

N.
v.
WHO

125th Session

Judgment No. 3918

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. N. against the World Health Organization (WHO) on 13 October 2015 and corrected on 8 February 2016, WHO's reply of 12 May, the complainant's rejoinder of 24 June and WHO's surrejoinder of 3 October 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 a wide-scale restructuring at Headquarters in Geneva, under the direction of the Director-General, and at the regional offices, including the Regional Office for Africa (AFRO), under the responsibility of each Regional Director. In AFRO, the financial crisis led the Regional Director to abolish several posts and a Staffing Review Ad Hoc Committee was created to review the list of staff whose separation from service was proposed and to make necessary recommendations to the Regional Director. On 1 February 2011 WHO published 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.

By a letter of 19 August 2011 the complainant, who had held a continuing appointment at AFRO since 2007, was informed that his post was to be abolished with immediate effect, but that, in accordance with the provisions of Staff Rule 1050.2 and subsection III.10.11 of the Human Resources e-Manual, the Global Reassignment Committee (GRC) would initiate the formal reassignment process, unless he preferred to opt for a separation by mutual agreement. The complainant declined the offer of a separation by mutual agreement.

By a memorandum of 30 May 2012 he was notified that no suitable assignment had been identified and that the Director-General had decided to terminate his appointment with effect from 31 August 2012. On 22 July he filed an appeal with the Regional Board of Appeal (RBA) against that decision. The RBA issued its report on 6 June 2013, concluding that the abolition of the complainant’s post was due to financial constraints and complied with the applicable rules, and that the appeal was therefore not justified. Agreeing with that conclusion, the Regional Director rejected the appeal on 24 June 2013.

The complainant filed an appeal with the Headquarters Board of Appeal (HBA) on 9 August 2013. He requested the cancellation of the reassignment process as far as he was concerned, a proper inquiry into the nature of the new posts which were created in AFRO following the abolition of the other posts, his immediate reinstatement in a post suited to his qualifications and experience until his retirement in 2017, compensation for moral and professional injury, financial compensation for undue delay in the procedure before the RBA and reimbursement of legal costs.

In its report, which it submitted to the Director-General on 27 April 2015, the HBA accepted some of the complainant’s pleas and recommended the quashing of the decisions of 30 May 2012 and 24 June 2013, an award of damages in lieu of reinstatement and the reimbursement of legal costs. By a letter of 17 June 2015, which constitutes the impugned decision, the Director-General informed the complainant that she did not accept the HBA’s recommendations and

that she had dismissed his appeal. Nonetheless, she acknowledged that the complainant had lost an opportunity to be reassigned, entitling him to compensation of 20,000 United States dollars, and that he had been a victim of unequal treatment in that four staff members in AFRO had benefited from lateral transfers, without the intervention of the GRC, entitling him to additional compensation in the amount of 10,000 dollars. Lastly, she awarded him 3,000 dollars in costs.

In his complaint, the complainant seeks the cancellation of the reassignment process as far as he is concerned, a proper inquiry into the abolition of his post and the nature of the new posts created, his immediate reinstatement until retirement in 2017, and the payment of all entitlements during that time, compensation for moral and professional damages, financial compensation and the reimbursement of all legal costs.

WHO asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant commenced employment with WHO in July 1982. In 2007 he was granted a continuing appointment and was scheduled to retire in July 2017 aged 60. However, in August 2011 a decision was made to abolish his post with immediate effect. Thereafter processes were followed to ascertain whether the complainant could be reassigned to another post. He was not reassigned and by a memorandum dated 30 May 2012, the complainant was informed that the Director-General had decided to terminate his appointment effective 31 August 2012.

