Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P.

v.

WHO

123rd Session **Judgment No. 3755**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. P. against the World Health Organization (WHO) on 5 May 2014 and corrected on 6 August, WHO's reply of 2 December 2014, the complainant's rejoinder of 9 March 2015 and WHO's surrejoinder of 4 June 2015;

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 terminate his continuing appointment owing to the abolition of his position.

In January 2011, against a background of ongoing financial constraints, WHO published Information Note 03/2011 announcing the establishment of a Road Map Review Committee to review proposals for the abolition of a significant number of longer term positions in the context of departmental restructuring at Headquarters. The following month saw the publication of Information Note 05/2011 entitled "Reprofiling Process at Headquarters". Its purpose was to outline the process to be followed in order to allow staff to be matched to positions in a new structure following a major restructuring exercise, and it announced

the establishment of an ad hoc Review Committee responsible for making recommendations regarding reassignment.

The complainant, who had held a continuing appointment at the Organization's Headquarters since 2007, was informed by a letter of 11 July 2011 that the Road Map Review and reprofiling exercise in his department had been completed. He was advised that, after the matching process referred to in Information Note 05/2011, it had proved impossible to assign him to a position at his grade or at one grade lower in the new structure of his department, that a decision had been taken to abolish his position, that every effort was being made to find alternative assignments and that a Reassignment Committee was going to embark upon the formal reassignment process laid down in the Staff Rules, which would normally run for six months as from receipt of the letter. The complainant was advised by a letter of 19 March 2012 that no alternative assignment had been found for him by the end of the process and that his appointment would be terminated with effect from 30 June 2012. In the event, this date was deferred to 31 July 2012 at his request.

On 10 May 2012 the complainant filed an appeal with the Headquarters Board of Appeal against the decision of 19 March 2012. He requested the payment of the salary and allowances he would have received between 1 August 2012 and July 2015 (the month at the end of which he would have retired had his appointment not been terminated), "including full pension rights", without prejudice to the sums due on termination of his contract, in compensation for professional, financial and moral injury.

In its report, which it submitted to the Director-General on 13 January 2014, the Headquarters Board of Appeal found that the appeal was irreceivable *ratione temporis* to the extent that it challenged the decision of 11 July 2011 to abolish the complainant's position. As far as the decision to terminate his appointment was concerned, it was of the opinion that the Global Reassignment Committee had done a thorough job, albeit to no avail. It recommended the dismissal of the appeal and made two general recommendations concerning staff members' right to information during the reassignment process. The Director-General informed the complainant that she had dismissed his appeal in a letter of 11 February 2014, which constitutes the impugned decision.

The complainant filed his complaint with the Tribunal on 5 May 2014, seeking the setting aside of the impugned decision and that of 19 March 2012, redress for moral and material injury, "including the restoration of his pension rights", an award of 5,000 euros for the excessive length of the internal appeal proceedings and costs in the amount of 10,000 euros.

WHO submits that the complaint is irrecievable in part and unfounded in all other respects.

CONSIDERATIONS

1. In his rejoinder the complainant disputes the receivability of the Organization's reply on the grounds that it mentions neither the name nor the function of "any representative of the defendant organisation". This criticism is irrelevant. Although it is true that neither the reply nor the surrejoinder provides any indication of the identity or function of its author, WHO has explained that its submissions came from the Legal Counsel *ad interim*. This satisfies the requirements of Article 5, paragraph 3, of the Tribunal's Rules.

2. WHO submits that the complaint is irreceivable in part, for failure to comply with deadlines. Indeed, the Director-General considered that the internal appeal was time-barred insofar as it challenged the decision of 11 July 2011, by which the Organization abolished the complainant's position pursuant to Staff Rule 1050. In her opinion, that decision had become final, because no appeal against it had been filed within the prescribed time limits.

The internal appeal was thus deemed irreceivable to the extent that it sought to call into question any aspect of the decision to abolish the complainant's position. Moreover, the fact that the appeal was partly time-barred was the reason why the Headquarters Board of Appeal did not disclose the documents concerning that decision to the complainant.

3. This finding that the appeal was irreceivable, which is challenged in the complaint, is consistent with the Tribunal's case law as set forth in

particular in Judgments 2933 and 3439, which concerned cases where the facts of the dispute were similar to those in the instant case.

