117th Session **Judgment No. 3313**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. D. against the World Health Organization (WHO) on 4 October 2011, WHO's reply of 19 April 2012, the complainant's rejoinder of 31 May and WHO's surrejoinder of 29 August 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a former staff member of WHO, challenges the decision not to reinstate him following the abolition of his post. He joined WHO's Regional Office for Europe (EURO) in 2005 under a one-year contract which was extended several times. The EURO Administration informed him in 2008 that his post was likely to be abolished, but in the event this decision was postponed and his contract was extended until 31 December 2009. By a letter of 10 June 2009 he was formally notified that, owing to changes in EURO's strategic priorities, his post would indeed be abolished and that he would therefore separate from service on 31 December 2009.

On 5 August 2009 the complainant lodged an appeal with the EURO Regional Board of Appeal (RBA), challenging the decision to abolish his post on the grounds that it was tainted with personal prejudice on the part of his supervisors, incomplete consideration of the facts and failure to follow the proper process for abolishing a post. In its report dated 18 December 2009 the RBA concluded that, despite obvious tensions between the complainant and his supervisors, there was insufficient evidence to support a finding of personal prejudice. However, it considered that there was no doubt that the applicable rules had not been followed with respect to the documentation of the process, and it therefore recommended that the complainant be granted a final six-month extension of contract or, failing this, that the post abolition process be resumed from scratch, in which case the complainant's contract would have to be extended accordingly. The RBA urged the Regional Director to take a decision on the appeal without delay, in view of the imminent expiry of the complainant's contract.

In January 2010 the Regional Director asked the RBA to provide further information on the case. This was submitted on 11 January 2010 in the form of an addendum to the RBA's report. Between January and June 2010 the parties discussed the possibility of an amicable settlement of the dispute. Meanwhile, on 1 February a new Regional Director took office. On 24 February, having not yet received a decision on his appeal, the complainant filed a Notice of Intention to appeal with the Headquarters Board of Appeal (HBA), challenging the implied decision to dismiss his appeal to the RBA.

The settlement discussions having failed, the new Regional Director wrote to the complainant on 20 July 2010 to inform him of her decision on his appeal. Although she agreed with the RBA's conclusions, she decided not to accept its recommendation of a six-month extension of contract because, as the RBA itself had noted, there were sound programmatic reasons justifying the abolition of his post and because, for practical reasons, it was no longer possible to extend his contract. Instead, she decided to award the complainant salary and entitlements equivalent to a six-month extension of contract.

The complainant then filed a second appeal with the HBA, challenging the decision of 20 July. The HBA joined the complainant's two appeals and issued a report in July 2011. It found that the programmatic reasons mentioned by the Administration to justify the decision to abolish his post had been provided only after the decision was taken, which constituted a serious breach of due process and of the relevant procedure. It also noted that the decision had not been signed by the Regional Director, and that the process had not been properly documented as required by the WHO Manual. The HBA considered that the evidence revealed a "likelihood of personal prejudice" on the part of the complainant's supervisors. For these reasons, it recommended that the contested decision be quashed, that the abolition process be recommenced and that the complainant be reinstated in his post with retroactive effect from 1 January 2010, which would enable him to benefit from the reassignment process.

On 22 July 2011 the Director-General wrote to inform the complainant of her final decision on his appeal. She considered that the contested decision had been taken for objective reasons, and not for reasons of personal prejudice, but that the complainant was nevertheless entitled to redress on account of the procedural errors that had been committed. She did not accept the HBA's recommendation of reinstatement, because she considered the abolition of his post to be justified and because she was not satisfied that, in the normal course of events, he would have received an extension of appointment. Instead, she decided to award him material damages in an amount equivalent to 12 months' salary and entitlements, less any amount already received pursuant to the decision of 20 July 2010. Occupational earnings received after his separation from WHO were not to be deducted. The Director-General also awarded him 10,000 United States dollars in moral damages and 3,000 dollars in costs. That is the impugned decision.

B. The complainant maintains that the decision to abolish his post was tainted with personal prejudice on the part of his supervisors. In this connection, he refers in particular to an e-mail exchange between the two supervisors. He also points out that, when it was created, his post covered only three countries, whereas by the time it was abolished

it covered 22, which casts doubt on the justification for abolishing it. According to him, there is no evidence that the reasons for abolishing his post were ever considered by the Regional Director, or that the latter authorised his supervisors to sign the decision on his behalf. Moreover, the form which had to be submitted to request the abolition of his post – Form 171 – was submitted without the background information and supporting documents required by Manual provision II.3.150.

