

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**A.**

**v.**

**WHO**

**126th Session**

**Judgment No. 4029**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. K. A. against the World Health Organization (WHO) on 17 February 2016 and corrected on 18 April, WHO's reply of 8 August, the complainant's rejoinder of 1 October and WHO's surrejoinder of 16 December 2016;

Considering Articles II, paragraph 5, and VII 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 not to grant him the two-step within-grade increase which, he argues, WHO ought to have granted him at the time of his appointment under a fixed-term contract.

Between August 1986 and June 1994 the complainant worked for the WHO Regional Office for Europe under short-term appointments. On 21 December 1994 he was granted a fixed-term appointment as an Office Caretaker/Gardener at grade C.2, step 1. Effective 1 November 2000, the Regional Director approved the reclassification of his post at grade C.3 and his simultaneous promotion to that grade. In 2004 his post was reclassified at grade C.4 and in 2007 he was granted a continuing appointment.

By a memorandum of 20 December 2000, the complainant's supervisor, Mr C.N., requested the approval of the Director of Services, Ms Z.J., for the reclassification of the complainant's post at grade C.3 and he added: "I have looked at the level at which [the complainant] commenced his fixed-term appointment and it would appear that he commenced at step 1 in his grade whereas he already has several years of service and other staff members in the same situation were given a minimum of 2 within grade steps upon commencement of their fixed-term contracts. Your support in putting these matters into effect as soon as possible would ensure that [the complainant] receives the recognition he deserves." Ms Z.J. indicated her strong support for Mr C.N.'s proposal by a handwritten note on the memorandum.

At a meeting held on 13 August 2012, the complainant was informed that effective 31 May 2013 his post would be abolished due to the relocation of the Regional Office and that efforts would be made to reassign him. The possibility of a Separation by Mutual Agreement (SMA) was also raised at that meeting. Although the complainant initially accepted the offer of the proposed SMA, he eventually turned it down, refusing to waive his right to bring an appeal against WHO.

On 28 August 2012, while inspecting his personnel file, the complainant discovered the December 2000 memorandum and became aware of Mr C.N.'s proposal contained therein for the award to him of a two-step within-grade increase. On 4 September 2012, during a meeting with Ms Z.J., now Regional Director, to discuss the abolition of his post, he handed her a letter in which he asked to be exceptionally granted a meritorious two-step within-grade increase for long service under Staff Rule 555.1, with retroactive effect from August 2007. The next day, the complainant sent an email to the Human Resources Department providing it with a summary account of his meeting with Ms Z.J. The Human Resources Department responded in an email of 6 September 2012 that all issues raised in the December 2000 memorandum had been addressed and that, given the complainant's upgrade from C.1 to C.2 upon his appointment to a fixed-term post in 1994, his assignment to grade C.2, step 1, was correctly established and implemented at that time.

A meeting was held to discuss the question and on 27 September 2012 the complainant wrote another email to the Human Resources Department asserting that it had been unfair for him not to have been granted a two-step increase upon appointment on a fixed-term contract in 1994, i.e. assigned to step 3 of grade C.2. He added that the reclassification of his post at grade C.3 in 2000 did not correct the unfairness of his grading between 1994 and 2000. Further exchanges between the parties culminated in a letter of 5 February 2013, in which the Human Resources Department confirmed in substance the position it had taken in its 6 September 2012 email, adding that the applicable rules did not allow it to accept a retroactive claim as far back as 1994 and there was no evidence of administrative oversight or error in 1994 or 2000.

On 3 April 2013, the complainant submitted to the Regional Board of Appeal (RBA) a notice of intention to appeal against the 5 February 2013 decision. On 16 April 2013 he submitted his statement of appeal. In its report of 10 October 2013, the RBA recommended that he be offered financial compensation for the loss of income and that he be granted a two-step within-grade increase retroactively from 1 June 2010, i.e. 36 months before his separation from WHO. By a letter of 13 December 2013, the Regional Director informed the complainant of her decision not to accept the RBA's recommendations and to dismiss his appeal as irreceivable and, in any event, unfounded.

