

T.
v.
WHO

128th Session

Judgment No. 4149

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V. T. against the World Health Organization (WHO) on 28 August 2017 and corrected on 13 October 2017, WHO's reply of 18 January 2018, the complainant's rejoinder of 19 April, corrected on 7 May, and WHO's surrejoinder of 9 August 2018;

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 oral proceedings;

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

The complainant contests the decision to abolish his post and to place him on special leave with pay until the expiry of his fixed-term appointment.

The complainant joined WHO in March 2009 on a six-month temporary appointment as a Policy Advisor, at grade P.5, at the Convention Secretariat (CSF) of the WHO Framework Convention on Tobacco Control (FCTC). In June 2009 the post which he occupied was advertised through a vacancy notice for a fixed-term appointment. The complainant applied and was selected for the post, and in September 2009 his temporary appointment was converted to a two-year fixed-term appointment. In July 2011 he was promoted to the P.6 grade post

of Coordinator, Policy, Implementation and International Cooperation and was subsequently granted a two-year extension of appointment. In September 2013 and again in September 2014 he was offered and accepted one-year extensions of his fixed-term appointment.

On 17 July 2014 the new Head of CSF, Dr D.C.S., advised all staff members in CSF that following an initial review of CSF's funding situation, there was a need to consider possible changes in the structure of CSF. Soon after, on 25 July 2014, she met with the complainant and informed him of her intention to abolish his post.

In October 2014 a proposed Workplan and budget for the financial period 2016-2017 was submitted to the Conference of the Parties to the FCTC. This document, which provided for the abolition of the complainant's post and also of a G.5 grade post in CSF, was approved by the Conference of the Parties on 18 October 2014. A Road Map Review Committee was then set up to review the proposed restructuring. It held a meeting on 17 February 2015 and, in its report of 5 March 2015, it endorsed the proposed restructuring of CSF. The Staff Association representative on the Committee, nevertheless, stated in the report the express reservation that there had not been adequate prior consultation and that no effort appeared to have been made to maintain the two posts. By a memorandum of 16 March 2015, the Head of CSF submitted the restructuring proposal, together with the Road Map Review Committee report, to the Director-General, who approved the proposal on 20 March 2015.

The decision to abolish the complainant's post effective 1 April 2015 was formally communicated to him by a letter of 30 March 2015. In that letter, the Director of Human Resources Management (HRM) indicated that, as per the terms of his appointment, the complainant's reassignment options were limited to CSF and he had no right to be considered for reassignment to a WHO position outside the CSF. She added that, while it was for the Global Reassignment Committee to review the reassignment options within CSF and make its recommendations to the Director-General, it was the Administration's understanding, based on the FCTC proposed Workplan and budget for the financial period 2016-2017, that there were no suitable reassignment options in CSF,

nor were any expected to become available during the normal six-month reassignment period. Therefore, it had been decided to place the complainant on special leave with full pay (SLWFP) until the expiry of his fixed-term appointment on 31 August 2015 and to pay him, in addition to the termination indemnity, “four months’ net base salary plus post adjustment and dependency allowances to take into account the missing one-month reassignment period and the three-month notice period”.

The complainant separated from service upon the expiry of his fixed-term appointment on 31 August 2015. Soon after, on 28 September 2015, the Global Reassignment Committee concluded in its report of the same date to the Director-General that all reassignment options had been explored within the current reassignment period and that no suitable positions had emerged.

In the meantime, on 20 May 2015, the complainant had filed a Notice of Intention to Appeal the 30 March 2015 decision with the Headquarters Board of Appeal, and on 31 August 2015 he filed his statement of appeal. Effective 1 January 2016, however, WHO introduced a new internal appeal system replacing the Regional and the Headquarters Boards of Appeal with a single Global Board of Appeal. The complainant chose to have his appeal dealt with under the new system. The Global Board of Appeal delivered its report on 30 March 2017 based on the parties’ written submissions. It found that, although the abolition decision had been taken in accordance with the WHO’s regulatory framework and was based on objective grounds, the decision to place the complainant on SLWFP until the expiry of his appointment was not supported by compelling reasons which were in the interest of WHO and hence the complainant had suffered some loss as a result. The Global Board of Appeal recommended that the appeal be dismissed insofar as it concerned the abolition decision but that the complainant be awarded 26,000 Swiss francs in damages for the decision to place him on SLWFP and up to a maximum of 5,000 francs in costs. By a letter of 2 June 2017, the Director-General informed the complainant that she agreed with the finding of the Global Board of Appeal regarding the decision to abolish his post and to separate him from service. With regard to the decision to place him on SLWFP, she informed him that, although she disagreed

