N.

v.

WHO

125th Session **Judgment No. 3920**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. N. against the World Health Organization (WHO) on 17 March 2015 and corrected on 18 April, WHO's reply of 24 July, the complainant's rejoinder of 11 November 2015 and WHO's surrejoinder of 15 February 2016;

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 terminate her fixed-term appointment pursuant to the abolition of her post.

In 2011, against a background of ongoing financial constraints, WHO conducted a wide-scale restructuring at Headquarters, in Geneva, under the direction of the Director-General, and at the regional offices, including the Regional Office for the Eastern Mediterranean (EMRO), under the responsibility of each regional director. By a letter of 10 August 2011 the complainant, who held a fixed-term appointment on secondment in EMRO, was informed of the decision to abolish her post "following completion of a programmatic, financial, and strategic review" of the Division in which she worked. She was told that efforts would be made to find her an alternative assignment through a formal

reassignment process conducted by the Regional Reassignment Committee, unless she preferred to opt for a separation by mutual agreement (SMA).

On 15 September 2011 the complainant made a formal request for SMA and tried to negotiate its terms and conditions. The Director-General, to whom the EMRO Regional Director had forwarded the formal request, agreed to offer her an SMA, but not on the terms proposed by the complainant. By a memorandum of 23 October she was advised that the offer was not negotiable and that, under the terms of the SMA, she was required to agree that she would not work for WHO, including bodies or entities administered by it, under any type of contractual arrangement for a two-year period following her separation. As the complainant did not accept the offer within the time limit stipulated in the memorandum, she was informed on 21 November that a formal reassignment process, limited to the locality of the abolished post, i.e. Cairo (Egypt), would be conducted.

In the meantime, on 2 November 2011, the complainant had filed an appeal with the Regional Board of Appeal (RBA) against the decision to abolish her post, the decision to cancel a competition for a position for which she had applied, the decision to include in the SMA offer a provision prohibiting her from working for WHO for two years and the fact that her last contract renewal was for a period of only eight months, instead of two years. She sought inter alia the quashing of the decision of 10 August 2011, reinstatement, damages and costs.

On 11 March 2012 the complainant was informed that no suitable alternative assignment had been identified for her, and that the Regional Director had therefore decided to terminate her appointment effective 13 June 2012. She separated from service on that date. By a letter of 29 July 2012, she was notified of the decision of the Regional Director to accept the RBA's recommendation to dismiss her appeal.

On 28 September 2012 the complainant filed an appeal with the Headquarters Board of Appeal (HBA) maintaining most of the claims raised before the RBA and requesting the quashing of the decision of 11 March. In its report, transmitted to the Director-General on 3 November 2014, the HBA observed that the complainant's claims

concerning the formal reassignment procedure and the termination of her appointment were the subject of a separate appeal and were irreceivable in the present proceedings. Moreover, it considered that the actions cited by the complainant as evidence of "duress and discrimination", which had occurred between 2005 and 2011 and led to the abolition of her post, had not been challenged within the relevant time-limits and were also irreceivable. As to the merits, it recommended that the appeal be dismissed in its entirety. The Director-General endorsed the HBA's recommendations in a letter of 23 December 2014, which constitutes the impugned decision.

On 17 March 2015 the complainant filed her complaint with the Tribunal in which she seeks the setting aside of the impugned decision and all the previous decisions mentioned above, her retroactive reinstatement and the "re-rout[ing]" of her case back to the Regional Reassignment Committee or her reinstatement in a post of commensurate responsibility, grade and step, with full retroactive effect, including payment of all emoluments, compensation for moral and material injury, and costs. Moreover, she asks the Tribunal to make various declarations in law and to "recommend" that no retaliatory action be taken against her. She requests that action be taken to "restore" her two-year fixed-term appointment to its original date, and she claims interest at the rate of 8 per cent per annum on all amounts paid to her and such other relief as the Tribunal determines to be just, necessary and equitable.

WHO asks the Tribunal to dismiss the complaint as partly irreceivable for failure to exhaust the internal means of redress, and as unfounded.

CONSIDERATIONS

1. The complainant was a staff member of WHO whose employment was terminated on 11 March 2012, effective 13 June 2012. Her termination had been preceded by a decision to abolish her post communicated to her in August 2011. Attempts to reassign the complainant were unsuccessful.

2. It is desirable, at the outset, to identify the legitimate subject matter of this complaint. The complainant, in terms, impugns a decision of the Director-General of 23 December 2014. The Director-General dismissed an appeal of the complainant and, in so doing, followed the recommendations of the HBA in a report transmitted to the Director-General on 3 November 2014 to dismiss all the complainant's claims.

