

111th Session

Judgment No. 3038

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V.U. A. against the World Health Organization (WHO) on 4 September 2009 and corrected on 20 November 2009, WHO's reply of 24 February 2010, the complainant's rejoinder of 28 April, corrected on 10 May, and the Organization's surrejoinder of 18 August 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is an American national born in 1954. He joined the Organization in 1993 as a Technical Officer at grade P.3 based in Cameroon, and was subsequently assigned to duty stations in Congo and South Africa. On 17 July 2000 he was promoted to the grade P.5 post of Manager of the Management Support Unit (MSU) within the Family and Community Health (FCH) cluster at WHO Headquarters. On 1 November 2003 he was reassigned with his post to the External

Relations and Governing Bodies (EGB) cluster as an External Relations Officer and Focal Point for the New Partnership for Africa's Development (NEPAD).

By a letter of 18 January 2006 he was informed that his post would be abolished, but that efforts were being made to reassign him through the formal process conducted by a Global Reassignment Committee, in accordance with the provisions of Staff Rule 1050.2 and WHO Manual paragraphs II.9.250 to II.9.370. He was invited to take an active role in the process by bringing potential reassignment options to the attention of the Committee. In the following 12 months the complainant applied for a number of vacant posts and the Committee made several recommendations for his reassignment, but these recommendations were not endorsed by the Director-General or the Acting Director-General. By a letter of 30 January 2007 the complainant was advised that the Global Reassignment Committee had not been able to identify a suitable alternative assignment and that, consequently, his appointment would terminate on 30 April 2007, pursuant to Staff Rule 1050.2.9. The complainant separated from service on 1 May 2007.

Prior to that, on 30 March 2007, the complainant filed a notice of intention to appeal against the decision to terminate his appointment, and on 30 June 2007 he submitted a full statement of appeal. He argued that that decision was tainted with procedural irregularities, personal prejudice, abuse of authority and lack of due care. He also argued that the Administration had not acted in good faith when it reassigned him to the EGB cluster in 2003, since it was clear that there were no budgetary resources to support his function in that cluster. In its report of 7 July 2008 the Headquarters Board of Appeal considered the appeal to be receivable only to the extent that it challenged the decision to terminate the complainant's appointment. It commended the Global Reassignment Committee for its efforts to identify suitable posts, and held that there was no evidence to support the decision not to reassign the complainant to any of these posts and ultimately to terminate his appointment. It concluded that the reassignment process had been flawed and that the Organization had failed in its duty of care

towards the complainant. It thus recommended that the decision to terminate his appointment be quashed and that he be reinstated in a post commensurate with his skills and experience or, if he did not wish to return to WHO, that a mutually agreeable compensation be negotiated. By a letter of 30 October 2008 the Director-General informed the complainant that she had decided to allow his appeal and that, in view of the fact that in June 2007 he had taken up a position in South Africa, the best way to provide him with the required redress would be through the negotiation of “mutually agreeable compensation”.

In the ensuing negotiations, the complainant’s counsel provided Human Resources Management (HRD) with an estimate of the complainant’s loss of earnings, initially calculated on the basis that his employment with WHO would have continued until his retirement, and subsequently adjusted to reflect his loss of income during the two years following the termination of his appointment. HRD requested proof of the complainant’s earnings during that period, in particular copies of his salary statements and tax returns. Counsel submitted copies of the complainant’s payslip for January 2009 and of his United States tax returns for 2007 and 2008. HRD then requested copies of the complainant’s South African tax returns. In the numerous exchanges that followed, counsel insisted that the Organization make an offer to the complainant, while HRD reiterated its request for additional information on his occupational earnings.

By a letter of 10 June 2009 counsel informed the Director-General that, in the absence of an offer from WHO, she considered the negotiations for an amicable settlement to be terminated. On 13 October 2009 HRD advised counsel that the Director-General had in principle agreed to an offer of compensation corresponding to two years’ salary, minus any earnings from other employment since June 2007, and sought a written undertaking that the amount indicated in the complainant’s payslip for January 2009 was a true and accurate indication of his monthly earnings from June 2007 to April 2009. In a letter of 30 October 2009 counsel provided the requested undertaking, while informing HRD that the complainant had filed a complaint with the Tribunal, which he would nevertheless withdraw if the

Organization made an acceptable offer. On 9 February 2010 WHO offered the complainant 201,816.70 United States dollars in final settlement on condition that he withdraw his complaint. By an e-mail of 16 February 2010 counsel informed the Organization that the complainant would accept an offer in the amount of 499,611.08 dollars.