with the Global Board's finding, she accepted that he might have suffered loss by not being placed on SLWFP for a total period of nine month (the six months' reassignment period followed by the three months' notice period) and had therefore decided to endorse the recommendation of the Global Board of Appeal in that regard. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his retroactive reinstatement in his former post or, alternatively, in another post commensurate with his grade, training, experience and skills. He claims retroactive payment of all salaries, including post adjustment, benefits, step increases, pension contributions and all other emoluments he would have received had he not been separated from WHO, from the date of his separation through the date of his reinstatement. In the event that he is not reinstated, in addition to the above requested retroactive payment, he claims payment of an amount equal to two years' gross salary, including post adjustment, benefits, step increases, pension contributions and all other emoluments he would have received had he not been separated from WHO. He seeks exemplary compensation in an amount not less than 150,000 Swiss francs for the prejudice he suffered from October 2013 onwards, moral damages in an amount not less than 150,000 francs for the affront to his dignity, full reimbursement of the actual costs he incurred and any other relief the Tribunal deems necessary, appropriate and fair. He claims interest on all amounts awarded at the rate of 5 per cent per annum from 31 August 2015 through the date that all such amounts are paid in full.

WHO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant commenced employment with WHO in March 2009 on a six-month temporary appointment as a Policy Advisor at the P.5 grade. He was employed to work at CSF Headquarters (HQ/CSF) in Geneva. In September 2009 his appointment was retroactively converted to a two-year fixed-term appointment. In July 2011 he was promoted to the P.6 grade post of Coordinator, Policy, Implementation and International Cooperation and he served in that

role on a two-year extension of his fixed-term contract. Thereafter he was employed in 2013 and 2014 on two successive one-year extensions of his fixed-term contract concluding on 31 August 2014 and 31 August 2015 respectively. The Head of CSF when the complainant commenced employment in March 2009, Dr N., was replaced by another person, Dr D.C.S., whose employment commenced on 20 June 2014. The complainant had applied for the position of Head of CSF when it became vacant but was unsuccessful. He was then the second most senior staff member in CSF.

2. On 25 July 2014 the complainant met with Dr D.C.S. and was informed by her that his position would be abolished and she would assume some of his duties. The remainder would be performed by other staff. Thereafter steps were taken to give effect to this proposal. One involved the submission to the Conference of the Parties to the FCTC in October 2014 of a proposed Workplan and budget for the financial period 2016-2017 which, in relation to staffing costs, referred to the abolition of the P.6 position (held by the complainant) “due to its high cost, the capacity of the Head of the Convention Secretariat to absorb some of the post’s senior policy-level functions, and the possibility of distributing remaining activities to other Convention Secretariat staff”. This Workplan and budget was adopted by the Conference of the Parties to the FCTC in a decision later in October 2014. Another step was the creation of a Road Map Review Committee that met on 17 February 2015 to discuss the proposed restructuring of CSF. In a report dated 5 March 2015, the Road Map Review Committee endorsed the proposed restructuring including the abolition of the complainant’s P.6 position. Ultimately, the proposal to restructure was submitted to the Director-General who approved it on 20 March 2015. By a letter dated 30 March 2015 from the Director of HRM, the complainant received formal notification of the decision to abolish the post he then occupied, effective 1 April 2015. By that letter, the Director of HRM also informed the complainant that his eligibility for reassignment was restricted to positions within CSF and she stated: “While it will be for the Global Reassignment Committee to review the reassignment options within the HQ/CSF Secretariat and make its recommendations to the Director-

General, it is our understanding based on the [Workplan and budget for the financial period 2016-2017, approved by the Conference of the Parties in October 2014] that there are no suitable reassignment options available in the HQ/CSF Secretariat, nor are any expected to be available during the normal six-month reassignment period.” The Director of HRM added: “[I]t has been decided to place you on Special Leave with Full Pay (SLWFP) from 1 April 2015 until 31 August 2015, which will be your effective date of separation from WHO.” The complainant separated from service on 31 August 2015. On 28 September 2015 the Global Reassignment Committee issued its report concluding that no suitable reassignment options could be identified for the complainant. In a notation on the report dated 30 September 2015, the Director-General noted: “Unfortunately, as it has not been possible to find a suitable position to which [the complainant] could be reassigned, it will be necessary to terminate his appointment.”

