

**M. (No. 5)**

**v.**

**WHO**

**121st Session**

**Judgment No. 3584**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr S. K. M. against the World Health Organization (WHO) on 25 October 2012 and corrected on 22 November 2012, WHO's reply of 28 March 2013, the complainant's rejoinder of 24 May and WHO's surrejoinder of 28 August 2013;

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:

In June 2009 WHO published a vacancy notice for the position of National Professional Officer (Fellowships) in New Delhi (Post No. 5.1954). The complainant applied for the vacancy, was invited to take a written test and was subsequently placed on the shortlist. On 3 February 2010 another candidate, Ms S., was selected for the position and the complainant was so informed on 8 February.

On 18 March 2010 the complainant filed a notice of intention to appeal with the Regional Board of Appeal (RBA), followed by a statement of appeal in early April 2010. He challenged his non-selection for the contested post, alleging personal prejudice on the part of a

supervisor or of any other responsible official, incomplete consideration of the facts and failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules, or the terms of his contract. In its report of 11 May 2011 the RBA recommended that the selection for the contested post be treated as null and void. On 19 July 2011 the complainant was informed that the Regional Director had decided to dismiss his appeal insofar as he had alleged personal prejudice and a failure by the Administration to take into consideration his educational qualifications or experience. Nevertheless, the Regional Director had concluded that the selection procedure had been flawed as the Administration had erroneously applied the Selection Guidelines for General Service Staff in the WHO South-East Asia Region, IC-2007-33 (hereinafter “the Selection Guidelines”) to a competition for a National Professional Officer position. As a consequence, he had decided to set aside the decisions of 3 and 8 February 2010, to move Ms S. to a different post with commensurate duties and responsibilities, to abolish the contested post and to establish a grade P.2 post instead. He awarded the complainant costs, but rejected his claims for moral damages.

On 28 July 2011 the complainant filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) in which he challenged the decision of 19 July and requested that it be set aside. He sought relief in the amount of 35,000 United States dollars (as requested in his appeal before the RBA), 15,000 dollars in moral damages and legal costs in the amount of 5,000 dollars.

Before the HBA issued its report, the complainant filed the present complaint with the Tribunal, alleging that no decision had been taken, within the sixty-day time limit provided for in Article VII, paragraph 3, of the Tribunal’s Statute, on the claim that he notified to WHO on 8 April 2010. The HBA subsequently submitted a report to the Director-General on 30 January 2013 in which it recommended, among other general recommendations, that the complainant be awarded 2,000 dollars for the delay in the internal appeal process but that his other claims for redress be dismissed.

In a decision of 15 February 2013 the Director-General endorsed the general conclusions of the HBA and its recommendations that the

complainant's appeal be dismissed and that he be awarded 2,000 dollars for the delay in the internal appeal process.

The complainant asks the Tribunal to award him moral damages in the amount of 25,000 United States dollars and legal costs in the amount of 3,000 dollars.

WHO requests the Tribunal to dismiss the complaint and deny the complainant's requests for relief.

### CONSIDERATIONS

1. The complainant challenges his non-selection for the post of National Professional Officer, Fellowships (Post No. 5.1954). Before the HBA issued its report and the Director-General took a final decision on the internal appeal, the complainant filed his complaint with the Tribunal.

2. In summary, the complainant alleges bias and prejudice in the selection process, personal prejudice on the part of the Regional Director and undue delay. He also advances claims regarding the Regional Director's decision to transfer the selected candidate to a commensurate post and his decision to abolish the post at issue.

3. The complainant's claims of bias and prejudice are grounded on the procedural irregularities and flaws in the selection process. These claims have been overtaken by the Regional Director's decision to set aside the selection process and do not require further consideration. As to the allegation of personal bias on the part of the Regional Director, the complainant claims that the Regional Director arbitrarily divested him of certain duties and responsibilities that he previously had while working as Head of the Travel Unit. He states that this change was communicated to him by e-mails of 30 July and 2 August 2010. He attributes the change to the fact that he appealed the Regional Director's decision not to appoint him to the subject post. As the complainant did not attach the two e-mails to his rejoinder, the claim has no evidentiary foundation and is rejected.

