W.

v.

WHO

123rd Session **Judgment No. 3756**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. R. W. against the World Health Organization (WHO) on 3 April 2014 and corrected on 7 July, WHO's reply of 13 November 2014, the complainant's rejoinder of 26 January 2015 and WHO's surrejoinder of 4 May 2015;

Considering the additional submissions submitted by WHO on 23 August 2016 pursuant to the Tribunal's request of 16 August 2016, the complainant's comments thereon of 2 September and WHO's comments of 14 September 2016;

Considering the complainant's additional submissions of 26 September 2016 and WHO's comments thereon of 5 October 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant, a former WHO staff member, challenges the decision to abolish his post and terminate his fixed-term appointment.

The complainant joined WHO in April 2008. On 18 May 2009 he was assigned to the P.5 position of Programme Manager in the Special Programme for Research and Training in Tropical Disease (TDR) – within the Innovation, Information, Research and Evidence Cluster (IER Cluster)

at WHO Headquarters – under a two-year fixed-term appointment expiring on 17 May 2011.

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, and established an Ad Hoc Review Committee (AHRC) to carry out the reprofiling process.

On 11 April 2011 the complainant was notified that his post was being abolished and that following the reprofiling process the AHRC had not been able to identify a suitable longer-term position within the new department structure commensurate with his profile. Consequently, his appointment would be terminated effective 15 July 2011.

On 9 June 2011 the complainant filed an internal appeal with the Headquarters Board of Appeal (HBA). He alleged in particular that the abolition of his post and the termination of his appointment were improperly influenced by personal prejudice, that the contested decision was procedurally flawed, that WHO had failed to reassign him and that the decision to abolish his post was "illusory". In its report transmitted to the Director-General on 11 November 2013 the HBA held that the complainant did not have grounds to claim that he was the victim of personal prejudice, bias and malice. It also concluded that the decision to abolish his post and the decision not to reassign him to open existing posts for which he was qualified were not the result of procedural irregularities. It further held that there were no grounds to claim that his post was not abolished but merely downgraded. It therefore recommended that the Director-General dismiss the appeal.

By a letter of 8 January 2014 the Director-General informed the complainant that she had agreed with many of the HBA's conclusions and recommendations. However she considered that the AHRC had failed during the reprofiling process to consider the most recent version (that of 30 March 2011) of his 2010 performance appraisal report established under the Performance Management and Development System (PMDS)

and that the HBA had failed to note it. The Director-General awarded him 25,000 Swiss francs in damages for this flaw in the matching exercise and agreed to the payment of legal fees not otherwise reimbursable under insurance of up to a maximum of 5,000 francs. That is the decision he impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision. He also asks the Tribunal to order his reinstatement immediately with full retroactive effect and that he be awarded an additional two-year fixed-term contract; or, alternatively, to order that be awarded all salary, benefits, step increases, pension contributions or any other emoluments he would have received had he not separated from service on 15 July 2011, through the date of execution of the Tribunal's judgment and that he be paid an amount equivalent to a full additional two-year fixed-term appointment (including all salary at grade P.5, step increases, pension contributions, benefits and other emoluments). He requests that WHO be ordered to delete his PMDS reports for 2009 and 2010 and replace them by a note indicating that they were removed as a result of an administrative appeal, issue an agreed statement to all staff in TDR absolving him of any personal responsibility for the 2010-2011 financial crisis faced by TDR, provide him with an "enhanced [...] work certificate" for service rendered from April 2008 to July 2011 with agreed content referring to the quality of his performance and official conduct (as set out in Staff Rule 1095). He also seeks 150,000 Swiss francs in moral damages for the anxiety, stress and humiliation resulting from the wrongful termination of his appointment, together with reimbursement of his legal fees in an amount of not less than 30,000 francs. He further claims moral and exemplary damages for undue delay in the internal appeal process. Lastly, he seeks the award of 5 per cent interest per annum on all amounts awarded to him, from 15 July 2011 to the date of execution of the judgment.

WHO submits that the complaint is unfounded and asks the Tribunal to dismiss it.

CONSIDERATIONS

1. The complainant commenced employment with WHO on 1 April 2008 as a Programme Officer, at grade P.4, in TDR within the IER Cluster. On 18 May 2009 he was appointed Programme Manager, at grade P.5, on a two-year contract expiring 17 May 2011. During the currency of that contract there was a review of TDR's structures and staffing. In the result, on 11 April 2011 the complainant was informed that his post had been abolished and his employment would be terminated effective 15 July 2011.

