested new position approved by the RMRC and the translation of these functions into the position description of the contested position. The functions described in the RMRC document were of a global nature and did not specify language grouping whereas the position description stated that the incumbent of the position would play a key role in facilitating South-South collaboration and that Portuguese speaking countries were concerned. The HBA stated that it did not see how Portuguese could be regarded as the main focus of South-South collaboration given that many other countries were involved,

and it queried why Portuguese was made a required language for the post. It also noted that the only requirement for which the selected candidate had obtained a better score than the complainant was with respect to the expert knowledge of Portuguese, and that the selected candidate, unlike the complainant, did not meet the minimum experience requirement. It therefore disagreed with the evaluation done by the AHRC of the suitable candidate. The HBA further observed that the Director of the Department rating candidates also prepared the Road Map report, designed the new structure, wrote the position descriptions, prepared the rating sheets and participated in the matching exercise. It further noted with surprise that the selected candidate had not expressed any interest for that post (nor for any other). It therefore recommended that the complainant be reinstated “to the terms of his fixed-term appointment”, that he be awarded material damages in an amount equal to the loss of salary for the period of unemployment from the date of his termination until the date of the Director-General’s final decision, that he be awarded 20,000 Swiss francs in moral damages and that he be paid his “real and actual legal costs” upon submission of bills.

By a letter of 25 November 2013 the Director-General informed the complainant that while it was the correct decision not to match him to the contested position, she considered that the matching process was flawed due to a lack of clarity on the suitability of the staff member who was matched to the contested position. The Director-General therefore awarded him 15,000 Swiss francs in damages and agreed to reimburse his legal fees up to 5,000 Swiss francs upon review of bills. On 21 February 2014 the complainant filed a complaint with the Tribunal challenging that decision.

In April and June 2014 the complainant’s legal representative asked WHO to provide some documents pertaining to the restructuring and matching exercise to better understand WHO’s legal position and to substantiate the complaint filed with the Tribunal. On 27 July WHO provided some of the requested documents stating that it would make additional material available to the Tribunal upon its request.

The complainant asks the Tribunal to quash the decisions to abolish his post, not to match him against the new contested position and to

terminate his appointment. He also claims 20,000 Swiss francs in moral damages and 20,000 Swiss francs in costs. He further asks to be reassigned to a P.4 post that matches his grade, education and experience and to be compensated for the losses resulting from the decisions to abolish his post, not to reassign him and to terminate his appointment from the date of termination until the date of reinstatement; or, in the alternative, to be paid two years' gross salary including post adjustment and benefits such as pension fund and health insurance contributions.

WHO asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant commenced employment with WHO in January 2006 as a Technical Officer at the P.3 level, but on a temporary appointment, in the KMS Department, within the IER Cluster. He was based at Headquarters in Geneva. In August 2009 the complainant's post was upgraded to the P.4 level and he was appointed to the post. In December 2009 the complainant's temporary appointment was converted to a fixed-term appointment and he was laterally transferred to the HSI Department in the IER Cluster. Commencing in early 2011, reviews were undertaken of WHO's structure and staffing. In the result, by letter dated 28 July 2011, the complainant was informed that his post had been abolished and that his employment was terminated. Ultimately he was separated from service on 31 January 2012.

2. The abolition of the complainant's post arose from a review of the structure of departments within WHO by the RMRC whose report, in relation to the IER Cluster, was approved by the Director-General on 3 June 2011. Earlier, on 1 February 2011, Information Note 05/2011 was issued outlining the process which would be followed in order to allow staff to be matched to positions in a new structure. Information Note 05/2011 contemplated the creation of the AHRC to undertake a matching process to review the position of each member of staff affected by the restructuring and assess their suitability for matching to positions within the new structure. As part of this process, staff could provide an

expression of interest in positions in the new structure. The complainant did so on 5 July 2011, expressing interest in one position.

3. On 30 September 2011 the AHRC provided the Assistant Director-General of the IER Cluster with its recommendations arising from the reprofiling exercise. It did not recommend that the complainant be matched to any of the positions in the new structure. The recommendations were approved by the Assistant Director-General on 25 July 2011. The complainant was informed orally on 27 July 2011 and in writing on 28 July 2011 that it had not been possible to match him to any of the available longer-term positions either at grade or below grade. On 29 August 2011, the complainant commenced an internal appeal to the HBA which ultimately reported on 11 September 2013.

4. The HBA report addressed five contentions advanced by the complainant. First he had argued that the reprofiling exercise which led to the abolition of his post lacked transparency and had not involved due process. Secondly he had argued that the abolition of his post involved an abuse of power and that no reasons were given for its abolition. Thirdly he had argued that there had been manipulation of post descriptions and, in truth, his position had not been abolished. Fourthly he had argued that there had been a violation of his acquired rights and lastly that no proper efforts had been made to reassign him.