On 7 February 2014 the complainant submitted a notice of intention to appeal against that decision to the Headquarters Board of Appeal (HBA), and he filed his statement of appeal on 20 March 2014. In its report of 6 October 2015, the HBA recommended that the appeal be dismissed. By a letter of 20 November 2015, the Director-General informed the complainant of her decision to endorse the HBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to declare the impugned decision null and void and to order WHO to implement the memorandum of 20 December 2000 by granting him a two-step within-grade increase retroactively from 1 June 2010. He claims a lump sum equal to what he would have earned if he had been granted the two-step increase while still in active service and the amount of 375,000 Danish Kroner (DKK)

to help cover his personal and family expenses, including health insurance, in the period between his separation from WHO on 31 May 2013 and the date on which he would have retired, in August 2014. He requests that his first eight years of service under temporary contracts be taken into account in the calculation of his total length of service and that WHO be ordered to pay him a lump sum corresponding to the two-step within-grade increase awarded for long service and to arrange that his pension is adjusted accordingly and paid to him retroactively. He asks the Tribunal to declare the decision to abolish his post 14 months before his mandatory retirement date unlawful and to award him 344,000 DKK in moral and material damages. Similarly, he asks it to declare the decision to withdraw the proposed SMA unlawful and to award him the lump sum proposed therein, estimated at 190,000 DKK. He seeks an order that WHO provide him with a Certificate of Service and he claims 20,000 Swiss francs in costs.

WHO asks the Tribunal to dismiss the complaint.

#### CONSIDERATIONS

1. The central issue in this complaint is whether the complainant should have been granted a two-step within-grade increase at the time of his initial fixed-term appointment in December 1994. WHO does not dispute the receivability of the complaint in this respect and does not raise any issue about time limits. However, WHO submits, and the Tribunal accepts, that the complainant's claims for a two-step within-grade increase for meritorious long service, his challenges to the legality of the abolition of his post and the terms of the SMA he was offered, as well as his allegations concerning his early years of service in support of his claims of bias and personal prejudice are irreceivable for failure to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute.

2. An overview of the appointments contemplated in the WHO Staff Regulations and Staff Rules and the WHO Manual provisions in force at the material time is useful. Except for the Deputy Director-General, Assistant Directors-General and Regional Directors, staff members were granted either permanent or temporary appointments (Staff Regulation 4.5). A permanent appointment was a “career service appointment” without time limit (Staff Rule 420.1). Relevantly, there were two categories of temporary appointments: fixed-term appointments having a duration of one year or more, and short-term appointments having a duration of less than one year (Staff Rule 420.2). In the Staff Rules, there was only one rule pertaining to short-term appointments. It provided that “[t]he Director-General may appoint short-term staff for conference and other short-term service without regard to the provisions of other sections of the Staff Rules” (Staff Rule 1320).

3. At the material time, the provisions governing all aspects of short-term appointments were in the WHO Manual Part II, Section 11. A short-term staff member was defined as a person appointed for a period of less than one year “to perform specific duties” under the supervision of a WHO officer and received regular remuneration calculated at either a monthly or a daily rate (paragraph 15). There were three categories of short-term staff: conference staff, language staff and non-language staff, the complainant being in the last-mentioned category. Non-language staff were under the control of the unit utilising their services. The staff member’s engagement and the determination of the rate of pay were authorized by the unit in consultation with Personnel (paragraph 90). For short-term General Service staff employed outside Geneva, the rates of pay were established by the Regional Director based either on step 1 of the grade in an existing WHO salary scale at which a post with the same duties and responsibilities would be classified; or the best prevailing local practice (paragraph 310, see also paragraphs 240.1 and 240.2).

4. For the first three years after the complainant joined WHO in 1986, he was employed part-time on short-term temporary appointments. Subsequently, he was employed full-time on short-term temporary

appointments until 21 December 1994, when he was granted a fixed-term temporary appointment. It is convenient to note here that from the time the complainant joined WHO and throughout the material time, the General Service staff on short-term appointments were remunerated at the rate equivalent to the salary of a grade C.1, step 1, fixed-term appointment. Staff members holding short-term appointments did not receive the equivalent of any step-in-grade increases applicable to the staff members with fixed-term appointments.