2. The complainant appealed to the RBA, unsuccessfully, and then to the HBA. He was substantially successful in his appeal to the HBA. In its report submitted to the Director-General on 27 April 2015 (which was a balanced and thoughtful report), the HBA made a number of recommendations favourable to the complainant. However, by a decision of the Director-General communicated to the complainant by a letter dated 17 June 2015, those recommendations were rejected, as

were a number of the conclusions of the HBA. Nonetheless, the Director-General did accept two of the conclusions of the HBA about the reassignment process and that, in the result, the complainant may have lost an opportunity to be reassigned within the Organization. The Director-General concluded that this flaw entitled the complainant to moral damages which she assessed in the sum of 20,000 United States dollars. In addition, the Director-General concluded that four other staff members in AFRO had been treated differently within the framework of the reassignment process and apparently accepted this involved discrimination against the complainant, for which the Director-General decided a sum of 10,000 United States dollars should be paid to the complainant by way of moral damages. The decision of the Director-General of 17 June 2015 is the decision impugned in these proceedings.

3. In his brief, the complainant argues that the reassignment process was flawed both procedurally and substantively. He also argues that WHO did not treat him with dignity and respect. He also raises delay in the internal appeal at the regional level. The relief he seeks is:

- “(a) The cancellation of his reassignment process as based on discrimination, non[-]application of guidelines and incomplete and biased review of the facts;
- (b) A proper inquiry into [the abolition of his post and] the nature of the new posts created in the financial sector of AFRO;
- (c) His immediate rein[statement] to a position suited to his qualifications and experience until his retirement in 2017 [and the payment of all entitlements during that time];
- (d) The compensation for moral and professional damages after an exemplary career with the Organization;
- (e) Financial compensation for discrimination and denial of opportunity for another position;
- (f) Reimbursement of [all] legal costs.”

4. It is convenient in this particular case to address the relief sought before considering the merits of the complainant’s case, bearing in mind that at least some aspects of the case were accepted in the impugned decision of 17 June 2015. The first point to be made is that this judgment of the Tribunal is being given after the date on which the

complainant would have retired from WHO. Accordingly, there would be no utility in making orders to the same effect of the proposed orders in (a) and (c) above. What is sought by order (b) is obscure, though if it is directed to the question of whether the complainant should now be reassigned to one of the new posts arising from the restructuring, there would be no utility in making the order for the reason just given in relation to the orders in (a) and (c). Proposed order (e) is, in substance, already comprehended by proposed order (d). Proposed order (d) would be made, in an amount determined by the Tribunal, if the moral damages awarded in the impugned decision of 17 June 2015 were inadequate or there were additional bases on which moral damages should be awarded. Proposed order (d) would also be made, in an amount determined by the Tribunal, if material damages should be awarded.

5. Turning immediately to the question of material damages, they should indeed be awarded. As noted earlier, the Director-General accepted in her decision of 17 June 2015 that the complainant had lost an opportunity to be reassigned to another position within the Organization because of a failure, in the reassignment process, to consider the complainant for one of two specified positions. This is not contested by WHO in its reply. The Tribunal's case law establishes that, in such circumstances, a complainant is entitled to material damages (see, for example, Judgments 3756, consideration 14, 3755, consideration 20, 3754, consideration 21, 3753, considerations 15 and 17, and 3752, consideration 17). While it is not for the Tribunal to determine whether the complainant would have been reassigned, it is noted that in the letter of 17 June 2015 the Director-General said: "it was most unfortunate that your [appointment] was terminated after your long career within the Organization. I assure you that this in no way reflects the assessment made of your services and competencies." Plainly enough reassignment would have been effected, if possible. At the time of the complainant's termination of appointment, he had approximately five years remaining employment under his continuing appointment, was 55 years old and had served as an official of WHO for a little over 30 years. These factors influence the assessment of the material damages, particularly the fact

that the complainant was some considerable time off retiring. The Tribunal assesses the material damages for this lost opportunity in the sum of 80,000 United States dollars.

