

The Administrative Tribunal,

Considering the complaint filed by Mr H. A. against the World Health Organization (WHO) on 28 April 2006, the WHO's reply of 10 August, the complainant's rejoinder of 9 November 2006, the Organization's surrejoinder of 8 February 2007 and the complainant's additional statement of 21 February 2007;

Considering Article II, paragraph 5, 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, a Mauritian national born in 1947, joined the WHO Regional Office for Africa in 1981 as a Technical Officer at grade P.2. In May 1989 he was transferred to Headquarters in Geneva where he worked as a Technical Officer for Information and Promotional Material (audiovisual communications) at grade P.3 on a one-year fixed-term appointment. After several extensions of his fixed-term appointment, he held a post of indefinite duration in the Audio-Visual Team of the Division of Health Promotion, Education and Communication as from May 1994. The Team was transferred in 2002 to the Department of Information Technology and Telecommunications in the General Management Cluster (GMG). In March 2004 the possibility of restructuring the Audio-Visual Team was examined in the context of a review of the GMG's budget. Due to the need to reduce costs, it was decided to outsource the video production function and, as a consequence, to abolish the complainant's post.

From April 2004 discussions were held between the Administration and the complainant about a possible separation by mutual agreement. The Administration made a proposal to the complainant on 19 August and the complainant submitted a counterproposal on 10 September. Further discussions took place before an official request setting out the proposed terms of a possible separation by mutual agreement was sent to the Director-General, who turned it down in January 2005.

In the meantime, the complainant was notified on 1 December 2004 that his post would be abolished as of 1 January 2005, but that this "[did] not necessarily mean the termination of [his] appointment". His contract, which was due to expire on 31 December 2004, would be extended for a period of six months, during which efforts would be made to reassign him "through a formal process conducted by a Global Reassignment Committee". In the event, no position corresponding to his qualifications and experience was identified, and the Organization informed him by a letter of 26 June 2005 that his appointment would terminate on 30 September 2005. His contract was extended for a further three months, representing the period of notice required under the Staff Rules.

The complainant filed an appeal with the Headquarters Board of Appeal on 27 January 2005 against the decision to abolish his post. In its report of 25 October 2005 the Board considered that, in the light of available evidence, the programmatic and financial reasons given by the Administration to justify its decision were not credible. It found that the decision to abolish the complainant's post shortly before his retirement in February 2007 had caused him undue financial hardship, loss of dignity and significant distress. It nevertheless held that, although it believed that the abolition of the complainant's post was unfair, the latter had not provided sufficient evidence to support his allegation of personal prejudice. The Board recommended the immediate reinstatement of the complainant or, alternatively, that he be awarded – subject to the deduction of all payments already received – the following: his salary until the age of 60, "post adjustment for the same number of months", the Organization's monthly contribution to his pension until February 2007 (or equivalent loss of pension) and moral damages in the amount of 5,000 Swiss francs.

By a letter of 6 February 2006 the Director-General informed the complainant that, from a "programmatic perspective" and considering the restructuring of the Department of Information Technology and Telecommunications, there were valid reasons for the abolition of his post. He also held that the reassignment

process had been carried out in accordance with the relevant rules and procedures, and he had consequently decided to reject the complainant's appeal. That is the impugned decision.

B. The complainant contends that the impugned decision was not properly motivated and is therefore tainted with an error of law. The Director-General failed to address one of the core findings of the Headquarters Board of Appeal, namely that a temporary staff member having been recruited at the same grade as him to perform part of his work, the intention of outsourcing video production had not been followed up. The complainant emphasises that, according to the Tribunal's case law, where a decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body, such decision must be fully and adequately motivated.

Referring again to the Tribunal's case law, the complainant asserts that since the abolition of his post was not justified by real needs and was accompanied by the creation of an equivalent post, the impugned decision is tainted with misuse of authority. He draws attention to the Board's finding that the programmatic and financial reasons given by the Administration for the abolition of his post were not credible. He submits that a temporary staff member was recruited at the same grade as him to perform similar duties as from 1 December 2004, which is the date borne by the letter informing him that his post would be abolished. The initial six-month appointment of the temporary staff member was renewed several times. In his view, no savings could result from employing, for a period of ten months, beginning on 1 December 2004, a temporary staff member as well as him to perform tasks that he used to do on his own. He also indicates that the contract of another short-term staff member, whose tasks were also duplicating part of those he previously performed – including matters related to “film production” that should have been outsourced – was renewed for 11 months as from May 2005.