The complainant contends that his post, though initially classed as a post of limited duration, was later shown as having no date of expiry. In his view, WHO ought to have considered him for reassignment even if his post was of limited duration. The award of one year's salary is not adequate compensation for the illegal abolition of his post. He asks the Tribunal to quash the impugned decision insofar as the Director-General rejected the recommendation of reinstatement, and to order WHO to reinstate him with retroactive effect from 1 January 2010 and to assign him immediately to a suitable post. He also claims 3,000 euros in costs.

C. In its reply WHO asserts that the complainant's post was abolished for valid and objective reasons, of which he was duly informed. Owing to changing strategic priorities, the complainant's functions were merged with those of other staff and there was no longer any need for a dedicated post in his area of work. WHO emphasises that the RBA recognised that there were valid reasons for abolishing his post. It acknowledges that the abolition process was procedurally flawed but argues that he has already received adequate compensation in this respect.

With regard to the complainant's allegations of personal prejudice, WHO submits that the complainant bears the burden of proving these allegations and that the evidence on which he relies is insufficient. It points out that it would be hard to understand why his contract was extended in 2009 if his supervisors were prejudiced against him. Moreover, the fact that one of his supervisors signed the Form 171 on behalf of the Regional Director is of no consequence, as he was duly authorised to do so.

Lastly, WHO states that the complainant's post was not a post of indefinite duration, but one of limited duration. As he had not served on a fixed-term appointment for a continuous and uninterrupted period of at least five years, he was not eligible for inclusion in a reassignment process under Staff Rule 1050.2. Nevertheless, consultations were held with him to explore further employment possibilities when it was decided that his post was to be abolished.

D. In his rejoinder the complainant submits that he is qualified for many positions at WHO and that there is no evidence to support the view that reinstatement would be inappropriate. He emphasises that both the RBA and the HBA found in his favour in this case.

E. In its surrejoinder WHO maintains the position set out in its reply. It considers that it is up to the complainant to show that he is duly qualified for vacancies, but he has not done so. His applications for various vacancies have, however, been given due consideration.

CONSIDERATIONS

1. The complainant's post was abolished with effect from 31 December 2009. He challenged that decision in an appeal to the RBA citing prejudice, incomplete consideration of the facts and failure to observe or apply correctly the provisions of the Staff Regulations, Staff Rules, and the terms of his contract. The RBA found that there was "not enough concrete evidence" to conclude that there was personal prejudice in the decision to abolish his post. It concluded that "a clear case can be made on the 'redundancy' of the EMS [Emergency Medical Services] function and that the decision on this is within the mandate of [the complainant's second-level supervisor] as Director [of the Division]". It also concluded that "without any shadow of a doubt the Rules have not been followed correctly as regards the documentation of the process […] also that the spirit as well as the letter of the regulations have been overlooked". The RBA recommended that "the Administration offer the [complainant] a six month contract extension

to run from 1 January 2010 as his last contract with the Organization to be in place as soon as possible or by 15 January 2010 at the latest". The RBA also added the following:

> "Additional and general recommendations
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> […]
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> 1. A well defined support service provided by HRM to lead on HR processes including post abolition and ensure that steps and documentations of steps is complete.
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> 2. A training and support programme to assist all managers wishing to tackle disciplinary or attitudinal issues with staff and to counsel staff facing difficulties.
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> 3. A reiteration of disciplinary procedures particularly where they concern supervisors encouraging or allowing junior colleagues and interns to put themselves in unprotected situations.
>
> 4. A clear policy on supporting staff whose posts are to be abolished making clear what they can expect and attempting to help them to look for other roles in a concrete and constructive way i.e. not only by including a sentence in the separation letter encouraging them to apply for other posts.
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> 5. Formal recognition of the importance of mediation in such cases with Executive Management and that the Director of Administration and/or the Human Resources Manager be mandated to mediate when negotiations between staff members and supervisors reach an impasse. Executive Management are asked also to monitor whether these mediation efforts reduce the number of cases going to appeal."

2. The RBA submitted an addendum to its report at the request of the Regional Director. In that addendum the RBA clarified some of its points and reiterated its conclusions and recommendations. The complainant and WHO entered into negotiations in an effort to reach an amicable agreement. The complainant filed a first internal appeal (dated 24 February 2010) with the HBA challenging the abolition of his post and the implicit rejection of his appeal to the RBA. Following the unsuccessful negotiations, the new Regional Director informed the complainant of her decision regarding his appeal in a letter dated 20 July 2010. She agreed with the RBA's conclusions that the rules were not followed with regard to the documentation of the process, that a clear case could be made on the redundancy of the EMS function, that the decision to abolish the post was within the mandate of the

Division Director, and that there was no concrete evidence of personal prejudice. She found the RBA's recommendation for a six-month contract extension to be reasonable but, taking into account the programmatic reasons for the abolition of the complainant's post and the impracticability of reinstatement, she decided instead to pay him salary and entitlements equivalent to a six-month contract.