4. Turning first to the transfer of Ms S., the selected candidate, pursuant to Article II, paragraph 5, of its Statute, the Tribunal is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations”. In Judgment 2670, an analogous case, the Tribunal held, under 5, that a decision to reassign a selected staff member to a commensurate post after a selection decision was set aside did not affect the terms and conditions of the unsuccessful candidate’s employment; it did not adversely affect that staff member’s rights or interests or cause him any injury. As the complainant has failed to show that Ms S.’s transfer affected the terms and conditions of his employment or adversely affected him, this aspect of the complaint is irreceivable.

5. The complainant also claims the loss of a valuable opportunity due to what he describes as the Regional Director’s unlawful abolition of the subject post. WHO maintains that the Regional Director properly abolished the post but does not explain how this was accomplished. The Tribunal observes that it was in the memorandum of 19 July 2011 in which the Regional Director withdrew the flawed selection process that he stated that, “given [his] recent decision to discontinue the use of NPO positions in the Regional Office, [he] ha[d] decided to abolish the [subject post] and establish a P.2 position against this function. [The] position [would] be advertised shortly.”

6. The Tribunal observes that several decisions were taken by the Regional Director simultaneously: to set aside the flawed selection process; to move the selected candidate to a commensurate post; to abolish the subject post; to promise to establish and advertise a new P.2 post in the place of the subject post with no apparent authority or prior budgetary provision for it. These simultaneous decisions undermined the requirement that a new selection process be conducted, thereby denying the complainant an opportunity to compete for possible promotion. This entitles the complainant to damages for which the Tribunal awards 20,000 United States dollars.

Unlike in an earlier case involving the same selection process that the Tribunal considered in Judgment 3380, the complainant in this case grounds the plea of lost opportunity on the unlawful abolition of the subject post without reliance on Ms S.'s reassignment to a commensurate post.

7. On the question of delay, in Judgment 3380 in which the delay was similar to the delay in this case, the Tribunal stated in consideration 11:

“As concerns the complainant’s assertion that the delays in the internal appeal process were deliberate and amount to harassment, there is no evidence to support the assertion and it is rejected. The unacceptable delay was acknowledged by the Director-General and the complainant was awarded compensation for the undue delay. While the Tribunal cannot condone such delay, it must be observed that the complainant’s claims were extensively and carefully examined and objectively reviewed at both levels of the internal appeal.”

In that case, as in the present case, the Director-General awarded the complainant 2,000 United States dollars as compensation for the delay in the internal appeal proceedings. This earlier award was not disturbed by the Tribunal in Judgment 3380 and the Director-General’s award to the complainant in the present case will not be disturbed in this proceeding.

8. One matter remains. In his submissions, the complainant claims moral damages for the RBA’s failure to share with him “all the documents it received from Administration and which went into its consideration in deciding the case. [The] RBA claimed confidentiality of certain documents, while the Administration did not raise this claim.”

9. In Judgment 3380, under 12, the Tribunal said:

“At the RBA hearing in January 2011, the Administration agreed to provide the complainant with copies of certain documents he had requested. However, on the grounds of confidentiality, the Administration later refused to give the copies to the complainant. Nonetheless, the documents were submitted to the RBA. As the Tribunal stated in Judgment 3264, under 15:

‘It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally, ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).’

In the present case, one of the documents was clearly material and, in fact, was, later in the appeal process, relied on by the HBA in its finding that the replacement of the interested party on the Selection Committee was due to conflict of interest and not bias. The failure to disclose this document constitutes a breach of procedural fairness. In the circumstances of this case the appropriate remedy is an award of moral damages in the amount of 1,000 United States dollars. All other claims are dismissed.”

In the present case, the HBA requested and received documents from the Administration on a “confidential basis”. It is clear from a reading of the HBA’s report that the HBA relied on the content of these documents in arriving at its findings and in making its recommendations that in turn the Director-General endorsed in reaching the final decision. The observations of the Tribunal in consideration 12 of Judgment 3380 are equally applicable in the present case. The failure to disclose these documents to the complainant constitutes a breach of procedural fairness for which the complainant is entitled to an award of moral damages in the amount of 1,000 United States dollars. As he succeeds in part, he is also entitled to an award of costs, which the Tribunal sets at 1,000 United States dollars.

#### DECISION

For the above reasons,

1. WHO shall pay the complainant damages in the sum of 21,000 United States dollars.
2. WHO shall pay the complainant costs in the amount of 1,000 United States dollars.
3. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