3. The complainant submitted a Notice of Intention to Appeal to the Headquarters Board of Appeal on 20 May 2015 and a statement of appeal on 31 August 2015. Neither of these documents is in the material before the Tribunal. The system of internal appeal within WHO was changed effective 1 January 2016 establishing a Global Board of Appeal. The complainant elected to have his appeal heard by the Global Board of Appeal, which issued its report on 30 March 2017. In relation to the subject matter of the appeal, the Board said: “The [complainant] appeals the decision to abolish his position effective 1 April 2015” and noted that the letter communicating this decision also informed the complainant there would be no suitable reassignment options available in the succeeding six months (the reassignment period) and that he would be placed on SLWFP. Under a heading “RECEIVABILITY” the Board said that the appeal was receivable insofar as it concerned the decision of 30 March 2015 to abolish the complainant’s post and that it would consider the submissions concerning the complainant’s non-selection as Head of CSF and the reclassification of the posts of staff members under the complainant’s supervision within the context of the complainant’s allegations of bias and prejudice.

4. The Global Board of Appeal was satisfied that the decision to abolish the complainant's position "was taken within WHO's regulatory framework and that it was based on objective grounds" and also it found "no evidence that the decision was motivated or otherwise affected by bias, malice or personal prejudice". However, the Board did indicate that it was "not satisfied that there was a compelling reason, in the interests of the Organization, to place the [complainant] on SLWFP until the expiration of his contract". The Board recommended that the complainant be paid 26,000 Swiss francs in damages and "up to 5,000 [francs] towards [his] legal costs".

5. The Director-General decided to accept the recommendations of the Global Board of Appeal about payment and agreed with the Board's conclusions about the abolition of the complainant's position, though she disagreed with its conclusions about the placement of the complainant on SLWFP. This decision was communicated to the complainant by a letter dated 2 June 2017. This is the impugned decision in these proceedings.

6. Under the general heading "LEGAL ARGUMENTS" in his brief, the complainant advances arguments in relation to his treatment before the abolition of his post, the abolition of his post and his reassignment, and the decision to place him on SLWFP. In relation to his treatment before the abolition of his post, the arguments are developed under three subheadings. One concerns personal prejudice on the part of a supervisor, or of any other responsible official, as addressed by Staff Rule 1230.1.1. The second subheading concerns the restructuring of CSF, alleged to be unlawful and undertaken for the sole irregular purpose of removing the complainant from CSF. The third concerns the alleged failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules or the terms of his contract.

7. The Tribunal will first consider the complainant's pleas and those of WHO concerning his treatment before the abolition of his post. WHO raises a threshold issue about the receivability of the complaint insofar as it might be thought to contain allegations of harassment,

malice, prejudice and retaliation being pursued independently of the challenge to the impugned decision to abolish the complainant's post. However, it is relatively clear that the allegations of harassment and related matters are intended to establish an aspect of the unlawfulness of the decision to abolish the post and the complainant's claims are cast no wider. It is open to the complainant to follow this course (see, for example, Judgment 3688, consideration 1).

8. With regard to the complainant's allegations concerning his treatment before the abolition of his post, the Tribunal is satisfied that these allegations are unfounded on the facts. A significant part of the complainant's narrative focuses on, firstly, a public rebuke of him by the Director-General in 2012 and, secondly, the conduct of Dr N., who had been Head of CSF from the time the complainant commenced employment with WHO until Dr D.C.S. assumed the position in June 2014. WHO was, inappropriately, reluctant to admit without hesitation that the Director-General publicly rebuked the complainant. The Tribunal is satisfied she did. This fact should have been readily admitted. However, that rebuke was in 2012. Even if the conduct of Dr N. can be characterised as harassment and was otherwise inappropriate, there is no persuasive evidence, even inferentially, of a causal connection between the rebuke by the Director-General and the alleged harassing conduct or the decision to abolish the complainant's position. It is to be recalled that the abolition of the position was put in train by the assessment of Dr D.C.S. of the needs of CSF shortly after she commenced as Head of CSF in June 2014. The evidence does not support a conclusion that this initial assessment was influenced by the attitude of the Director-General towards the complainant or the attitude of Dr D.C.S.'s predecessor, Dr N., or that Dr D.C.S.'s pursuit of this assessment was influenced by these matters.