5. In the meantime, on 5 November 1992, a new post, Post No. 6.3030, classified at grade C.2 with the functional title of Office Caretaker/Gardener and an effective date of 1 July 1993 was created. This is the post to which the complainant was appointed on a fixed-term contract at step 1 of grade C.2 in December 1994. Subsequently, in February 2001, the complainant's post was reclassified from grade C.2 to grade C.3 with an effective date of 1 November 2000 and reclassified again in 2004 from grade C.3 to grade C.4.

6. As set out above, this complaint stems from the complainant's discovery in August 2012 of Mr C.N.'s December 2000 memorandum to the Director of Services. Mr C.N. was the complainant's former supervisor. The memorandum concerned the upgrading of the complainant's post and a new rental agreement for the premises the complainant occupied on WHO property. In the penultimate paragraph of the memorandum, Mr C.N. also observed that "[f]urther to the above, I have looked at the level at which [the complainant] commenced his fixed-term appointment and it would appear that he commenced at step 1 in his grade whereas he already ha[d] several years of service and other staff members in the same situation were given a minimum of 2 within grade steps upon commencement of their fixed-term contracts". Mr C.N. added that "[y]our support in putting these matters into effect as soon as possible would ensure that [the complainant] receives the recognition he deserves".

7. The discovery of the December 2000 memorandum, together with the notification of the abolition of the complainant's post and the various options open to the complainant in the circumstances resulted in several meetings and exchanges of written communications between the complainant and the Administration. The following three exchanges concern the two-step within-grade increase. On 5 September 2012 the complainant informed the Human Resources Department about his meeting with the Regional Director, Ms Z.J., a day earlier. The complainant reported that the Regional Director recalled having approved the two-step increase, as recommended by Mr C.N., and also recalled that she was happy for having taken the decision at the time. The complainant also noted the Regional Director's concern when she was informed that the two-step increase was never implemented.

8. On 6 September 2012 the Human Resources Department responded by an email stating:

"As regards your request below, I have reviewed the [Human Resources Department] records and can confirm that all issues raised by [Mr C.N.] in his memorandum dated 20 December 2000 were addressed as follows:

- A new lease agreement was concluded and signed by you on 16 February 2001.
- I have reviewed again the calculation of your step on fixed-term appointment; i.e. granting you two steps in the C1 grade (C1 step 3 = Dkk 141,775) and compared it to the C2 step 1 (Dkk 144,664). This reflects an increase of more than two steps upon appointment and promotion. Therefore, I can confirm that your step on fixed-term appointment and upgrade to C2 was correctly established and implemented at step 1.
- You received a letter dated 6 February 2001 informing you of your promotion from C2 to C3 grade level through reclassification of the position with a retro-active effective date of 1 November 2000."

9. In his 27 September 2012 email, the complainant clarified and explained his position as follows:

"1. My case is based on the unfairness of my appointment in 1994 at C2 step 1 and not at C2 step 3 and the consequences that this has had on my salary and pension. This is supported by the approved memorandum signed

by [the Director of Services] (now the [Regional Director]) and dated 20.12.2000.

2. [The Human Resources Department] implemented a reclassification of my position in 2000 at C3 step 6. However, this does not correct the unfairness of my grading between 1994 and 2000, as the number of years of previous experience in the Organization and the duties of the post already qualified me for this grade.”

10. In the letter of 5 February 2013, the Human Resources Department acknowledged the fact that the December 2000 memorandum, among other things, did raise the issue of the two-step increase and repeated the information and calculation provided in the 6 September 2012 email. The Human Resources Department added that the relevant Staff Rules did not permit the Administration to take action retroactively on a 12-year old claim and, in any event, there was no evidence of oversight or error in any of the administrative actions taken in 1994 and 2000. The complainant lodged an appeal to the RBA against this decision. Subsequently, he filed an appeal with the HBA against the Regional Director’s dismissal of his appeal to the RBA.