B. The complainant argues that the abolition of his post was flawed, because it was based on his 2003 reassignment to the EGB cluster which, in his view, was irregular, biased and deceptive. Indeed, he was reassigned to a function without proper funding or a formal post description, and although it was agreed that his reassignment would be temporary, there was no subsequent review, nor any request for its continuation beyond the initial 12-month period. Moreover, no letter of reassignment was ever issued and the applicable rules, as set forth in WHO Manual paragraphs II.5.440 to II.5.465, were disregarded. He points out that, despite his repeated requests, the Administration did nothing to address the lack of funding and that, instead of moving him back to his post as MSU Manager when it became clear that his position in the EGB cluster was no longer sustainable, it decided to abolish his post without giving any reasons.

The complainant asserts that the reassignment process and the decision to terminate his appointment were tainted with procedural irregularities, personal prejudice and abuse of authority. The Administration did not issue the required form WHO 80.1, nor did it properly notify him of his rights and obligations following the decision to abolish his post. Furthermore, it failed to comply with Staff Rule 1050.2.7, which requires that staff members be given due preference for vacancies during the reassignment period. Even though he applied for several vacant posts which fully corresponded to his profile, and the Global Reassignment Committee made positive recommendations regarding his reassignment, the Acting Director-General refused to accept any of these recommendations without providing any reasons. He repeatedly requested information from the Committee, including the final report on his case, but all his requests were turned down on the grounds of confidentiality. He points out that the Staff Association withdrew its participation in the Committee,

denouncing its opaque, slow and ineffective procedures. In effect, he was not afforded the opportunity of a proper reassignment process.

According to the complainant, the Organization did not act in good faith and showed a complete lack of due care and respect towards him. Following his reassignment to the EGB cluster, his requests to meet with senior managers were denied and he was subjected to a “confusing and demoralising array of four supervisors”, who constantly interfered in the exercise of his duties but who, nevertheless, failed to inform him of the decision to abolish his post and to terminate his appointment.

The complainant asks the Tribunal to quash the Director-General’s decision to terminate his appointment, to declare the reassignment process conducted by the Global Reassignment Committee null and void and to order his reinstatement in a suitable post outside Geneva. He claims material and moral damages as well as costs.

C. In its reply WHO submits that the complaint is irreceivable. The complainant did not challenge his 2003 reassignment to the EGB cluster within the time limit prescribed by Staff Rule 1230.8.3, and his claims in that respect are therefore time-barred. Moreover, although he was advised by a letter of 30 October 2008 that the Director-General had decided in favour of compensation rather than reinstatement, he did not file a complaint against that decision within the time limit laid down in Article VII, paragraph 2, of the Tribunal’s Statute and, consequently, his complaint is time-barred in its entirety.

The Organization also submits that the complaint is devoid of merit. It states that the abolition of the complainant’s post was based on objective programmatic reasons and that it was carried out in accordance with the Staff Regulations and Staff Rules and the applicable provisions of the WHO Manual. It submits that the complainant’s reference to his 2003 reassignment to the EGB cluster bears no relevance to the subject matter of the complaint.

The defendant denies that the reassignment process and the decision to terminate the complainant’s appointment were tainted with procedural irregularities, personal prejudice or abuse of authority.

Referring to the findings of the Headquarters Board of Appeal, it asserts that the Global Reassignment Committee worked relentlessly in finding alternative employment for the complainant and that it acted in good faith, and in accordance with the relevant protocol. It rejects the allegation of personal prejudice as unsubstantiated, and notes that the Staff Association did participate in the reassignment process almost until the end. As for form WHO 80.1, it explains that, since the complainant's appointment was not terminated on the basis of Staff Rule 1040, i.e. on the completion of an agreed period of service, it was not required by Manual paragraph II.9.20, to issue that form.

WHO contends that it did its utmost to fulfil its duty of care towards the complainant. It conducted the reassignment process in good faith during a period of 12 months, i.e. the maximum duration, and paid the complainant a substantial amount in termination indemnities. Having acknowledged that the decisions of the Acting Director-General were not properly reasoned, it entered into negotiations with a view to offering him compensation that would be mutually acceptable. Although the complainant failed to provide appropriate proof of his occupational earnings in the period after the termination of his appointment, so as to enable HRD to carry out the necessary calculations, it exceptionally agreed to offer him compensation on the basis of incomplete documentation.

D. In his rejoinder the complainant asserts that the complaint is receivable, because it was filed within ninety days from the date his counsel informed the Director-General that she considered the negotiations for an amicable settlement to be terminated, thereby rendering the Director-General's decision final. He accuses the Organization of negligence and bad faith and considers it responsible for the termination of the negotiations. He notes that, although he provided HRD with the requested documents, he received no offer in response. Emphasising his preference for reinstatement rather than compensation, he denies that he ever waived his right to file a complaint against the decision not to reinstate him. He requests that the Tribunal order the parties to agree on suitable financial compensation in the event that he does not wish to be reinstated.