According to the complainant, the impugned decision was taken in breach of Staff Rule 1050.2, which reads, in part, as follows:

“When a post of indefinite duration [...] is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member occupying that post”.

He submits that the Organization did not offer him alternative employment and did not produce evidence showing that the Administration had made “reasonable efforts” to reassign him. Moreover, he was not given due preference for vacancies, as required under Staff Rule 1050.2.7, according to which “staff members shall be given due preference for vacancies during the reassignment period, within the context of Rule 1050.2.2”. Staff Rule 1050.2.2 provides that “the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned”. He concludes that the Organization's decision to abolish his post contravened Staff Rule 1050.2.7 particularly as it was decided, during his “reassignment period”, to extend the contract of a temporary staff member who was assigned the same duties as him. The complainant further explains that the distinction made by the Administration between “fixed-term posts” to be considered in the reassignment process and “short-term positions”, which are not to be taken into account, is flawed. Indeed, Staff Rule 1050.2 refers to “reassignment” without specifying the duration of the new assignment, whilst Staff Rule 1050.2.7 merely refers to “vacancies”.

The complainant asks the Tribunal to set aside the decision of 6 February 2006, to order the WHO to pay him his full salary and post adjustment for the period from 1 October 2005 to 28 February 2007, less any payments already received, and to pay him “the equivalent of his loss in pension”. In addition, he claims moral damages of such an amount as the Tribunal may deem just and equitable and the award of 8,000 Swiss francs in costs.

C. In its reply the WHO denies that the impugned decision was improperly motivated or tainted with misuse of authority. It argues that the decision to abolish the complainant's post was based on objective programmatic and financial reasons. The Organization points out that, due to budgetary constraints, it had decided to move towards a new approach with regard to communication issues but due consideration was given, at that time, to the funding of posts within the Audio-Visual Team, including the complainant's post. Since video production services had evolved and were now available in most countries at a low cost, it was decided to outsource most of its video production; consequently, the functions performed by the complainant, that is to say film and video production, were no longer needed. It denies that the hiring of a short-term staff member to undertake communication work amounted to the creation of an “equivalent post” to that of the complainant, in particular since the functions performed by the short-term staff member were materially different from those assumed by the complainant.

Indeed, the main duty of the short-term staff member did not involve film production.

Citing the Tribunal's case law, the Organization contends that the decision to restructure some or all of its departments falls within its discretionary authority. It adds that the complainant was informed, as early as April 2004, of the Organization's intention to restructure the Audio-Visual Team and of the possible abolition of his post.

In addition, the WHO submits that it acted in compliance with the Staff Rules and asserts that short-term positions do not fall within the context of the established reassignment process. In support of its assertion, it indicates that Staff Rule 565.1 defines reassignment as "any formal movement of an individual from one post to another", which means that the reassignment process does not envisage reassignment to a short-term position because such a position is not a post but rather a function of a temporary nature. It adds that a short-term contract does not give rise to the same entitlements and benefits as a fixed-term contract. It also explains that available and suitable posts corresponding to the complainant's qualifications and experience were reviewed, but no suitable vacant post could be identified in his particular field of expertise, that is to say film production. The Organization further points out that it carefully considered the consequences for the complainant of the abolition of his post and from the outset explored the possibility of a separation by mutual agreement.

D. In his rejoinder the complainant reiterates his pleas. He adds that, contrary to the WHO's statement, his duties encompassed more than merely film and video production. He provides details of the duties he used to perform and which were taken over by the short-term staff member recruited as from 1 December 2004. He also indicates that, according to the vacancy notice for the post of Multimedia Producer occupied by the short-term staff member, one of the latter's duties was to "[w]rite, produce and distribute multimedia content, including photo essays, flash films, audio and video clips". The Organization's statement that the duties of that staff member "differ[ed] materially in nature from the functions undertaken by the complainant" is therefore misleading. He points out that the short-term staff member is still performing the same functions on a short-term basis and was assigned a numbered post in June 2006 with the title of "Technical Officer".

In support of his allegation of misuse of authority, the complainant submits that by "mismatching [...] permanent functions with a short-term employment offer" the Organization removed the vacant post of Multimedia Producer from the purview of the Reassignment Committee and thus deprived him of his "statutory entitlement to priority consideration for filling the job". Regarding the Organization's assertion that the reassignment process does not envisage reassignment to a short-term position, he contends that the semantic distinction between posts and short-term positions has no basis in the actual practice of the Organization. He explains that the Staff Rules do not define the terms "post" or "short-term position". Lastly, he submits that if he had been reassigned to the vacant short-term position from 4 June to 31 October 2005 in lieu of the temporary staff member, his entitlements or benefits would not have changed; indeed, his fixed-term appointment would have merely been extended. Thus, he would have been employed at least until 31 October 2005 instead of 30 September 2005, and in all likelihood until regular retirement age, given the continuity of the short-term official's appointment.

E. In its surrejoinder the WHO maintains its position. It acknowledges that the complainant undertook various duties related to audiovisual film and photography projects, but nevertheless maintains that from 1999 onwards the complainant's main function was "documentary video film production". As evidence it produces a copy of the complainant's performance appraisal report.

It asserts that the decision to appoint a short-term official to perform the function of Multimedia Producer was a discretionary decision taken in the interest of the Organization and in the light of available funding. Moreover, the numbering of the post occupied by the short-term staff member was a clerical mistake and did not mean that a post was created.

## CONSIDERATIONS

1. The complainant had held a post in the General Management Cluster since 2002; the post was abolished with effect from 1 January 2005. However, his contract was extended several times, finally ending on 30 September 2005, 17 months prior to his reaching retirement age. On 27 January 2005 the complainant lodged an appeal with the Headquarters Board of Appeal against the decision of 1 December 2004 to abolish his post with effect from 1 January 2005. The complainant impugns the decision of 6 February 2006 by which the Director-General rejected

his appeal and the Board's recommendations for redress. He contests the legality of that decision on the grounds of error of law, misuse of authority and disregard of the Staff Rules.

2. In his submissions the complainant argues that the Organization's decision to abolish his post and outsource the film production function for programmatic and financial reasons was illusory as a person on a short-term contract was hired to perform similar duties, at the same grade, starting on 1 December 2004, the date he was notified that his post was to be abolished. The short-term contract of six months was renewed first for five months, with one month's interruption, and then for six months. On 7 May 2005 another short-term professional, with duties similar to the complainant's, including support for "video concept, production and post-production", as well as "[p]roducing and directing video health education materials related to epidemic disease control", had his contract renewed for 11 months. In both cases, the list of skills and experience required for the short-term positions was well within the abilities of the complainant. On 25 November 2004 the complainant applied for a vacancy but the position was filled otherwise. The complainant's appointment was terminated on 30 September 2005 as the Reassignment Committee failed to find any position corresponding to his qualifications and experience.

3. The WHO denies any misuse of authority, error of law, disregard for Staff Rules or personal prejudice against the complainant. It argues that the complainant's post was abolished for purely programmatic and financial reasons. It also argues that outsourcing video production and abolishing the complainant's post represented substantial savings and that "the decision to hire a short-term official was premised on the need for a set of functions that differ materially in nature from the functions undertaken by the complainant". In response to the complainant's assertion that he was not given due preference for vacancies, the Organization states that "short-term positions do not fall within the context of the established reassignment process". It does not contest the complainant's statement that he continued doing the same work right up until his contract ended in September 2005. In addition, it contends that the Reassignment Committee did everything possible to find suitable and available posts that matched the complainant's qualifications and experience but that the search was unsuccessful.

4. The Headquarters Board of Appeal found that "[t]he programmatic and financial reasons given by the Administration for the abolition of the [complainant's] post have not been supported by the available evidence and are not credible". It also found that it was not proven that there were substantial savings and that the functions previously done by the complainant were no longer needed. In fact, the Board stated that "[t]here was evidence that funds were available and that the tasks previously carried out by the [complainant] were being performed by a temporary staff member at the same grade". The Board did not find that the complainant had proved that the Organization acted out of personal prejudice, but did assert that "the abolition of the [complainant's] post was unfair" and that "[t]he decision to abolish the [complainant's] post so shortly before his retirement ha[d] caused him undue financial hardship, loss of dignity and significant distress". The Board recommended that the Organization immediately reinstate the complainant, or as an alternative, that he be awarded, less all payments already received: salary until the age of 60; "post adjustment for the same number of months"; the Organization's monthly contribution to the pension during leave without pay until February 2007 or equivalent loss of pension; and moral damages in the amount of 5,000 Swiss francs.