5. The HBA rejected most, but not all, of the arguments of the complainant. The one argument it accepted was that there had been a manipulation of the position description of a position in the new structure (position No. HQ.327945) for which the complainant had applied on 5 July 2011. The HBA described this as the “core issue of th[e] appeal”. Because it concluded that there had been this flaw in the processes leading to the termination of the complainant’s employment, he was entitled, in the HBA’s view, to be reinstated “to the terms of his fixed-term appointment”, and to receive an award of material damages representing his loss of salary from the date of his termination until the date of the Director-General’s final decision, an award of moral damages in the sum of 20,000 Swiss francs plus legal costs. This constituted the

recommendation made by the HBA to the Director-General. However the Director-General, while generally accepting the conclusions of the HBA rejecting arguments of the complainant, did not accept its conclusions concerning the argument that there had been a manipulation of the position description. Accordingly, the Director-General did not adopt the recommendations of the HBA though she did decide to award the complainant 15,000 Swiss francs as damages for what she perceived to be a flaw in the matching process. These conclusions were communicated to the complainant in a letter dated 25 November 2013. This is the impugned decision.

6. It is convenient to commence a consideration of the contentions of the complainant in this complaint by addressing the issue in respect of which the HBA and the Director-General had differing opinions and, as noted earlier, described by the HBA as “the core issue of th[e internal] appeal”. It is an issue raised in these proceedings. It is desirable to refer to the reasoning of the HBA and the reasoning of the Director-General in the impugned decision. Before doing so, it should be noted that, at the time the restructuring process commenced, the complainant was serving in a team performing eHealth functions. In late March 2011 it was agreed by senior WHO officials that, as part of the restructuring, there should be a unified eHealth team, effectively consolidating two teams within the Organization then performing this role. In the ensuing months, various versions of the new structure were forwarded to staff that set out in some detail eHealth functional areas and organigrams. A draft was sent on 12 April 2011 seeking feedback from staff, a more complete version was circulated to staff on 1 May 2011 which incorporated staff feedback, and an approved version was provided to staff on 7 June 2011 following a meeting of staff at which they were told of the proposed structure and the processes which would be implemented around it.

7. It is to be recalled that the position in the new structure which the complainant applied for was position No. HQ.327945. The first function described in the position description was to “[m]anage the ePortuguese network as a South-South collaboration to contribute significantly to improving performance and health service delivery and

health systems strengthening in Portuguese-speaking countries [...]”. One of the qualifications specified in the position description was expert knowledge in reading, writing and speaking Portuguese. The complainant did not have this qualification though one of the several technical officers also affected by the eHealth restructure did. This position description appears to have been approved over two days on 20 and 21 June 2011. This fact is asserted by the complainant in his brief, and is consistent with the sign off to the post description itself.

8. The HBA addressed the complainant’s argument that there had been a manipulation of the position description in paragraphs 58 to 68 of its report. All five members of the HBA said:

“60 [...] The Board observed a discordance between the functions as approved by the RMRC and how these functions were translated into the post description of the new post. As mentioned above, the Board sought clarification from the Administration as to why the said post description, which has a strong regional-language focus, was not in line with the RMRC approved functions which were of a fully global nature. In addition, the Board considered the [Personal History form] and the old post description of the selected candidate.

61 Despite the Administration’s affirmation that the duties in the post description of the new post were in line with the approved functions, the Board found that the Administration did not adequately address the Board’s concern. The eHealth functions as described in the RMRC document are of a global nature and do not specify any particular regional grouping such as a South-South collaboration nor any specific language grouping. In fact, the document states that the function aims ‘to build global, regional and national networks of eHealth partners (...)’. The new post description, however, states that the incumbent of the position (which is the only position that addresses networks and capacity building as described in the RMRC document) [...] plays a key role in facilitating south-south collaboration and furthermore, half of the duties of the new post are about ePortuguese and Portuguese speaking countries. Moreover, the Board does not see how ePortuguese can be regarded a main focus of South-South collaboration because there are many other countries involved in this collaboration.

62 In view of this, the Board determined that, as the Administration was unable to explain why the new post description for the position N° HQ327945 focused on eight Portuguese speaking countries, and why

Portuguese was made a required language for the position, this puts into doubt that the selection was not targeted to one single individual.”

9. The Director-General addressed this analysis in the impugned decision, namely the letter of 25 November 2013. She said:

“I carefully considered the Board’s analysis and the background documentation on this issue. I do not share the Board’s observations in paragraphs 60 and 61 that the RMRC approved functions that were *‘of a fully global nature’* and that, as a result, there was no basis to include in the post description duties that were specific to ‘south-south collaboration’ and to the e-Portuguese network and technical assistance to Portuguese speaking countries.

On the contrary, the description of the e-Health functional areas that were approved and which the Director circulated to you and other staff members by e-mail on 7 June 2011, referred to functions that were global, regional and country (Member State) specific, with express reference to the support of e-Health programmes in member states based on language grouping, geography or special interest. The Portuguese focus of post HQ.327945 is consistent with this general description of the e-Health functional areas, and these areas were never intended to be exclusively global.

I am satisfied that the focus in the post description on eHealth duties specific to Portuguese speaking countries was in the interest of WHO, for sound and objective reasons. The intention was to expand electronic based networks, while using the e-Portuguese network as the flagship project. I am also satisfied that it was legitimate to require that the incumbent of the position have an expert knowledge of the language.

