

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D.

v.

WHO

125th Session

Judgment No. 3916

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. D. against the World Health Organization (WHO) on 5 October 2015 and corrected on 25 November 2015, WHO's reply of 7 March 2016, the complainant's rejoinder of 19 April and WHO's surrejoinder of 27 July 2016;

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 challenges the decision to terminate his fixed-term appointment pursuant to the abolition of his post.

In 2011, against a background of ongoing financial constraints, WHO conducted restructuring and reduction-in-force exercises at Headquarters in Geneva and at the regional offices. On 26 February it published Information Note 05/2011, entitled "Reprofiling Process at Headquarters", the purpose of which was to outline the process to be followed in order to allow staff to be matched to positions in the new structure. In the case of the WHO Regional Office for Africa (AFRO), a memorandum of 14 December 2011 from the Regional Director shows that an ad hoc committee was established in order to review the list of staff members for whom separation had been proposed and make any necessary recommendations to the Regional Director. That committee

submitted its conclusions and recommendations to the Regional Director on 16 December 2011.

By a letter of 17 January 2012, the complainant, who had held a fixed-term appointment as an Administrative Officer at AFRO since 2004, was informed that the Regional Director had decided to abolish his post and to initiate the formal reassignment process. He was further informed that he could opt for a separation by mutual agreement instead, but he declined that offer. By a memorandum of 30 August 2012, he was notified that, despite the efforts that had been made, the formal reassignment process had been unsuccessful in his case and his appointment would be terminated with effect from 30 November 2012.

On 26 October 2012 the complainant filed an appeal with the Regional Board of Appeal (RBA), requesting, *inter alia*, the cancellation of the decision of 17 January. In its report, the RBA stated that the decision to abolish the complainant's post had been prompted by financial constraints and was consistent with the applicable rules. The RBA concluded that the appeal was unfounded. On 8 August 2013 the complainant was informed that, in light of the conclusions of the RBA, the Regional Director had decided to maintain the decision to abolish his post.

On 20 September 2013 the complainant filed an appeal with the Headquarters Board of Appeal (HBA), challenging, *inter alia*, the reassignment procedure followed in his case, on the grounds that it was flawed in several respects, and the nature of his employment contract, insofar as the Organization had not offered him a continuing appointment. He requested that the decision of 30 August 2012 and the decision of which he had been notified on 8 August 2013 be set aside, that the reduction-in-force and reassignment procedures concerning him be cancelled, that he be reassigned immediately to a post matching his qualifications and experience and that he be awarded moral damages and costs "in addition to his salary". In its report, which it submitted to the Director-General on 27 April 2015, the HBA concluded that the appeal was receivable only insofar as it concerned the decision to terminate the complainant's appointment following an unsuccessful reassignment process. On the merits, it upheld some of the complainant's

arguments, including that the decision of 30 August 2012 was procedurally and legally flawed, that the Organization had breached its obligation to treat the complainant with dignity and respect and that the complainant had been the victim of “indirect discrimination”. It recommended that the decision of 30 August 2012 and the decision of which the complainant had been notified on 8 August 2013 be set aside, that damages be awarded in lieu of reinstatement, since the complainant had reached retirement age, and that legal costs be reimbursed upon submission of receipts.

By a letter of 17 June 2015, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to reject the HBA’s recommendations. She nonetheless awarded him compensation in the amount of 10,000 United States dollars for any loss of opportunity in respect of a post for which the complainant’s profile had been considered and ultimately rejected; additional moral damages in the amount of 10,000 dollars for the feeling of injustice arising from the fact that four AFRO administrative officers had benefited from lateral transfers; and costs in an amount not exceeding 3,000 dollars upon submission of receipts.

On 5 October 2015 the complainant filed his complaint with the Tribunal, requesting that the decision of 30 August 2012 and the impugned decision be set aside and that the reduction-in-force and reassignment procedures concerning him be cancelled. Since, owing to his age, he can no longer be reassigned, he requests appropriate financial compensation for the years that he would have served prior to retirement. He also claims damages for moral and professional injury, including damages for undue delay in the internal appeal proceedings, costs, “and any other positive measures that the Tribunal may wish to recommend”.