2. The abolition of the complainant's post arose from a review of the structure of TDR by a RMRC whose report was approved by the Director-General on 1 March 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 an AHRC to undertake a matching process to review the position of each member of staff affected by the restructure 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 13 March 2011, expressing interest in two positions. One was the position of Portfolio and Programme Manager, grade P.5, and the other Programme Officer, grade P.4.

3. At about the time of the approval of the roadmap, reports were being prepared on staff performance as an element in a Performance Management and Development System (PMDS) and, relevantly, the complainant's 2010 report (the 2010 PMDS report) was being prepared. In its deliberations the AHRC considered a version of the complainant's 2010 PMDS report it retrieved, it seems, from an electronic data storage system on 23 March 2011. However this version was not the final version and it was not until 30 March 2011 that the complainant's 2010 PMDS report was completed. The final version did not contain as critical a commentary on the complainant's performance by the complainant's second-level supervisor, the Assistant Director-General of the IER Cluster

(ADG (IER)), as had appeared in the version considered by the AHRC nor did the version it considered contain a detailed response of the complainant which appeared in the final version. There were also some changes in the final 2010 PMDS report to the first-level supervisor's remarks, the Director of TDR. On 4 April 2011 the AHRC provided the ADG (IER) with its recommendations arising from the TDR reprofiling exercise. It did not recommend that the complainant be matched to any of the positions in the new TDR structure. The recommendations were approved by the ADG (IER) that day.

4. As noted earlier, the complainant was informed on 11 April 2011 that the ADG (IER) had decided to abolish his position and terminate his employment. On 9 June 2011 the complainant indicated he intended to appeal against the decision of 11 April 2011. During the remainder of 2011 and during 2012 the parties prepared and submitted their pleas to the HBA and after some issues about procedure were resolved in the first half of 2013, the HBA met in June 2013 to consider the complainant's appeal. It provided its report and recommendations to the Director-General on 11 November 2013. The HBA recommended that the complainant's appeal be dismissed.

5. In a letter dated 8 January 2014 the Director-General explained that while she accepted much of the HBA's analysis of the complainant's arguments she did not accept a conclusion of the HBA that "all facts were completely considered" in the complainant's case when the AHRC considered the circumstances of the complainant on 23 March 2011. The Director-General accepted that this was wrong given that the AHRC's consideration was by reference to a version of the complainant's 2010 PMDS report retrieved electronically that day and not the version finalised on 30 March 2011. The Director-General characterised this as a "flaw in this aspect of the matching process" for which she decided the complainant was entitled to damages assessed in the sum of 25,000 Swiss francs. She also agreed to the payment of legal fees otherwise not reimbursable under insurance up to a maximum of 5,000 Swiss francs. The decision of 8 January 2014 is the impugned decision in these proceedings.

6. The complainant advances five contentions in his pleas. The first is that the impugned decision was improperly motivated by an abuse of authority incorporating personal prejudice. The second is that the decision to abolish his post was the result of a procedure that was tainted with irregularities. The third is that the failure of WHO to reassign the complainant to existing posts for which he was qualified or could fulfil with a minimum of further study was unlawful. The fourth was that the position occupied by the complainant had been downgraded and the position adopted by WHO that it was abolished was an excuse to facilitate the termination of the complainant's employment. The fifth was that the damages awarded by the Director-General in the impugned decision were wholly inadequate.

7. The Tribunal should note that in his brief, the complainant sought the production of certain documents. The Tribunal concluded that documents should be produced and a request was made to WHO in August 2016 to produce certain documents. First, WHO was requested to produce all notes of the AHRC recording its consideration of the position of the complainant and the formulation of recommendations concerning the complainant as to whether he could be matched to a position in the new WHO structure. Second, WHO was requested to produce the report of the AHRC insofar as it addresses the position of the complainant whether he be matched to a position in the new WHO structure. Third, WHO was requested to produce all documents provided by the Administration to the HBA (referred to in section III of its report) that have not been included in the documents provided either by the complainant or WHO as annexures to the pleas. The documents that were produced gave rise to a series of further submissions of the complainant and WHO.