11. In the 20 November 2015 impugned decision, the Director-General accepted the reasoning and conclusions of the HBA and dismissed the appeal. In particular, the Director-General agreed with the HBA’s conclusions that the penultimate paragraph in the December 2000 memorandum could not be considered as a request by Mr C.N. for a two-step within-grade increase; the Staff Rule governing the salary determination was correctly applied; and the practice at issue would have been inconsistent with the Staff Rule. Accordingly, the Director-General concluded that there was no legal basis for a two-step within-grade increase upon the complainant’s initial fixed-term appointment. The Director-General also noted the HBA’s observation that taking into account the complainant’s fixed-term appointment in 1994 at grade C.2, his promotion in 2000 as a result of the reclassification of his post from grade C.2 to grade C.3, the complainant had obtained a salary increase that was more than a two-step within-grade increase.



12. The complainant maintains that the prevailing practice in 1994 was to grant staff serving for long periods under short-term contracts, otherwise known as “long-term short-term staff”, a two-step within-grade increase upon being granted their initial fixed-term appointment in recognition of their prior service. The complainant submits that in accordance with the existing practice at that time, as applied to other staff members in similar situations, his fixed-term appointment should have been at grade C.2, step 3, rather than grade C.2, step 1, as was the case.

13. WHO contends that the complainant’s within-grade step was correctly determined in accordance with the version of Staff Rule 320.1 in force at that time. In the absence of any exceptional circumstances regarding the complainant’s previous income level contemplated in that rule, his starting salary was properly fixed at grade C.2, step 1. WHO rejects the existence of a “legally binding practice” and points out that the complainant has failed to discharge his burden of proving the existence of the practice. In particular, Mr C.N.’s December 2000 memorandum and his letter of 18 January 2016, which the complainant adduces as proof of the alleged practice in the present proceedings, do not establish the existence of the practice. WHO also notes the Tribunal’s consistent case law that a practice cannot become legally binding if it contradicts a written rule already in force. In this case, the granting of additional steps within grade would have been in direct contradiction with Staff Rule 320.1.

14. WHO argues that even if the practice did exist, given that the complainant was promoted to a higher grade when he took up his initial fixed-term appointment, his prior work experience was acknowledged with the promotion. Thus, he would not have been entitled to receive additional steps within grade. Moreover, the complainant’s assertion that the practice was also applied in circumstances of promotion to a higher grade is illogical in view of the rationale of the practice to belatedly compensate staff members who had not received pay increases because of their temporary status. The rationale could not justify the granting of additional steps within grade to a staff member “who was promoted upon the conversion of his or her appointment to fixed-term”. WHO

also points out that the application of the practice could result in the unequal treatment of other staff members, whose prior service would not be acknowledged in the same way. Lastly, WHO adds that the evidence the complainant relies on in support of the existence of the practice is silent on the question whether the practice included the staff members who were promoted to a higher grade on the conversion of their temporary appointment to a fixed-term appointment.

15. It is convenient to deal first with WHO's assertion that the complainant's fixed-term appointment was a promotion. WHO states that "[o]n 1 July 1993, the complainant took up the C-1 post of Office Caretaker/Gardener" and then "[o]n 21 December 1994, the complainant was appointed on a fixed-term basis and promoted to C-2 level". Leaving aside the absence of any evidence in support of the first statement, it cannot be accurate. First, it is not disputed that throughout 1993 and up until December 1994, the complainant was still employed on short-term appointments. Having regard to the definition of a short-term staff member, the nature of the employment relationship between a short-term staff member and the Organization and the calculation of the remuneration as provided in WHO Manual Part II, Section 11, and detailed in consideration 3 above, staff members on short-term appointments were not assigned to and did not encumber classified posts. Although the complainant was assigned to perform some of the duties of this post in late June or early July 1993, he could not have "taken up" the post as stated.

16. Second, WHO's characterization of the complainant's initial fixed-term appointment as also being a promotion is at odds with the provisions of the Staff Rules in force at that time. Staff Rule 560.1 defined promotion as "the advancement of a staff member to a post of higher grade, as a result either of the reclassification of the post he occupies or of reassignment to a different post". In the complainant's case, neither of these events occurred. Thus, it is clear that when the complainant was granted his fixed-term appointment on 21 December 1994, he was not "promoted to C-2 level".