WHO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In his complaint, the complainant, whose appointment has been terminated, alleges that the reassignment process undertaken following the abolition of his post was flawed, that WHO breached its duty of care and that it ought to have converted his fixed-term appointment to a continuing appointment.

2. The complainant contends that because Information Note 05/2011 was not applied in his case, he was the victim of discrimination during the reassignment process. WHO argues that the Information Note applied only to Headquarters staff and was not applicable to the complainant because he was working at AFRO. The Tribunal observes that the Information Note concerns the reassignment of staff members in the specific context of WHO Headquarters. In this case, because the complainant was not working at Headquarters, the provisions in question, which concerned only Headquarters staff, were not applicable to him.

3. The Tribunal recalls that it has consistently held that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990, under 7, 2194, under 6(a), 2313, under 5, 3029, under 14, or 3787, under 3). With regard to reassignment, WHO Headquarters staff are not in an identical or similar situation to non-Headquarters staff. The Tribunal therefore considers that Information Note 05/2011 is not discriminatory.

4. The complainant alleges that WHO extended the reassignment period (from 17 January 2012 to 30 August 2012) for no valid reason and without regard for the applicable rules, that he had no contact with the Global Reassignment Committee (GRC) and that he received no information during the reassignment process. The Organization maintains that there is no rule establishing a time frame

– which, moreover, varies on a case-by-case basis – between the end of the reassignment period and the taking of a reassignment decision, and it states that the reassignment period began on 18 January 2012 and ended on 18 July 2012. It adds that the outcome of the process was delayed by the issuance of the report of the GRC on 27 August 2012, when a large number of cases were being handled at the same time. It also points out that this delay made it possible to postpone the effective date of termination of the complainant’s appointment.

5. Staff Rule 1050.6 states that “[t]he reassignment period will end within six months from its commencement”. In this case, the complainant was notified of the abolition of his post on 17 January 2012 and the decision stating that the reassignment process had been unsuccessful was issued on 30 August 2012, seven and a half months later. Thus, the Organization implicitly extended the reassignment period. It cannot reasonably contend that this period ended on 18 July 2012, given that the complainant was not informed of the termination of his appointment until 30 August 2012. The Tribunal therefore considers that WHO failed to observe the time limit for the complainant’s reassignment pursuant to the Staff Rules and thus violated the principle of *tu patere legem quam ipse fecisti* (see, for example, Judgment 2170, under 14). The complainant is therefore entitled to compensation for moral injury.

6. With regard to the allegation that the complainant received no information during the reassignment process, the file shows that while WHO established a reassignment committee – namely, the Global Reassignment Committee – with a view to reassigning the staff members whose posts had been abolished, there is no evidence that the Committee met with the complainant. The Tribunal’s case law has it that administrative bodies have a duty to explore all existing reassignment options with the person in question (see Judgments 2902, under 14, 3439, under 9, and 3755, under 9). In this case, the complainant had no opportunity to participate in the reassignment process. The Tribunal therefore considers that the Organization breached its obligations.

7. The complainant submits that the reassignment process lacked transparency because the AFRO Ad Hoc Committee had simply examined the budgetary issue rather than reviewing the reassignment proposals in depth. He adds that the GRC rejected his candidature for posts that matched his profile. The Organization asserts that the reassignment procedure was followed scrupulously and in accordance with the applicable rules. It points out that only the GRC, and not the AFRO Committee, had the authority to deal with reassignments, and that the Director-General has already granted the complainant compensation in the amount of 10,000 United States dollars for any loss of opportunity in respect of a post to which he might have been reassigned.

8. According to the memorandum of 14 December 2011 from the Regional Director of AFRO, the Ad Hoc Committee was established in order to review the list of staff members for whom separation had been proposed and make any necessary recommendations to the Regional Director. Having read this document, the Tribunal notes that the AFRO Ad Hoc Committee was not involved in the reassignment process, which did not fall within its mandate. Therefore, the complainant's allegation that the Committee lacked transparency during the reassignment process is ill founded.

9. The Tribunal also notes that by awarding the complainant compensation in the amount of 10,000 United States dollars, WHO acknowledged that his candidature for one of the posts matching his profile had not been given due consideration.

10. The complainant further alleges that, at the same time as it was abolishing numerous posts, WHO created new posts to be filled solely through local recruitment, in violation of the applicable rules. The Organization considers that it is free to restructure its services as it chooses and that the new posts to be filled locally could not be taken into account during the reassignment process.

11. Pursuant to Staff Rule 1050.2, “[w]hen a post held by a staff member with a continuing appointment, or by a staff member who has served on a fixed-term appointment for a continuous and uninterrupted period of five years or more, is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member occupying that post, in accordance with procedures established by the Director-General [...]”. In this case, it was therefore incumbent on the Organization to make every effort to reassign the complainant, who had been employed by WHO without interruption from 2004 to 2012, when his appointment was terminated. The Tribunal notes that by creating new posts to be filled solely through local recruitment, the Organization, through its own actions, limited the reassignment options of AFRO administrative officers, including the complainant, whose posts were abolished. In so doing, it restricted the opportunities for reassignment whereas it was incumbent on it to seek or expand them. WHO therefore failed to abide by its own rules.

12. The complainant also alleges that WHO displayed favouritism by granting four of the 27 AFRO administrative officers lateral transfers without following the formal reassignment procedure. The Organization is of the view that it has provided sufficient compensation by awarding the complainant 10,000 United States dollars.

13. The Tribunal considers that in granting this compensation, WHO implicitly acknowledged that it had violated the principle of equal treatment.

14. The complainant alleges that WHO showed a lack of respect for him by failing to reassign him, notwithstanding his many years of outstanding service with the Organization and his wide range of skills. He adds that it was in fact because of his age that he was not reassigned. WHO maintains that the GRC made considerable efforts to reassign the complainant.

15. The Tribunal notes that the record, including the report of the HBA, shows that the GRC recommended that the complainant not be reassigned because his retirement date was less than three years away. Furthermore, it rejected his candidature for a two-year appointment without explanation. Therefore, WHO breached the duty of care it owed to the complainant.

16. The complainant alleges that the Organization's refusal to offer him a continuing appointment had a negative impact on his reassignment. WHO asserts that with regard to "preferential treatment", Staff Rule 1050.2 makes no distinction between fixed-term and continuing appointments; thus, if the complainant had held a continuing appointment, that circumstance would have had no impact on the outcome of the reassignment process. The Tribunal considers that this allegation must be rejected as the failure to reassign the complainant was not based on the nature of his appointment with WHO.

17. The evidence shows that the internal appeal proceedings, which began in October 2012, did not conclude until 17 June 2015 – more than two and a half years later – with the Director-General's decision regarding the recommendations of the HBA. Such a delay is unreasonable and entitles the complainant to compensation for moral injury.

18. It follows that there were several flaws in both the reassignment process and the internal appeal proceedings, which caused the complainant moral and material injury that WHO must redress.

19. In light of the specific circumstances of the case, including the fact that the complainant has reached retirement age, the Tribunal considers that in addition to the damages that he has already been awarded by the Director-General, he should be granted compensation in the amount of 20,000 United States dollars as redress for the material injury resulting from the loss of an opportunity to be reassigned to a post within the Organization, and compensation in the amount of 25,000 dollars for the moral injury suffered as a result of the flaws in

the impugned decision and the undue delay in the internal appeal proceedings.

20. The complainant, who succeeds in part, is entitled to costs, which the Tribunal sets at 5,000 United States dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant material damages in the amount of 20,000 United States dollars.
2. WHO shall pay the complainant moral damages in the amount of 25,000 United States dollars.
3. WHO shall also pay the complainant costs in the amount of 5,000 United States dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

GIUSEPPE BARBAGALLO PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