3. The complainant impugned that decision in a second appeal to the HBA (dated 16 September 2010). He reiterated the claims raised before the RBA and specifically alleged that he had suffered personal prejudice from his first and second level supervisors. The HBA stated that this appeal was receivable and, considering that it covered the same issues raised in the previous appeal, decided that the two appeals should be reviewed together, irrespective of the question of the receivability of the first appeal. The HBA joined the two appeals and concluded "in the likeliness of personal prejudice on the part of the [complainant's] supervisors and that the post abolition process and documentation were flawed". It "[did] not agree with the conclusion of the RBA that the justifications for the post abolition were sufficiently clear and articulated. On the contrary, the [HBA] acknowledge[d] that these justifications were added later in the procedure. In the [HBA's] opinion, this constitute[d] a serious breach of the principle of due process and of the relevant rules and procedures." The HBA stated that "[b]ecause of these flaws in the abolition procedure and the personal prejudice, [it saw] sufficient reasons for compensation […]". The HBA recommended the following: that the post abolition decision of 10 June 2009 be quashed and that the abolition process be recommenced in accordance with the relevant rules and procedures; and that the complainant be fully reinstated in his position from 1 January 2010 with back pay and entitlements from that date. The HBA emphasized the importance of giving the complainant "a very fair chance for reassignment and thus a fair chance to remain in the Organization".

4. In her decision dated 22 July 2011, the Director-General contested the arguments on which the HBA based its conclusion that

there was personal prejudice on the part of the complainant's supervisors. She considered the case in its totality and concluded that the decision to abolish the complainant's post was taken for objective reasons and not for reasons of personal prejudice, but that there were errors in the abolition of the complainant's post for which redress was warranted. However, she did not agree that the redress should include reinstatement. Instead she decided that the complainant should receive the equivalent of 12 months' salary and entitlements as detailed above. The complainant impugns this decision in the present complaint.

5. The Tribunal finds that the complaint is unfounded. The claim of prejudice has not been proven. The evidence presented is not convincing and the HBA's statement that there was a "likelihood of prejudice" is not sufficient. The Tribunal agrees with the Director-General's analysis and conclusions. As she pointed out, the complainant was involved at an early stage in the discussions regarding the abolition of his post and it was ultimately decided to extend his contract until the end of 2009, which is not consistent with personal prejudice regardless of the complainant's interpretation of the e-mail between his two supervisors. The Tribunal is of the opinion that the comments in that e-mail ("it may be hard to make the case convincingly that this has less to do with him personally than it does with the 'changing priorities of the organization'" and "I'll be hard pressed to make the case that this doesn't have to do with his attitude and performance") do not prove the existence of prejudice as they could just as easily be interpreted as the concern that the appearance correspond to the reality.

The Director-General rightly pointed out that the increased number of countries covered by his post at the time when it was abolished was not relevant because the restructuring that took place made the phasing out of his functions practicable. This reflects programmatic reasons rather than personal prejudice.

6. It should be noted that the flaws identified in the post abolition procedure were formal ones (e.g. lack of documentation and express motivation) which were unfortunate but do not show that if the process had been correctly followed, a different outcome would have resulted and

again do not necessarily reflect personal prejudice. The Director-General stated in her decision of 22 July that "[she was] not satisfied that, in the normal course of events, [the complainant] would have been offered an extension of appointment" and the Tribunal finds this to be convincing. WHO has stated that although one of the complainant's supervisors signed Form 171 on behalf of the Regional Director, he was duly authorised to do so and the Tribunal finds that this is a normal delegation of authority considering the Regional Director was away on duty travel at the time. It is apparent, from the "additional general recommendations" of the RBA detailed above, that WHO has some areas in which it could improve its administrative functions. This supports the idea that the procedural flaws identified in this case were the result of general mismanagement and not the direct result of personal prejudice.

7. The flaws in the abolition process do indeed warrant redress and the Tribunal considers that the amount already paid (i.e. the salary and entitlements equivalent to a 12-month contract) is sufficient compensation for the material and moral injury suffered by the complainant. Furthermore, considering the complainant had worked for less than five years at WHO, that his duties were redistributed following his separation from service, and that several years have passed since the complainant's post ceased to exist, the Tribunal agrees with the conclusion of the Director-General that reinstatement would not be practicable. The Tribunal also notes that some efforts were made to consider the complainant for other employment opportunities even though there was no obligation for WHO to do so.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