In the first of these cases, the complainant had been notified that his post had been abolished, but that this did not necessarily entail the termination of his appointment, and that efforts would be made to reassign him through a procedure which was about to begin. As those efforts proved fruitless, his appointment was terminated. The complainant had not immediately lodged an internal appeal against the decision to abolish his post, but he challenged it at the same time as the decision to terminate his appointment.

In both cases, the Tribunal found that, since the complainants had failed to submit an appeal against the decision to abolish their positions within the time limit stipulated in the Staff Rules, the decision had become final, with the result that they could not challenge its legality in the context of an appeal against the decision to terminate their appointment. It drew attention to the fact that time limits serve the purpose of, amongst other things, creating finality and certainty in relation to the legal effect of decisions. An organisation is entitled to proceed on the basis that a decision which is not challenged within the prescribed time limits is fully and legally effective when the applicable time limit for challenging that decision before the competent internal appeal bodies has passed (see Judgments 2933, under 8, and 3439, under 4).

In the present case, the complainant did not immediately challenge the decision of 11 July 2011 to abolish his position. He challenged it only subsidiarily when appealing the decision of 19 March 2012 to terminate his appointment. The opinion of the Headquarters Board of Appeal and the Director-General that, in this respect, the internal appeal was time-barred was therefore consistent with the aforementioned case law of the Tribunal.

With reference to this particular point, it may be concluded that the complaint is irreceivable on the grounds that internal means of redress have not been exhausted as required by Article VII, paragraph 1, of the Statute of the Tribunal.

4. Since the complaint is receivable in all other respects, it is necessary to examine the complainant's pleas regarding the conduct of the process to reassign him after the abolition of his position, the conduct of the internal appeal proceedings and the decision to terminate his appointment.

5. First, it is necessary to recall what duties international organisations have towards staff members whose posts must be abolished.

6. While it is true that international organisations have the right to restructure their operations, abolish posts if necessary and consequently terminate the appointment of their staff members who are affected by the planned restructuring (see Judgment 1854, under 10), they cannot simply terminate their appointment – at least not if they hold an appointment of indeterminate duration – without first taking suitable steps to find them alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, 2207, under 9, and 3238, under 10).

When an organisation has to abolish a position occupied by a staff member holding a continuous appointment, it therefore has a duty to do all that it can to reassign that person, as a matter of priority, to another post matching his or her abilities and grade. The staff member in question may therefore claim to be appointed to any vacant post which she or he is capable of filling in a competent manner, regardless of the qualifications of the other candidates (see Judgment 133). If the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place her or him in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, and 2830, under 9).

7. WHO has given effect to these principles in its Staff Rules, in particular in Rules 1050.1 to 1050.3, which stipulate that when a post is abolished, reasonable efforts must be made to reassign a staff member who holds a continuing or fixed-term appointment and who has completed at least five years of continuous and uninterrupted service. These provisions in no way disregard the interests of the proper functioning of the Organization, since they state that "the paramount consideration for

reassignment shall be the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned".

8. It is clear that the complainant was covered by the scope of these provisions on 11 July 2011 when he was notified of the abolition of his position. He entered the service of WHO on 1 February 2004 on the basis of an interagency transfer agreed by UNAIDS, the Joint United Nations Programme on HIV/AIDS, which is administered by WHO, where he had been working since August 2000. He was a 57-year-old scientist holding a grade P-5 post in the HIV/AIDS Department when his position was abolished. In the above-mentioned letter of 11 July 2011, the Organization assured him that every effort would be made to find him alternative assignments and it emphasised that it hoped that the reassignment process would be successful so that it might continue to benefit from his service.

9. The complainant submits that, despite these assurances, he was kept "completely in the dark" about what was happening in the reassignment process and denied the right to play an active part in it.

The Headquarters Board of Appeal found that the Global Reassignment Committee, which was responsible for exploring reassignment options, did not communicate regularly with the complainant and failed to keep him adequately informed of its endeavours to reassign him to another job.

The submissions in the file confirm the accuracy of this finding.