8. The first issue identified by the complainant in his brief raises the question of whether the impugned decision was improperly motivated by an abuse of authority incorporating personal prejudice. However the submissions of the complainant do not, with clarity, identify whether this allegation concern the abolition of his post, on the one hand, or the failure to find him another position as part of the reprofiling exercise,

on the other. In his brief, the complainant refers to authorities concerning the abolition of a post which may have been tainted by personal prejudice but also refers to the consideration by the AHRC, as part of the reprofiling exercise, of the incomplete 2010 PMDS report which obviously occurred, in point of time, after a decision had been made to abolish the post.

9. It is convenient, at this point, to focus on the consideration by the AHRC of the initial 2010 PMDS report. As noted in considerations 3 and 5, the Director-General accepted that the decision of the AHRC was flawed because it considered a version of the 2010 PMDS report less favourable to the complainant than the final version. The Director-General said in her letter of 8 January 2014:

> "Considering the emphasis that the AHRC placed on PMDSs when making their recommendations, and bearing in mind your detailed response to your supervisors' comments in the final version of the 2010 PMDS, I do not agree with the HBA's conclusion in paragraph 58 of its report that all facts were completely considered. Instead, I find that the reliance on the 23 March 2010 version of the PMDS constituted a flaw in this aspect of the matching process.
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> Please note that **I have reached no conclusion as to whether it would have made a difference to the eventual outcome of the matching process** if the AHRC had been able to consider the final version of the 2010 PMDS. I also emphasise that I see no evidence of bad faith or ill will, nor any attempt whatsoever by your supervisors to delay the finalization of the 2010 PMDS.
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> It is nevertheless clear that you were entitled to the application of a demonstrably accurate matching process which, given all the circumstances of this case, would have included the AHRC's consideration of the finalised 2010 PMDS." (Emphasis added.)

10. Two of the documents produced by WHO at the request of the Tribunal referred to in consideration 7 were the notes of the AHRC and its report insofar as they related to the complainant. In its report of 4 April 2011 to the ADG (IER), the AHRC sets out its conclusions on a number of positions including the two for which the complainant had applied, namely Programme Officer, at grade P.4, and Portfolio and Programme Manager, at grade P.5. In relation to the former, three staff members including the complainant were considered and assessed. In relation to the latter two staff members were considered and assessed, one of whom was the complainant. The report, in this respect, was divided into two

columns for each position considered. The first column set out the names of each of the individuals considered for the position and the recommendation whether they were matched to the position or not and a ranking, if there were multiple matched staff. The second column contained the detailed comments concerning each individual. In relation to the complainant, the comments were generally positive. However included in the comments concerning the complainant in relation to both positions were the words "the Committee unanimously agreed that it would not recommend [the complainant] for this post taking into consideration the ratings and negative comments on the last two PMDS reports". An observation in substantially the same terms is made by the AHRC in relation to the complainant towards the conclusion of its report when identifying staff members who had not been placed in the first position for any of the existing posts in the new structure.

11. There are some curious aspects about the AHRC's consideration of the complainant's position and what followed. It should be borne in mind that the AHRC was going to report (and did report) to the ADG (IER). Of the criticisms in the initial 2010 PMDS report, the ADG (IER)'s comments were the most strident and those comments were substantially modified in the final 2010 PMDS report. In the report of the AHRC of 4 April 2011 to the ADG (IER), the AHRC noted that it had met during the week of 21-25 March 2011. It appears that the amended comments of the ADG (IER) which were in the final 2010 PMDS report were added, in all likelihood, on 24 March 2011. Thus, at the very least, the ADG (IER) should have been concerned that there was the possibility that the decisions and recommendations of the AHRC in relation to the complainant (and particularly the comments quoted in the preceding consideration) were based on the initial comments she made and retreated from rather than the subsequent comments appearing in the final 2010 PMDS report. Yet the ADG (IER) appears to have done nothing to ascertain whether this was so and was seemingly prepared to act on the potentially tainted conclusions of the AHRC. Part of the complainant's case is that he was the victim of prejudice and bias. While the Tribunal is not affirmatively satisfied this is so, it nonetheless cannot discount entirely the possibility

that the consideration of the complainant's position was affected in the way he alleges.