E. In its surrejoinder the Organization recalls that the Director-General's decision of 30 October 2008 was for the negotiation of "mutually agreeable compensation" and not for the complainant's reinstatement. Consequently, had he wished to challenge his non-reinstatement, he ought to have filed a complaint within ninety days from the date of that decision. Instead, he chose to enter into negotiations for monetary compensation. According to WHO, the negotiations did not progress rapidly because the complainant did not provide the requested documents, in particular his South African tax returns, without any explanation for his failure to do so. Moreover, its attempts to settle the matter failed at the last moment when the complainant decided to more than double the amount requested in compensation.

CONSIDERATIONS

1. In January 2006 WHO advised the complainant that his post would be abolished but that every effort would be made to reassign him through a formal process conducted by a Global Reassignment Committee. During the following 12-month reassignment period, the Committee sent three memoranda to the Acting Director-General and one to the Director-General, recommending the complainant's reassignment to a number of posts. They both rejected all of the recommendations.

2. On 30 January 2007 the complainant was notified that since the reassignment process had not been successful, his appointment would terminate on 30 April 2007. He lodged an appeal challenging that decision. In its report of 7 July 2008 the Headquarters Board of Appeal noted that the Global Reassignment Committee had done a commendable job in identifying suitable positions for the complainant, and that the Committee's recommendations had been

supported by the Director of HRD. The Board also observed that the complainant had received very little information on the outcome of the recommendations and the progress of the reassignment process. It recognised the right of executive heads to take decisions based on the best interests of the Organization. However, it was unable to find any justification or convincing evidence to warrant the decision of the Acting Director-General and the Director-General not to reassign the complainant and to terminate his appointment after 14 years of service. In the Board's view, the complainant's termination was based on a flawed reassignment process, and WHO had failed in its duty of care toward the complainant during this process. The Board recommended that the decision of 30 January 2007 be quashed and that the complainant be reinstated to a post commensurate with his skills and experience outside Geneva, in accordance with his request. Alternatively, should the complainant not wish to return to WHO, mutually agreeable compensation should be negotiated.

3. By a letter of 30 October 2008 the Director-General advised the complainant that she agreed with the conclusions of the Headquarters Board of Appeal and had determined that negotiating mutually agreeable compensation was the preferred alternative, considering that he was working in a new position in South Africa.

4. On 27 November 2008 the complainant's counsel advised WHO regarding the amount the complainant was prepared to accept as compensation and costs, but emphasised his strong preference to be reinstated. Subsequently, there were multiple communications between the complainant's counsel and WHO Administration, wherein the latter repeatedly requested information regarding the complainant's employment and salary following the termination of his employment with WHO, and counsel asserted that the information had been provided.

5. According to the complainant, on 17 May 2009 he was requested to provide additional financial information, which counsel

refused to provide. In response, counsel reiterated her mid-January 2009 request for WHO's settlement proposal.

6. By a letter of 10 June 2009 to the Director-General counsel terminated negotiations. She stated that termination was necessary in light of the fact that the complainant had sent multiple e-mails and documents to the Administration in response to requests for financial information, but he had yet to receive a reply to his offer of 27 November 2008. She indicated that her understanding of the matter, confirmed twice by HRD, was that the negotiations had to be brought to an end before the Director-General's decision of 30 October 2008 became final.

7. In a memorandum of 13 August 2009 HRD asked the Director-General to approve compensation in an amount calculated on the basis of what WHO characterises in its submissions as "incomplete" documentation. HRD specifically asked the Director-General to approve, in principle, an offer of compensation to the complainant corresponding to two years' remuneration less his earnings from his current position. A handwritten note on the memorandum indicates the Director-General's approval of the offer, in principle, on 25 August 2009.

8. On 4 September 2009 the complainant filed this complaint with the Tribunal. The complaint form indicates that no express decision had been taken in response to the complainant's letter of 10 June 2009.

9. Following a telephone conversation between the parties on 7 October, WHO advised the complainant's counsel by an e-mail of 13 October that the Director-General had approved the offer of 13 August 2009 in principle. The Organization requested a written undertaking that the amount indicated in a January 2009 payslip from the complainant's South African employer was a true and accurate indication of his monthly earnings for the period from June 2007 to

April 2009, together with confirmation of the type of currency shown on the payslip. Upon receipt of the undertaking, a calculation for an amount of amicable compensation would be sent to the Director-General for her final approval.

10. On 30 October 2009 counsel provided the Director of HRD with the requested information and undertaking, and informed her that the complainant would request a 15-day extension from the Tribunal.

11. By an e-mail of 21 January 2010 WHO advised the complainant that as the compensation calculations were complex he could expect to have a proposal only by the following week.

12. On 9 February 2010 WHO sent the complainant a letter of agreement for his signature which, among other things, provided for a payment of 201,816.70 United States dollars in full settlement of all claims.