Moreover, the fact that the previous post description of the staff member who was matched to post HQ.327945 had a Portuguese focus is not evidence of post manipulation (paragraph 66 of the Board’s report refers). Rather, it demonstrates that a function that was important before reprofiling continued to be important in the new structure.”

10. In his brief, the complainant raises the issue of the absence of any reference in the strategy paper drafted by the Director of KMS and circulated to staff on 1 May 2011 that there would be a position in which the Portuguese language was essential. The complainant also notes in his brief that there was no suggestion in the team meetings discussing the strategic direction of the eHealth unit that the ePortuguese program would be the model for the global eHealth capacity building function or strategy. It could have been expected, particularly having regard to the analysis of the HBA, that WHO would, in its reply, refer to documents

generated in April, May or June 2011 revealing that the “intention was to expand electronic based networks, while using the e-Portuguese network as the flagship project”. If the project could properly have been characterised as “flagship” it could reasonably have been expected that it would have been referred to in the detailed description of the eHealth functions in the detailed description of functional areas released in those three months or other documentation generated at the time.

11. This issue is repeated quite directly by the complainant in his rejoinder. He says “[f]urther, if the e-Portuguese network were truly a ‘*flagship program*’, then one would have expected that this important fact would have been identified at the early stages of the restructuring process” and that “[i]nstead no reference was made thereto in the minutes for the internal team meetings relating to the strategic direction for the e-Health unit, nor in the e-Health Functional Areas document prepared by the Director of the KMS Department, nor was it mentioned in the RMRC report which was eventually approved by the Director-General”.

12. It might have been expected that WHO would, in its surrejoinder, take up the challenge arising from this submission by detailing how it was, during this period of fundamental restructuring of the Organization that a decision was made to pursue, as a “flagship project”, the e-Portuguese network and provide documentary material, beyond the position description of the contentious position, to show how that decision was made. It did not beyond statements at a level of generality and no such documents were provided.

13. WHO argues in its reply, correctly, that the complainant bears the burden of proving allegations of personal prejudice though it acknowledges, again correctly, that evidence of personal prejudice is often concealed and may rest on inferences drawn from all the circumstances (see Judgments 958, consideration 5, 1775, consideration 7, and 3380, consideration 9). In the present case the Tribunal infers that the adoption of the position description for HQ.327945 was not based on an anterior decision that the e-Portuguese network was a flagship program and its characterisation as such was an

ex post facto rationalisation of the adoption of the position description which had the effect of excluding the complainant and other non-Portuguese speakers from appointment to the post. It is not for the Tribunal to resolve precisely why the position description was said to require fluency in Portuguese. However it cannot be entirely discounted that this was done to facilitate the appointment of the Portuguese speaking individual who ultimately filled the position. But, importantly, what occurred does support the complainant's case that there had been a manipulation of the position description and the selection process. His contention that this was the case should be accepted.

14. Given this conclusion, it is unnecessary to address the other bases on which he challenges the impugned decision. However they mostly repeat contentions advanced to the HBA that rejected them. The Tribunal agrees, in this respect, with the conclusions of the HBA.

15. The HBA concluded that the complainant was better qualified for the position No. HQ.327945 than the person actually appointed (putting aside proficiency in the Portuguese language). While this proposition was challenged by WHO in its reply (at least to the extent that suggested the person appointed was not qualified), WHO did say "[i]t is not denied that the complainant possessed other [that is to say, other than fluency in Portuguese] valuable qualifications, skills and experience that were relevant to his ability to fulfil certain of the functions of the post". The Tribunal concludes that the manipulation of the position description and the selection process denied the complainant a fair and reasonable opportunity to obtain an appointment to a new position as part of the restructuring process though the Tribunal acknowledges that there was no certainty he would have been appointed to a post and, in particular, appointed to position No. HQ.327945. Nonetheless he is entitled to significant material damages.

16. His claim for relief includes an order requiring a quashing of the decisions to abolish his post, not to match him against position No. HQ.327945 and terminate his appointment with WHO as well as reassignment to a P.4 post. However he claims, in the alternative, the

payment of compensation equal to two years' gross salary, including post adjustment, and benefits such as pension fund and health insurance contributions. He also seeks moral damages in the sum of 20,000 Swiss francs and legal fees in the sum of 20,000 Swiss francs.

17. But as noted earlier, there was no certainty that the complainant would have been matched to position No. HQ.327945. Having regard, amongst other things, to the complainant's age, grade and the status of his employment (fixed-term appointment) and the circumstances giving rise to the flaw in the process identified in the reasoning of the Tribunal, the Tribunal will award material damages in the sum of 70,000 Swiss francs. From this sum should be deducted any amounts paid to the complainant as a result of the impugned decision. The Tribunal assesses the moral damages in the sum of 15,000 Swiss francs. He is entitled to costs assessed in the sum of 8,000 Swiss francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant 70,000 Swiss francs by way of material damages, less any amounts paid to the complainant as a result of the impugned decision.
2. WHO shall pay the complainant 15,000 Swiss francs by way of moral damages.
3. WHO shall pay the complainant 8,000 Swiss francs costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