12. It is clear that the 2009 and 2010 PMDS reports played a highly significant role in the decision-making of the AHRC concerning the complainant and a reasonable inference can be drawn that the critical comments in the initial 2010 PMDS report (but modified in the final report) are likely to have been of materially greater significance, given that they were, then, a more recent assessment of the complainant's performance by reference to work performed by him in the immediate past. In addition, it was accepted within the Organization that any assessment of the complainant's performance in 2009 had to take into account his personal circumstances, namely that his wife was terminally ill. She, in fact, died in January 2010. In the Tribunal's opinion the approach of the Director-General in the passage set out in consideration 9 does not give sufficient weight to the effect of the AHRC not considering the final 2010 PMDS report. First, the Director-General directs her attention to the significance placed on PMDSs by the AHRC as a matter of generality and does not consider, specifically, their approach in the case of the complainant. Second, the way in which the comments concerning the complainant are expressed by the AHRC reasonably leaves open the possibility that a different recommendation might have been made but for the comments in the initial 2010 PMDS report together with the absence of the complainant's response found in the final 2010 PMDS report. It is true, as the Director-General said, that it is not possible now to say "it would have made a difference" to the eventual outcome in the sense that the outcome would have necessarily been different. However this comment fails to recognise that some fair and balanced assessment, reasonably based, is possible about the impact of the AHRC's failure to consider the final 2010 PMDS report. That impact was considerable.

13. Indeed, as it turned out, the staff member who had been successful in securing appointment to the Programme Officer P.4 position in the reprofiling exercise (a position the complainant had also expressed interest in) had to go on sick leave from Monday 4 July 2011. Staff were told of this on the same day and were told that WHO was "currently

looking for someone to replace [that staff member]". By email dated 5 July 2011, the complainant wrote to the Director of TDR in response to the email noting the reasons why the staff member was going on sick leave and adverting to his desire for continued employment (at that time his employment was to end on 15 July 2011). In its pleas WHO treated this as a request "that he be assigned on a temporary basis" to the Programme Officer P.4 position. Whether this characterisation is entirely correct probably does not matter. There is no obvious reason why WHO would not have followed this course, at least by offering the complainant the position on a temporary basis given that the AHRC had not concluded he could not perform the work.

14. In the result, this flaw in the processes concerning the reprofiling of the complainant meant that he was denied the real possibility of further employment with WHO and the damages decided upon by the Director-General were inadequate (see, for example, Judgment 2306, consideration 10). 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 60,000 Swiss francs by way of material damages. Any payment already made of the 25,000 Swiss francs awarded by the Director-General can be offset against this amount. The complainant is entitled to moral damages also. They are assessed in the sum of 25,000 Swiss francs.

15. While the HBA erred in its consideration of this aspect of the complainant's case (involving the reliance by the AHRC on the initial 2010 PMDS report), its report otherwise addressed, in detail and with apparent care, the arguments of the complainant that there had been personal prejudice towards him, that the abolition of his post was attended by procedural irregularities, that the failure to reassign him was unlawful and that his post had not been abolished. These generally are the remaining issues advanced in these proceedings. The Tribunal is satisfied that the conclusions reached by the HBA are correct as is its reasoning, subject to the observations in the preceding considerations.

16. The complainant seeks moral and exemplary damages for what is described in the brief as the "egregious three (3) year delay in the internal appeal process" refined, in the rejoinder, to 19 months for the HBA to deal with the internal appeal and a further four months for the decision of the Director-General. It is true that the internal appeal did take some time to resolve but, in the circumstances, it was not a delay of a magnitude that would warrant the awarding of significant moral damages. Moreover the time the Director-General took no doubt included some time to reassess what was ultimately thought to be (correctly) a significant deficiency in the reprofiling exercise and assess what compensation should be offered to the complainant. This delay cannot be criticised. For the delay of 19 months the Tribunal awards moral damages in the sum of 3,000 Swiss francs.

17. The complainant is entitled to costs. They are assessed in the sum of 8,000 Swiss francs.

18. The complainant sought an oral hearing. However the Tribunal is satisfied that the complaint can fairly and adequately be dealt with on the written material provided by the parties.

DECISION

For the above reasons,

1. WHO shall pay the complainant 60,000 Swiss francs as material damages offset by any amounts already paid pursuant to the impugned decision to pay the complainant 25,000 Swiss francs.
2. WHO shall pay the complainant 28,000 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