13. On 16 February 2010 counsel informed the Organization that the complainant was seeking 469,611.08 dollars in material damages and 30,000 dollars in legal costs and damages. The Director-General rejected this proposal.

14. Before proceeding further, it should be noted that, although in his materials the complainant makes numerous submissions concerning the decisions to reassign him to the EGB cluster in 2003 and subsequently to abolish his post, the decision at issue in this complaint is the termination of his appointment.

15. On the question of receivability, the complainant argues that the close of negotiations started a new time period within which he could appeal the decision at issue. He states that it was his understanding that a complaint with the Tribunal could not be filed until the negotiations had come to an end. The complainant also points out that in the letter of 27 November 2008 he expressly reserved his right to appeal.

16. WHO submits that the complaint is time-barred as the complainant failed to file his complaint within ninety days of the final decision in accordance with the statutory time limit. It points out that the Director-General's letter of 30 October 2008 clearly indicated that if the complainant did not accept the decision he could file a complaint with the Tribunal within ninety days. The Organization takes the position that the decision of 30 October 2008 was a final decision and that counsel's letter of 10 June 2009 did not trigger a new time frame within which the complainant could appeal.

17. In Judgment 2584, under 13, the Tribunal made the following observation:

"If an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions as extending the time for the taking of any further step. That is because settlement discussions must proceed on the basis that no further step will be necessary. Where, as here, there has been no actual decision but the Organization has invited settlement discussions, the duty of good faith requires it to treat the time for taking a further step as running from the termination of those discussions and not from some earlier date identifiable as the date of an implied negative decision. That is because the invitation necessarily implies that, no matter what the Staff Regulations or Staff Rules provide, no final decision has been or will be taken during the course of discussions."

18. The above principle is equally applicable in the present case, where even if a final decision had been taken, its implementation necessitated further discussion and negotiation. When it became apparent that WHO was not even willing to make a proposal that could form the basis for discussion, it was open to the complainant to consider that the negotiations had come to an end and to pursue the matter with the Tribunal. In these circumstances, the complaint is receivable.

19. With regard to the substance of the complaint, namely the termination of his appointment, in her decision the Director-General

did not expressly state that that decision was set aside. However, it can be inferred from her decision that the decision to terminate the complainant's appointment was not sustained. In this light, a consideration of the decision to terminate is unnecessary. This leaves the question of remedy.

20. The complainant is entitled to compensation and moral damages for the unlawful termination of his appointment. Given the passage of time, reinstatement is not a viable option. The Tribunal notes the Organization's claim that the difficulties surrounding the settlement of the appropriate compensation stemmed from the failure on the part of the complainant to provide the necessary documentation in relation to the remuneration he had received in his new position. The Tribunal rejects this assertion. Despite repeated requests by the complainant's counsel for a proposal from WHO, none was communicated to the complainant until after the complaint was filed. Contrary to the Organization's assertion, the problems with respect to the complainant's documentation were in large measure due to WHO's conduct. Even if it could be said that the fault in this regard rested with the complainant, which in the Tribunal's view is not the case, a proposal for a gross amount could have been made subject to agreed deductions. The Tribunal finds that the inordinate delay on the part of the Organization, and its conduct during the negotiations, do not reflect the duty that is incumbent on an organisation to negotiate in good faith, or the care it should take in the implementation of a decision. These matters warrant an award of moral damages.

21. As the parties have been unable to agree on the terms of a negotiated settlement, remitting the matter to WHO to resolve the matter of compensation would be futile and would result in further unwarranted delay in the resolution of the dispute. In these circumstances, the Tribunal will itself determine the relief to which the complainant is entitled in consequence of his successful internal appeal. The Tribunal considers that the complainant is entitled to

material damages equal to two years' salary and other benefits less earnings during those two years, significant moral damages for the way he was treated in the reassignment process, together with a component in the nature of interest for having been denied the sums which he would have received at a significantly earlier time if his appeal had been finalised without delay. The Tribunal fixes a global sum of 300,000 United States dollars in respect of these matters. The complainant is also entitled to moral damages for WHO's delay and lack of due care and attention in implementing a decision with respect to the complainant's appeal, which the Tribunal fixes at 25,000 dollars. The above amounts should be paid within 28 days of the date of delivery of this judgment, failing which the sums should bear interest at the rate of 5 per cent per annum from that date until the date of payment. The complainant is entitled to costs in the amount of 20,000 dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant material and moral damages in the sum of 325,000 United States dollars.
2. The Organization shall pay interest on the sum referred to in 1 above at the rate of 5 per cent per annum from the date of delivery of this judgment until the date of payment, unless that sum is paid within 28 days of the date of delivery of the present judgment.
3. It shall also pay to the complainant costs in the amount of 20,000 dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet