

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

T.
v.
WHO

125th Session

Judgment No. 3917

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. D. T. against the World Health Organization (WHO) on 5 October 2015 and corrected on 17 December 2015, WHO's reply of 13 April 2016, the complainant's rejoinder of 25 May 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 continuing 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, including the Regional Office for Africa (AFRO). 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.

By a letter of 19 August 2011, the complainant, who had held a continuing appointment as an Administrative Officer at AFRO since 2007, 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 this offer. By a memorandum of 30 May 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 31 August 2012.

On 9 July 2012 the complainant filed an appeal with the Regional Board of Appeal (RBA), challenging the decision of 30 May. 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. By a memorandum of 15 March 2013, the Regional Director informed the complainant that in light of the conclusions of the RBA, his appeal was rejected.

On 8 May 2013 the complainant filed an appeal with the Headquarters Board of Appeal (HBA), requesting that the decisions of 30 May 2012 and 15 March 2013 be set aside, that the reduction-in-force and reassignment procedures concerning him be cancelled, that he be reassigned to a post matching his qualifications and experience until his retirement at the end of September 2013, 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 upheld some of the complainant's pleas. It considered that there were several procedural flaws in the decision of 30 May 2012, 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 decisions of 30 May 2012 and 15 March 2013 be set aside, that damages be awarded since reinstatement had become impossible and that legal costs be reimbursed upon submission of receipts. The HBA also made three general recommendations, including on the issue of reassignment.

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 moral damages in the amount of 10,000 United States 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 decisions of 30 May 2012, 15 March 2013 and 17 June 2015 be set aside; that the reduction-in-force and reassignment procedures concerning him be cancelled; that he be granted "administrative reinstatement", including the payment of salary and benefits, as if he had continued to work for WHO until the date of his retirement; that he be awarded damages for moral and professional injury, including damages for the undue delay in the internal appeal proceedings; and, lastly, that he be awarded 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 several flaws in the reassignment process undertaken following the abolition of his post, breach of WHO's duty of care, breach of the duty of transparency, and discrimination against him.

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. According to the complainant, the reassignment process lacked transparency insofar as the Administration never contacted him and he was not offered any post or training. He adds that the Organization did not make serious efforts to reassign him and that the Global Reassignment Committee (GRC), which is responsible for identifying reassignment opportunities, committed errors in reviewing posts and matching them with his skills. WHO considers that the reassignment procedures were followed scrupulously and in accordance with the applicable rules. It submits that the abolition of numerous posts at AFRO made the reassignment exercise difficult because many qualified people were under reassignment at the same time.

5. The written submissions show that while the Organization established a reassignment committee – the GRC – in order to reclassify 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 the 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 WHO breached its obligations.

6. The Tribunal recalls that when an organization has to abolish a position occupied by a staff member holding a continuous appointment, it has a duty to do all that it can to reassign that person, as a matter of priority, to another post matching her or his 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, 2830, under 9, and 3755, under 6).

The written submissions show that the complainant's qualifications and professional experience made him eligible for assignment to three vacant posts. The fact that numerous posts at AFRO were abolished is not in itself a valid reason for not reassigning the complainant.

7. The complainant also alleges that WHO displayed favouritism by granting four of the twenty-seven 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.

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

9. The complainant asserts that the reassignment period was extended from 20 February to 18 May 2012 without explanation or prior notice. He claims that the Organization violated Staff Rule 1050.6 and Staff Rule 1050.2.4 (in its pre-2012 version) as well as subsection III.10.11, paragraphs 240 and 260, of the Human Resources e-Manual. WHO maintains that there is no rule establishing a time limit within which a decision on reassignment must be taken following the end of the reassignment period; the time taken varies on a case-by-case basis. It adds that, in this case, the reassignment period began on

20 August 2011 and ended on 20 February 2012. The outcome of the process was delayed by the issuance of the report of the GRC on 18 May 2012, when a large number of cases were being handled at the same time. The Organization also points out that this delay made it possible to postpone the effective date of termination of the complainant's appointment.

10. Staff Rule 1050.6 states that “[t]he reassignment period will end within six months from its commencement. This period may only be exceptionally extended by the Director-General for up to an additional six months”. According to subsection III.10.11, paragraph 260, of the Human Resources e-Manual, the GRC may recommend to the Director-General that the reassignment period be extended in certain specific cases.

The effect of these two provisions is that the reassignment period is six months in duration and may be extended for a further six months. In this case, the reassignment period began on 20 August 2011, the day after the complainant was notified of the abolition of his post, and should therefore have ended on 20 February 2012. WHO asserts that it ended on that date but provides no evidence in support of its assertion. The decision stating that the formal reassignment process had been unsuccessful was not issued until 30 May 2012, in other words, after a period of more than nine months. Thus, WHO implicitly extended the reassignment period. Even though there is no established time limit within which a decision on reassignment must be taken following the end of the reassignment period, the Organization cannot wait more than three months before informing the person concerned of the decision. By doing so in this case, 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.

11. 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 alleges that he was a victim of indirect discrimination and suspects

that WHO failed to reassign him on account of his age. The Organization maintains that the complainant was not reassigned for objective reasons relating to his qualifications and experience.

12. These allegations of the complainant are untenable. He provides no evidence that the reassignment process was unsuccessful because of his age. He himself states that these are “suspicions”, and allegations of discrimination cannot be based on mere suspicion.

13. The written submissions show that the internal appeal proceedings, which began in July 2012, did not conclude until 17 June 2015 – almost three 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.

14. 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.

15. 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 40,000 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 20,000 dollars for the moral injury suffered as a result of the various flaws in the impugned decision and the undue delay in the internal appeal proceedings.

16. The complainant, who succeeds in part, is also 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 40,000 United States dollars.
2. WHO shall pay the complainant moral damages in the amount of 20,000 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