Between 11 July 2011, the date on which WHO informed the complainant of the abolition of his position and the opening of the formal reassignment process, and 19 March 2012, the date on which it advised him that this process had been unsuccessful, the complainant received only two e-mails and one telephone call from the Administration, all on 3 August 2011. Moreover, these communications concerned only his eligibility to take part in a career support programme.

It is to no avail that the defendant organisation refers to consideration 23 of the aforementioned Judgment 2933, in which the Tribunal held that a reassignment committee is under no obligation to inform staff members

participating in a reassignment process of every step taken to reassign them. Such discretion is fully justified when exhaustive information about the steps taken with a view to reassignment might arouse false hopes in the job seeker. In this case, however, the conduct denounced is plainly incompatible with the administrative bodies' duty to explore all existing reassignment options with the person in question (see Judgments 2902, under 14, and 3439, under 9).

It follows that the complainant did not in practice have any opportunity to participate in the reassignment process and that WHO thus neglected its duties.

10. The complainant also takes WHO to task for breaching the adversarial principle, the principle of transparency and the "right of appeal", since certain documents, in particular the report of the Global Reassignment Committee on which the Headquarters Board of Appeal based its recommendation that the internal appeal should be dismissed, were not disclosed to him.

The Tribunal has repeatedly held that a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) a decision affecting a personal interest worthy of protection. Under normal circumstances, such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers (see Judgment 3688, under 29, and the case law cited therein).

The Tribunal has also found that the report of the body responsible for conducting a reassignment process such as, in this case, the Global Reassignment Committee, is analogous not to the records of confidential discussions, but to the final report of a selection committee which may be disclosed to the staff member concerned, if necessary with redactions to ensure the confidentiality of third parties (see Judgment 3290, under 24).

WHO submitted the report of the Global Reassignment Committee to the Headquarters Board of Appeal on a confidential basis. However, there is nothing in the file to justify such confidential treatment. In the

circumstances of the case, the adversarial principle would, on the contrary, have required the disclosure of the report to the complainant at the latest at the stage of the internal appeal proceedings, regardless of whether or not he requested this.

The resultant flaw in the internal appeal procedure was not remedied in any way by the fact that the Organization produced the report in question with its reply before the Tribunal.

11. The complainant also objects to the Organization's refusal to provide him with a copy of the Human Resources e-Manual containing the rules on reassignment, although he asked the Headquarters Board of Appeal to do so in a letter of 29 April 2013. WHO contends that, apart from the report referred to in consideration 10, above, all material evidence was handed over or was accessible to the complainant and that it never refused to provide this manual, which the complainant, who was a serving staff member when he was notified of the decisions to abolish his post and to terminate his appointment, could freely access.

It is ascertained that when the complainant filed an appeal with the Headquarters Board of Appeal against the decision to terminate his appointment he had access to the Human Resources e-Manual in the same way as any other WHO employee and that the aforementioned decision expressly referred to it. At that juncture he could therefore have consulted that document, which sets out the reassignment procedure to be followed.

However, it is plain from the submissions in the file that that consultation could have been particularly useful to the complainant after he had read the surrejoinder which the Administration submitted to the Headquarters Board of Appeal on 15 January 2013, but by that time he had separated from WHO and hence no longer had access to the aforementioned manual.

In these circumstances, as part of its duty of care, the defendant organisation ought to have granted the complainant's request of 29 April 2013. In failing to do so, it once again breached his procedural rights.

12. In his rejoinder the complainant alleges several breaches of the provisions of the e-Manual, in particular paragraphs 80, 170 and 240 of

subsection III.10.11 thereof. The report of the Global Reassignment Committee was signed by only three of its members, "which suggests that a majority of committee members did not take part in the consideration of the complainant's case". Furthermore, the lists of vacant posts during the reassignment period were incomplete. Lastly, no account was taken of his qualifications, which means that the impugned decision rested on an incomplete exploration of reassignment options.

These allegations are devoid of any objective basis. The Tribunal, which accepts the explanations given in this respect by the defendant organisation in its surrejoinder, therefore rejects them.

13. Similarly, in view of the content of the decision of 11 July 2011, the Tribunal also accepts WHO's reply to the complainant's objection that he was insufficiently informed of the consequences of a possible failure of the reassignment process.