5. The Tribunal finds that the Director-General's decision to abolish the complainant's post and dismiss the complainant's appeal was objectively wrong. The Tribunal notes that no personal prejudice is evident in the decision or in the decision-making process. However, when a post is abolished the abolition must result "in a reduction of the number of staff in the affected department" (see Judgments 139, under 1, 1961, under 5, and 2092, under 7). The Organization insists that the main focus of the complainant's work was documentary film production and it states that the duties of the short-term staff member who occupied the post of multimedia producer as from 1 December 2004 were materially different. While it is true that the short-term staff member was not required to produce documentaries, the duties and responsibilities were not outside the capabilities of the complainant, and in fact the qualifications required, inter alia, a "[m]inimum five years total working in broadcast journalism, in film/documentary, or multimedia/web news", and "[s]trong multimedia background in producing and distributing video, radio, web and/or photography". The duties included "[w]rit[ing], produc[ing] and distribut[ing] multimedia content, including photo essays, flash films, audio and video clips", "[l]iais[ing] with the WHO web team and photo librarian to produce and publish multimedia content on the web", and "[l]iais[ing] with communications staff at WHO regional offices to produce country-focussed stories and coordinate multimedia content". The complainant's duties and responsibilities included running the photo library; the conception, design and setting-up of exhibitions for assemblies and meetings; documentation and research; the editing and directing of video productions on a wide range of health subjects; and liaising with Member States, television producers, photo agencies and regional offices for audiovisual matters.

6. It is self-evident that hiring a short-term employee to fulfil duties that could have been done by the complainant, while still employing the latter, shows that instead of a reduction of staff there was an increase in staff which is directly contrary to the idea of programmatic and financial savings. It has not been proved that there were real financial savings from the abolition of the complainant's post, nor that the functions of the complainant were no longer needed as stated by the Organization. In fact the evidence provided points to the contrary. After comparing the vacancy announcement and the terms of reference for the short-term position of multimedia producer with the duties and work experience of the complainant, it is clear that the complainant could have fulfilled the duties required of the short-term staff member who was recruited as multimedia producer, and in fact did assist that staff member. The WHO could still have outsourced the video production element of the complainant's job which would have ensured financial savings for the Organization while maintaining the complainant as an active staff member. This would have allowed the complainant to end his career with the Organization in a positive and dignified manner.

7. In view of the above considerations, the Tribunal sets aside the impugned decision and orders the WHO to pay the complainant damages equivalent to his full salary and post adjustment which he would otherwise have earned for the 17 months from 1 October 2005 to 28 February 2007, less all payments already received. The Organization shall also pay the complainant the equivalent of his loss of pension which he estimates at 90,890 United States dollars, a calculation not contested by the defendant.

8. The Tribunal states that it is unfortunate that this situation has occurred at all, but it is especially disappointing that the complainant, who was due for retirement, had to suffer such an undignified end to what was otherwise a long and rewarding career with the Organization. Although the WHO did not act out of personal prejudice, the Tribunal recognises that the decision to abolish the complainant's post and the impugned decision to reject his appeal have caused him moral injury. It therefore awards him 8,000 Swiss francs in moral damages as well as costs in the amount of 5,000 francs.

## DECISION

For the above reasons,

1. The impugned decision of 6 February 2006 is set aside.
2. The WHO shall pay the complainant damages equivalent to the full salary and post adjustment which he would otherwise have earned for the 17 months from 1 October 2005 to 28 February 2007, less such sums as have already been received from the Organization. Additionally, the complainant shall give credit for all professional earnings for that period.
3. The Organization shall pay the complainant the equivalent of his loss of pension, which the Tribunal fixes at 90,890 United States dollars.
4. It shall pay him moral damages in the amount of 8,000 Swiss francs.
5. It shall also pay him costs in the amount of 5,000 francs.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.