17. Turning to the existence of the practice at issue, WHO does not directly challenge the existence of the practice, instead it argues that the complainant has not discharged his burden of proof. Contrary to WHO's assertion, Mr C.N.'s December 2000 memorandum and his January 2016 letter do constitute evidence of the existence of the practice. Given that the statements in that letter were made by a WHO official, now retired, whose credibility and knowledge were not challenged, the statements are highly probative of the existence of the practice. It is also observed that the RBA did not question the existence of the practice. In this regard it stated: "This was the practice for all long-term short-term [...] staff converted to fixed-term at that time. The decision was taken as staff members on short-term contracts were not entitled to any Within-Grade increase as per the Staff Rules at that time. The granting of 2 steps upon conversion was a way to compensate for the fact that the [long-term short-term] staff 'lost' income during their short-term tenure as compared to staff on fixed-term contracts." Based on this evidence, the Tribunal finds that the practice was prevalent at the material time. Moreover, in view of the fact that Mr C.N. was the complainant's supervisor and was well aware of the fact that the complainant's initial fixed-term appointment was at grade C.2, his observation in the penultimate paragraph of the December 2000 memorandum is credible evidence that the practice was also applied when the initial fixed-term appointment was made to a post classified at a grade higher than C.1.

18. WHO's contention that the complainant's within-grade step was correctly calculated in accordance with Staff Rule 320.1 remains for consideration. Staff Rule 320.1 in force at the time provided:

"On appointment, the net base salary of a staff member shall be fixed at step 1 of the grade of the post he is to occupy. In exceptional circumstances it may be fixed at a higher step in the grade in order to maintain the staff member's former income level."

It is not disputed that the complainant's situation did not come within the exception in the Staff Rule.

As set out above, WHO submits that the practice at issue could not be legally binding as it was in direct contradiction with Staff Rule 320.1. Before dealing with the substance of this submission, it is

noted that this submission is at odds with the assertion stressed by WHO in its pleadings that the complainant's fixed-term appointment was a promotion. Although this proposition has been rejected, if it was indeed the case, then the terms of the appointment would have been governed by Staff Rule 320.2 and not Staff Rule 320.1.

19. It is well settled in the case law "that a practice cannot become legally binding if it contravenes a written rule that is already in force" (Judgment 3601, under 10). In Judgment 2959, under 7, the Tribunal explained that "a practice which is in violation of a rule cannot have the effect of modifying the rule itself". In this case, WHO initiated a practice for the benefit of long-term short-term staff members to address the concern that these staff members were not given any within-grade increases. The benefit provided in the application of that practice went beyond and was in addition to the provisions in Staff Rule 320.1. The practice did not modify Staff Rule 320.1 or affect the rights of other WHO staff members. Accordingly, the Tribunal concludes that the practice was legally binding.

20. Lastly, the principle of equality requires that persons in the same position in fact and in law must be treated equally. The failure to grant the complainant the two-step within-grade increase that at the material time was given to other long-term short-term staff members, who were in the same position as the complainant, constitutes unequal treatment and entitles the complainant to an award of material damages.

21. As the Director-General's 20 November 2015 decision involved reviewable error, it will be set aside, as will the Human Resources Department's 5 February 2013 decision. WHO will be ordered to pay the complainant material damages in an amount equivalent to the remuneration he would have received during the course of his employment if the two-step within-grade increase had been implemented at the time of his initial fixed-term appointment, over and above the remuneration he was in fact paid, together with interest on the total amount payable at the rate of 5 per cent per annum from the date of the complainant's separation from service to the date of payment.

WHO will also be ordered to pay the complainant costs in the amount of 1,000 Swiss francs.

22. The complainant's request for an order requiring WHO to provide him with a Certificate of Service is beyond the Tribunal's competence. However, it is noted that WHO has agreed to provide the complainant with a Certificate of Service upon request.

#### DECISION

For the above reasons,

1. The Director-General's 20 November 2015 decision and the Human Resources Department's 5 February 2013 decision are set aside.
2. WHO shall pay the complainant material damages as provided in consideration 21, above.
3. WHO shall pay the complainant costs in the amount of 1,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2018, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