6. The Tribunal now considers the issues raised by the complainant in his pleas, which are not implicitly dealt with by the award of material damages as discussed in the preceding consideration. The first concerns the lengthy time the reassignment process took, which was said to have caused the complainant stress and anxiety. It is true that Staff Rule 1050.6, which the complainant relies upon, contemplates the reassignment process will take six months, and that it can only be extended exceptionally by the Director-General for up to an additional six months. The HBA concluded that the process did not start for some period after the complainant was notified of the abolition of his post and should have concluded on 23 February 2012 whereas the GRC did not report until 18 May 2012. In her decision of 17 June 2015, the Director-General defends the time taken in several ways. Firstly, as a result of the budgetary constraints within WHO, the GRC had to handle a much larger number of cases of reassignment. The three additional months (after 23 February 2012) were necessary to allow the GRC to complete its analysis not only of the complainant's position but the position of other staff members. Secondly, the additional time allowed the GRC to receive further information from the regional office relating to the complainant's situation. WHO, in substance, repeats these arguments in its reply and adds that the delay was to the complainant's benefit because it postponed, as it turned out, the effective date of termination. However, having established a procedural rule about the time the reassignment process should take, WHO was bound to comply with it (see, for example, Judgment 2170, consideration 14), whatever, in practical terms, might be thought to have been positive elements accruing to the complainant. There is no reason to doubt that the length of time taken did cause additional stress and anxiety to the complainant. For this, the complainant is entitled to moral damages assessed in the sum of 15,000 United States dollars.

7. Information Note 05/2011 (the Note), promulgated by WHO in February 2011, outlined a process to follow in order to allow staff members to be matched to positions in a new structure following a major restructuring exercise. In terms, the Note applied to Headquarters staff only in relation to a restructuring of Headquarters. The HBA concluded that the Note could not have applied to the complainant and that it had been “drafted at a time when due to considerable budgetary constraints, the Organization had to review the Headquarters staffing structure in a major way”. What appears to be the complainant’s argument is that, even if the Note applied only to Headquarters staff, it was discriminatory, citing Judgment 3071, consideration 12. The Tribunal is not satisfied the Note was discriminatory. It was formulated for the purpose of addressing, and did address, the particular circumstances at Headquarters. In any event, ultimately, this argument is only material if the failure to apply the Note had the result that a possibility was lost to the complainant to be reassigned, which would sound in material damages. However, as discussed earlier, that is already demonstrated on another basis. This question is an immaterial one.

8. Similar comments can be made about the complainant’s arguments that the GRC was negligent and had overlooked essential facts, that no consideration was given to his seniority, that WHO failed to propose posts of a lower grade and that four staff members were transferred to posts without the intervention of the GRC, which is argued in the complainant’s brief to have “deprived [him] of opportunities”.

9. The HBA found, correctly, that there had been a lack of communication with the complainant during the reassignment procedure. The complainant relies on this lack of communication in his brief as a failure to treat him with dignity. The HBA’s conclusion was rejected by the Director-General in her letter of 17 June 2015 in which she noted, in particular, that the complainant “did not try to contact the GRC or the administration to inquire about the status of [his] reassignment”. This issue was not addressed, expressly, by WHO in its pleas. An organisation which has restructured, abolished positions, and is in the process of trying to reassign staff members whose positions

have been abolished is under a positive duty to communicate with them in a way that promotes the likelihood of reassignment (see, for example, Judgments 2902, consideration 14, 3439, consideration 9, and 3755, consideration 9). It is no answer to suggest that the staff member is under a duty to inform herself or himself and failed to do so. However, again, this is another manifestation of the flawed reassignment process by which the complainant was deprived of the opportunity of being reassigned. The Tribunal has already indicated that material damages should be awarded for that lost opportunity.

10. The last issue raised by the complainant in his brief concerned the delay in the internal appeal process before the RBA. The HBA concluded that the time taken was not unreasonable. The Tribunal is not satisfied this conclusion should be disturbed or is incorrect.

11. In addition to sums already awarded by the Director-General, the complainant is entitled to material damages in the sum of 80,000 United States dollars, additional moral damages of 15,000 dollars and costs assessed in the sum of 5,000 dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant 80,000 United States dollars by way of material damages.
2. WHO shall pay the complainant a further 15,000 United States dollars by way of moral damages.
3. WHO shall pay the complainant 5,000 United States dollars costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