Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

W.

v.

WHO

131st Session **Judgment No. 4353**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. W. against the World Health Organization (WHO) on 21 January 2019 and corrected on 22 February, WHO's reply of 18 June, the complainant's rejoinder of 23 September and WHO's surrejoinder of 20 December 2019;

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 to abolish his post.

The complainant joined WHO in July 2007. At the material time, he held a continuing appointment as a Technical Assistant, at grade G.5, in the Department of Communications/Online Communications (DCO/OLC). In September 2016 the Director, Department of Communications (DCO), submitted a proposal for the restructuring of DCO to the Road Map Review Committee (RMRC). The proposal envisaged, among other things, the abolition of three G.5 Technical Assistant posts, including that of the complainant. Further to the RMRC's endorsement of the proposal, the Director-General approved the proposed restructuring on 30 November 2016.

By a letter of 10 January 2017, the complainant was informed that the Director-General had decided to abolish his post and that, as he held a continuing appointment, efforts would be made to find an alternative

reassignment for him through a formal process conducted by the Reassignment Committee. The complainant was encouraged to take an active role in the reassignment process by updating his Personal History Form and bringing potential reassignment options to the attention of the Reassignment Committee for its review and possible submission to the Director-General, and also by applying for any vacancies arising in WHO or elsewhere in the United Nations system. The complainant requested an administrative review of the 10 January 2017 decision but his request was rejected by a memorandum of 26 June 2017. On 26 September 2017 he filed an appeal with the Global Board of Appeal (GBA) against the rejection of his request for administrative review. He contended that the abolition of his post was based on an error of law and incomplete consideration of facts, and that it was tainted by personal prejudice and bias, and he requested that it be set aside. He also sought moral damages and costs.

Prior to that, by a letter of 14 September 2017, the complainant was informed that, notwithstanding the efforts deployed by the Reassignment Committee, no suitable alternative assignment had been identified for him and his appointment would therefore be terminated and he would be separated from WHO on 15 December 2017.

Having made several requests for the production of additional documents, the GBA submitted its report on 30 August 2018. It concluded that, although the decision to abolish the complainant's post was in line with the Staff Regulations and Staff Rules, WHO had breached its duty of care towards the complainant in that it had failed to positively communicate with him regarding the abolition of his post. It thus recommended that the complainant be awarded 2,000 United States dollars in moral damages and 2,000 dollars in costs. The GBA also made a general recommendation aimed at enhancing the Administration's ability to communicate with staff during restructuring processes. By a letter of 24 October 2018, the Director-General informed the complainant that he had decided to accept the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to find that WHO failed to reassign him to another suitable post and violated its duty of care towards him. He also asks the Tribunal to reinstate him in his restored post, or another suitable post, with retroactive effect and to order that he be paid all salary, in-grade step increases,

pension contributions, and other emoluments that he would have received from the date of his separation from service through the date of his reinstatement. Alternatively, he asks the Tribunal to order that he be paid an amount equal to all salary, in-grade step increases, pension contributions, and other emoluments that he would have received had he not been separated, from the date of his separation from service through the date of his statutory retirement on 21 March 2023. He claims 80,000 Swiss francs in moral and exemplary damages, 5,000 Swiss francs in costs, interest on all amounts awarded, and any other relief the Tribunal deems necessary, just and fair. He also asks that WHO be ordered to disclose several documents.

WHO asks the Tribunal to dismiss the complaint in its entirety and to deny the request for the disclosure of documents.

CONSIDERATIONS

1. In his request for administrative review, dated 10 March 2017, the complainant, who had held the post of Technical Assistant in DCO/OLC, challenged the decision to abolish his post. He was notified of that decision by a letter of 10 January 2017, which informed him that the "decision ha[d] been taken in view of the changing internal demands and technology developments in the delivery of web production services within WHO by DCO. In particular, the demand for DCO staff to provide such services for WHO technical departments ha[d] reduced over the past years as clusters and departments ha[d] hired their own web production staff and/or used external consultants. Cost efficiencies ha[d] also been identified as part of the process. The transition ha[d] resulted in the need for DCO to shift its resources from technical functions to more specialized and strategic functions, including but not limited to project management, analytics, content organisation and related training." The 10 January 2017 letter also informed the complainant that since he "[held] a continuing appointment, and in accordance with the provisions of Staff Rule 1050.2 and e-Manual III.10.11, efforts [would] now be made to find an alternative reassignment for [him] through a formal process conducted by [the] Reassignment Committee".

2. Upon being informed, by a memorandum dated 26 June 2017, that the administrative review decision maintained the decision to abolish his post, the complainant appealed the latter decision before the GBA.

In his appeal he claimed that the decision to abolish his post "demonstrated mismanagement of his position and attribution of tasks in the past years". He also claimed that the decision "was tainted with flaw, abuse of authority and personal prejudice"; that the RMRC was biased, not properly informed, and its decision was based on an incomplete consideration of facts; and that WHO had failed in its duty of care and had not acted in good faith in abolishing his post (and then terminating his contract after the reassignment period). The GBA's recommendation, which the Director-General accepted in the impugned decision, relevantly states: "The Panel recommends that the [complainant's] [a]ppeal against the impugned decision be allowed insofar as it relates to the failure to communicate positively with the [complainant] as to the abolition of the post. The Panel concluded that the decision to abolish the post, conveyed to the [complainant] on 10 January 2017 was taken in accordance with WHO's Staff Regulations and Rules but that the WHO breached its duty of care in communicating with the [complainant]. The Panel did not find evidence that the decision was tainted by bias or personal prejudice. The Panel found no evidence of mistake of fact or law." The GBA recommended that the complainant be awarded 2,000 United States dollars in moral damages and 2,000 dollars in legal costs.

3. The complainant asks that the impugned decision be set aside on the grounds that:

(1) The decision to abolish his post was unlawful;

(2) WHO's use of consultants was unjustified and unlawful;

(3) WHO violated its obligation to reassign him following the abolition of his post; and

(4) WHO breached its duty of care and duty to act in good faith towards him.

4. The complainant also asks the Tribunal to conclude, among other things, that the GBA's failure (and implicitly that of the Director-General) to substantiate the reasons for its findings on the regularity of the abolition of his post vitiates the impugned decision. This request will be rejected, as the GBA had in fact substantiated the reasons for its recommendation, which the Director-General accepted.

The complainant further asks the Tribunal to conclude that he is entitled to be reinstated in his former post or in an alternative post, and to order that he be placed in his restored post with full retroactive effect, or in a suitable post commensurate with his grade, training, skills and experience, with payment of all salary and emoluments that he would have received from the date of his separation from WHO through the date of his reinstatement. Alternatively, he asks that WHO be ordered to pay him all salary and emoluments that he would have received from the date of his separation to the date of his statutory retirement on 21 March 2023. However, these claims, which are incidental to the decision to terminate his appointment, are irreceivable as they are beyond the scope of the present complaint. The complainant did not challenge the decision of 14 September 2017 to terminate his appointment in his underlying internal appeal (see, for example, Judgment 2734, consideration 5).

5. In his rejoinder, the complainant asked that WHO disclose a number of documents with its surrejoinder because, according to him, its rejection of his arguments concerning the reasons for the abolition of his post was based on "mere unsupported assertions". The complainant referred to four sets of documents. His ultimate request was that, if WHO did not disclose the requested documents with its surrejoinder, the Tribunal should reject WHO's assertions regarding the reasons it gave for abolishing his post. The complainant justifies his request by reliance on Judgment 3586, considerations 16, 17 and 20, specifically on the principle of equality of arms, under which he claims the right to have access to all of the evidence which WHO used for making the decision to abolish his post. In the Tribunal's view, his reliance on this principle is misplaced. As WHO states, the documents regarding DCO's restructuring and, by extension, the decision to abolish the complainant's post were shared with the complainant, including during the course of the internal appeal process before the GBA. Moreover, there is no evidence which shows that the decision to abolish the complainant's post was in any way made on the basis of the documents which he asked WHO to disclose. Accordingly, WHO's refusal to provide the requested documents with its surrejoinder was not unlawful.

6. On the merits, it is convenient to recall the Tribunal's case law concerning its purview in reviewing a decision to abolish the post of a staff member of an international organization in the context of a

restructuring exercise and the organization's obligations. The following was stated in Judgment 3930, consideration 8:

> "'[a]ccording to firm precedent, a decision concerning the restructuring of an international organisation's services, which leads to the abolition of a post, may be taken at the discretion of its executive head and is subject to only limited review by the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence. The Tribunal may not, however, supplant an organisation's view with its own (see, for example, Judgments 1131, under 5, 2510, under 10, and 2933, under 10). Nevertheless, any decision to abolish a post must be based on objective grounds and its purpose may never be to remove a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17)' (Judgment 3582, under 6)."

7. The following was also stated in Judgment 3238, consideration 7:

> "Precedent has it that in order to achieve greater efficiency or to make budgetary savings international organisations may undertake restructuring entailing the redefinition of posts and staff reductions (see, for example, Judgments 2156, under 8, or 2510, under 10). However, each and every individual decision adopted in the context of such restructuring must respect all the pertinent legal rules and in particular the fundamental rights of the staff concerned (see, for example, Judgments 1614, under 3, or 2907, under 13)."

Also, in Judgment 3041, considerations 8 and 9, the Tribunal relevantly stated:

> "8. The decision to abolish a post must be communicated to the staff person occupying the post in a manner that safeguards that individual's rights. These rights are safeguarded by giving proper notice of the decision, reasons for the decision and an opportunity to contest the decision. As well, subsequent to the decision there must be proper institutional support mechanisms in place to assist the staff member concerned in finding a new assignment.
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> 9. As the Tribunal stated in Judgment 2124, under 4, 'the need to give reasons in support of adverse administrative decisions arises precisely because the affected staff member must be given an opportunity of knowing and evaluating whether or not the decision should be timely contested'."

8. The complainant contends, in ground (1), that the decision to abolish his post was unlawful, as the reasons which were given therefor (referred to in consideration 1 of this judgment) were not genuine. He insists that the abolition was not based on objective grounds but on errors

of fact and was triggered by incomplete or erroneous consideration of the material facts.

The complainant submits that the work environment had not changed dramatically since he was hired; that the work did not demand professional skills and competencies which he did not possess, and that there were no financial reasons justifying the abolition of his post. He notes the GBA's findings that the restructuring proposal comprehensively provided an objective, programmatic and budgetary justification in favour of the proposed changes, including the abolition of his post; that it comprehensively set out a business case solidly justifying that abolition based on the evolution of the work of, and the decentralizing of tasks in, DCO; and that new posts created in the restructuring exercise included tasks which he was allegedly unable to perform. He also notes that the GBA referred to the justification provided by DCO to the RMRC that the web team, which was hired in 2002, and he (the complainant), who was hired in 2007, had become redundant because the ability to use the technology had become more mainstream allowing WHO to use the services of consultants who could be used on demand to meet the peaks and beyond the in-house hours during which the complainant and other web producers could have produced. He further notes the GBA's statement that the needs had shifted from "basic web posting" to strategic support and that technical units themselves had identified existing staff to be trained for day-to-day production needs. He however submits that the GBA did not itself analyse those reasons and motivate its finding that they were objective, but that above all, the reasons provided by the DCO (and adopted by the GBA and the Director-General in the impugned decision) for the abolition of his post are false. However, the Tribunal is satisfied that the GBA properly motivated its findings on the basis of the evidence and materials which WHO presented to it to justify that the restructuring, which resulted in the abolition of the complainant's post, was genuine. The Tribunal discerns no manifest error in the GBA's finding of the facts and its report warrants "considerable deference" (see Judgments 3908, consideration 3, 3608, consideration 7, 3400, consideration 6, and 2295, consideration 10).

9. The complainant further argues that the restructuring decision, and, by extension, the decision to abolish his post were unlawful, and were not taken in accordance with the rules on competence. This, he states, is because the Director, DCO, and not the Assistant Director-General,

submitted the restructuring proposal for approval in breach of paragraph 4 of Information Note 03/2011. This provision relevantly states that it is for the Assistant Director-General of a cluster to submit the proposal for restructuring to the RMRC. However, as WHO explains, DCO is located with the Office of the Director-General, which is equivalent to a cluster and headed by the Executive-Director, who is of the level of an Assistant Director-General and to whom the Director, DCO, correctly submitted the restructuring proposal. The Executive-Director then initiated the process under Information Note 03/2011 to permit the Director-General to receive recommendations concerning the restructuring proposal from the RMRC, as was done in the instant case. In these circumstances, it cannot be considered that the rules on competence were breached.

10. The complainant further contends that serious irregularities in the DCO restructuring proposal led to the irregularity and unlawfulness of the decision to abolish his post. He also contends, in ground (2), that DCO's use of consultants was unjustified and unlawful. However, the Tribunal finds no vitiating irregularity in the restructuring proposal and reiterates that an organization's decision to restructure its operations and, incidental thereto, to abolish posts, is within the discretion of the Administration so long as it acts in compliance with its internal rules and the Tribunal's case law. Moreover, in exercise of that discretion, it is for WHO to utilize the contract modalities available in its legal framework, including the use of consultants, to better serve its interests of efficiency and effectiveness. The complainant's reliance on Judgment 3376, consideration 3, to support the contention that DCO's use of consultants was unjustified and unlawful is misplaced, as the statements therein are applicable where outsourcing of work results in the abolition of a staff member's post, while in the present case the complainant's post was abolished as a result of restructuring. Grounds (1) and (2) are therefore unfounded.

11. Regarding ground (3), in which the complainant contends that WHO violated its obligation to reassign him following the abolition of his post, Staff Rule 1050.2 relevantly states that when a post held by a staff member with a continuing appointment is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member

occupying that post, in accordance with procedures established by the Director-General.

12. The complainant's allegations that insufficient attempts were made to reassign him to another post because of bad faith, malice, bias and personal prejudice against him are rejected, as he provides no evidence to establish those allegations (see, for example, Judgment 3193, consideration 9). Moreover, since he held a General Service post for the duration of his employment at DCO, his submission that he should have been automatically placed in a P.2 grade post which was advertised in July 2016, before the Director-General approved the restructuring of DCO on 30 November 2016, is also rejected. The Tribunal also rejects the complainant's contention that his reassignment was in effect frustrated because of irregularities in the advertisement of P.2 positions (Content Analyst and Technical Officer posts), to which he could have been reassigned. He argues that he was effectively deprived of the opportunity to apply for those posts, either because they were advertised well before he was informed that his post would be abolished, or because they were advertised as temporary positions (while described as long-term positions in the DCO proposal) and he could not have continued with WHO on a long-term basis. The complainant thereby signalled that he was not interested in those posts.

13. The evidence shows that DCO was not able to proceed with the P.2 Web Content Analyst and Technical Officer posts (established in the restructuring exercise) as long-term posts because of genuine financial constraints. It is noteworthy that following the restructuring of DCO, the Director-General took the decision to impose a freeze on recruitments and reclassifications. However, the complainant's supervisor had encouraged him and other members of the Web Production team to apply for the Technical Officer's post when it was advertised in July 2017. The complainant had missed the deadline for application by a week by the time that he requested an extension. He was informed that the deadline could not be extended.

14. The evidence also shows that the complainant's supervisor and the Reassignment Committee had made attempts to have the complainant reassigned to General Service posts without success. Indeed, the Reassignment Committee considered six posts but for objective reasons

it did not find it possible to reassign the complainant to any of the three posts for which he was qualified. Moreover, the complainant's challenge to the findings of the Reassignment Committee is not convincing. The Tribunal thus determines that the steps which were made to reassign the complainant were reasonable in the circumstances and in line with WHO's regulatory regime and the case law. Ground (3) is therefore unfounded.

15. In ground (4), the complainant contends that WHO breached its duty of care and its duty to act in good faith towards him. The GBA had concluded that WHO breached its duty of care towards the complainant because the complainant's supervisors had failed to positively communicate with him concerning the abolition of his post. The impugned decision accepted the GBA's recommendation to pay the complainant 2,000 United States dollars in compensation for that breach. The complainant, however, argues in the present complaint that, particularly in view of what he alleges was an absence of reasonable efforts by the Administration to reassign him, there is ample evidence to demonstrate bad faith, a breach by WHO of its duty of care, as well as personal prejudice against him as the reasons why his post was abolished, causing him prejudice beyond the 2,000 dollars that he was paid. While a breach of the duty of care was proved, the complainant provides no evidence to substantiate the other allegations. Consequently, his request that WHO should be ordered to pay him for the loss of the opportunity to secure continued employment by it and to receive a regular income until the date of his statutory retirement in 2023 is also rejected. Inasmuch as the complainant was paid moral damages for the breach of the duty of care, which in the Tribunal's view was reasonable compensation therefor, ground (4) is unfounded.

16. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