14. Lastly, the complainant taxes WHO with a breach of Staff Rule 1050.6, which sets the duration of the reassignment period at six months.

According to the terms of the letter of 11 July 2011, this period should have started to run on the date of its receipt. The complainant says, however, that he did not receive the letter until 18 July, which, in his opinion, meant that the reassignment period began to run only as from the latter date and should therefore have ended on 18 January 2012, and not on 11 January 2012, contrary to the statements of the Administration and the Headquarters Board of Appeal. In his rejoinder the complainant also contends that the aforementioned letter does not prove that the Global Reassignment Committee was in a position, as from that date, to embark upon its efforts to reassign him to a new job.

The explanations given by the defendant organisation in its briefs and in the documents produced convince the Tribunal that the reassignment process did indeed last for six months, since it was launched *de facto* on 11 July 2011 and ended not on 11 January 2012, but in February. For that reason, there was certainly no breach of Staff Rule 1050.6.

15. The complainant also holds that the internal appeal proceedings, which lasted some two years, were excessively long. The Organization admits that this was unusual, but tries to justify the length of the proceedings by the fact that complainant refused to have his case examined during sessions dealing with other appeals by staff members affected by the restructuring.

This argument is unconvincing.

The Tribunal considers that the Organization did not process the internal appeal with the requisite promptness and diligence. According to well-established case law, "[s]ince compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed" (see Judgments 2197, under 33, and 2841, under 9). A period of approximately two years is plainly unreasonable in light of all the circumstances of the case.

16. It follows from the foregoing that both the reassignment process and the internal appeal proceedings were flawed in several ways, causing the complainant moral injury which WHO must redress.

17. It remains to be considered whether the complainant's criticism of the decision not to reassign him to another post after the position he was holding had been abolished is well founded.

18. Since, as stated above, the complainant was not invited to play an active part in the various stages of the reassignment process, it cannot be denied that he had no opportunity to engage meaningfully in his reassignment, as he could have done if he had been informed in a timely manner of the vacant posts which might have matched his profile and qualifications and if he had been given a chance to show that he was suited to the duties related to these posts. In fact, the list of available posts attached to the Global Reassignment Committee's report indicates that not all these positions were obviously beyond the limits of his ability, training, experience and professional qualifications. In particular, the explanations given in the Organization's submissions to the Tribunal do

not demonstrate with sufficient clarity that the complainant would have been unable to occupy two positions which, he argues quite convincingly, would have matched his abilities.

19. This leads the Tribunal to conclude that the attempts to reassign the complainant were not conducted with due respect for the rights and guarantees which staff members must enjoy. The Tribunal notes that the Organization has not shown that in practice it did everything possible to look for a post matching the complainant's qualifications. Moreover, before terminating his appointment, WHO should have ascertained whether he was prepared to accept a post at a grade lower than that of the position which he had held previously (see Judgment 1782, under 11). It was not up to the complainant to prove that he was able to remain in the Organization's service in some capacity; it was up to the Organization to prove the contrary (see Judgment 2830, under 9, *in fine*).

20. It is not for the Tribunal to say whether one of the posts mentioned in the Global Reassignment Committee's report or another vacant position ought to have been assigned to the complainant at the end of the reassignment process. It is sufficient to note that the impugned decision has caused the complainant not only the moral injury referred to under 16, above, but also material injury due to the loss of opportunity resulting from the shortcomings in the efforts to reassign him.

In view of the personal circumstances mentioned in consideration 8, above, and the serious nature of the various errors on the part of WHO, the Tribunal considers that the complainant must be awarded compensation in the amount of 80,000 Swiss francs to redress the material injury and 15,000 Swiss francs to redress the moral injury.

21. As he succeeds, the complainant is also entitled to costs, which will be set at 8,000 Swiss francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant 80,000 Swiss francs in compensation for material injury.
2. It shall pay the complainant 15,000 Swiss francs in compensation for moral injury.
3. It shall also pay the complainant costs in the amount of 8,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 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.

(Signed)

CLAUDE ROUILLER GIUSEPPE BARBAGALLO MICHAEL F. MOORE

DRAŽEN PETROVIĆ