9. The preceding discussion is relevant to the complainant's second subheading in his pleas that concerns the restructuring of CSF which is alleged to have been unlawful and undertaken for the sole irregular purpose of removing the complainant from CSF. This argument is unfounded and should be rejected.

10. The third concerns the alleged failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules or the terms of the complainant's contract. The substance of this contention is that WHO breached its duty of care towards the complainant because of the matters discussed in the preceding considerations. However, the complainant has not made out his case in relation to those matters and this plea is unfounded and should be rejected.

11. The gravamen of the complainant's argument concerning the abolition of his post is that the stated reason, financial considerations, was not the real reason. While the Global Board of Appeal, in a considered report, was critical of some aspects of the process, it nonetheless concluded that "[t]he information contained in the Workplan demonstrated objective grounds to abolish the [complainant's] position". The reference to a "Workplan" is to the document prepared by the new Head of CSF, Dr D.C.S., in October 2014 for submission to the Conference of the Parties that, in fact, approved it. Implicitly, and sometimes explicitly, the complainant's analysis of CSF's financial position said to justify the abolition of his post is based on his assumption that the financial constraints were temporary and that the abolition was for an ulterior purpose. For example, the complainant says in his pleas: "[I]t appears from [the] minutes [of a meeting of the Road Map Review Committee of 5 March 2015] that the financial problems were only temporary, lasting conveniently just long enough to allow the Organization to abolish [his] post." But, as already discussed, the abolition of the complainant's post as the product of personal prejudice towards him or for an ulterior purpose has not been demonstrated.

12. The steps taken by WHO to reassign the complainant following the abolition of his position were limited by what the Organization viewed, mistakenly, as a constraining factor. It was that the complainant's contract (mirroring a similar statement in the vacancy notice) contained a clause saying: "[Y]ou will have no right to be considered for reassignment or transfer to a WHO position outside HQ/CSF Secretariat, either during or at the end of your appointment, including pursuant to Staff Rule 1050 should you be eligible." WHO viewed this provision as precluding

reassignment of the complainant to positions within the Organization more generally.

13. If a member of staff is, under the Staff Regulations and Staff Rules, entitled to be considered for reassignment, a bare contractual provision which limits, qualifies or removes that right has no legal effect. The Tribunal has recently said in Judgment 4018, consideration 7, that “a clause [of a contract of employment] which, as is the case here, contravenes the staff rules and regulations is unlawful and therefore cannot apply, even if the contracting parties clearly intended it to do so”. In the present case, Staff Rule 1050 did not limit consideration of reassignment to certain areas or parts of the Organization. Reassignment was possible, under that provision, to any position within the Organization. Accordingly, the focus of WHO solely on positions within CSF was misplaced and unlawful. An organisation could, of course, create a proviso in a rule such as Staff Rule 1050 rendering the rule subject to any contractual limitation agreed to by the staff member. But no such proviso exists in the present case.

14. As a result of this flaw in the reassignment process, the complainant lost the opportunity of appointment to another position within WHO with the prospect that he could secure ongoing employment, even after his then existing contract expired. This amounts to a loss of a valuable opportunity. Quantification of the value is difficult and necessarily imprecise. The Tribunal is, nevertheless, satisfied that the complainant’s loss entitles him to material damages assessed in the sum of 60,000 Swiss francs. Moral and exemplary damages, as sought by the complainant, are not warranted. The complainant is also entitled to an order for costs assessed in the sum of 8,000 Swiss francs. An order for reinstatement, as sought by the complainant, is impracticable.

15. The Tribunal has not addressed the complainant’s pleas concerning WHO’s action of placing him on special leave rather than permitting him to work for the residue of his contract. That is because the amount recommended by the Global Board of Appeal, which was accepted by the Director-General and paid by WHO, is adequate.

DECISION

For the above reasons,

1. WHO shall pay the complainant 60,000 Swiss francs as material damages.
2. WHO shall pay the complainant 8,000 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