3. The internal appeal process to the HBA commenced with a Notification of Intention to Appeal of 28 September 2012. The complainant appealed against a range of decisions and the HBA concluded some decisions were open to appeal and some were not anymore because the complainant had missed the sixty-day deadline provided in the Staff Rules. In her decision of 23 December 2014, the Director-General accepted these conclusions of the HBA and identified what was appropriately raised in the appeal and what was not. What were irreceivable were inter alia the challenges to the decision to terminate the complainant's appointment, the decision to end her participation in the reassignment process and the alleged failure to apply correctly the Staff Rules relating to reassignment. What were receivable were the challenges to the decision of the Regional Director, dated 29 July 2012, to accept the recommendation of the RBA to dismiss the complainant's appeal, the decision to abolish the complainant's post, the decision to include in the SMA offer a provision which prohibited the complainant from working for WHO for two years after separation, the decision to cancel the competition for the position of Regional Adviser at grade P.5 for which she had applied and the action to renew the complainant's fixed-term appointment for eight months as opposed to two years.

4. It is not entirely clear from the complainant's pleas whether she accepts, at all, any of the foregoing analysis and its basis which was that either the claims were time-barred or the complainant had not yet exhausted the internal means of redress given that there was another internal appeal pending at the time of the HBA's report concerning the complainant's termination of appointment and related matters. However, she does not advance any cogent reasons in her discursive pleas for

approaching the subject matter of these proceedings in any way other than as identified by the Director-General in her decision of 23 December 2014. The Director-General's conclusions and those of the HBA in this regard, are correct. Accordingly, the Tribunal will review and assess the pleas on the basis that the subject matter of the complaint comprises the receivable matters referred to in the preceding consideration.

5. However, one further observation about the complainant's pleas should be noted. The complainant includes in her brief, as one of the documents she appears to rely upon, the Statement of Appeal in her internal appeal to the HBA that contains the pleas advanced in that appeal. The Tribunal has stated on a number of occasions, and recently with increasing frequency, that it is inappropriate to effectively incorporate by reference into the pleas before the Tribunal arguments, contentions and pleas found in other documents, often a document created for the purposes of internal review and appeal (see, for example, Judgments 3842, consideration 4, 3692, consideration 4, and 3434, consideration 5). In this matter, the Tribunal will only have regard to pleas in the complainant's brief and rejoinder and will disregard any additional, supplementary or other pleas in the Statement of Appeal before the HBA.

6. The complainant's brief commences with a summary of the complaint and the complainant's service history. Thereafter, it is divided into two parts and each part is divided and subdivided into sections addressing various matters. The first part sets out the chronology of relevant facts. This part contains a lengthy summary of events (Section A), an account of the appeal to the RBA, that Board's report and the Regional Director's decision in a letter of 29 July 2012 (Section B) and a similar account of the appeal to the HBA, issues raised in that appeal, the HBA's report and the decision of the Director-General of 23 December 2014 responding to that report (Section C).

7. To the extent that the chronology referred to in the preceding consideration sets out the arguments made to the RBA and subsequently to the HBA, they appear to be intended mainly to provide the background against which the complainant now maintains her pleas to the Tribunal. Indeed it is in the second part of the brief that the complainant identifies and details the three legal arguments advanced to the Tribunal. It is true that the complainant prefaces her three legal arguments with the comment: "[a]part from arguments already raised in the above paragraphs in Sections A, B and C, the [c]omplainant submits the following". However, it is not for the Tribunal to distil from that chronology what is argument advanced in the proceedings before the Tribunal and what is simply an historical account of what occurred, even if expressed in argumentative terms. The Tribunal will consider each of the three legal arguments. However, as a matter of fairness to the complainant, if, elsewhere in the brief (or in the rejoinder), there were pleas about an issue of apparent substance concerning the limited subject matter of these proceedings, they will also be addressed.

8. The first of the legal arguments advanced by the complainant is that the decision to abolish her post "[wa]s vitiated on account of [WHO's] non-disclosure of essential documents to the [c]omplainant, depriving her of all relevant evidence, violating her due process rights and established principles of international civil service law". The complainant's pleas are vague as to when these documents should have been provided. However, it is tolerably clear that the complainant is asserting that they should have been provided at the time she was told of the abolition decision. She argues that the failure to produce them vitiates the decision to abolish her post. Whether right legally or not, logically this legal effect flowing from the non-production of documents would arise at the time of the post's abolition. The complainant argues that there were three specific documents she should have been provided with but none were provided. Those documents appear to have been created prior to, but at about the time of, the decision to abolish the post. The first was said to be a "document justifying the abolition of [her] post", the second was a "restructuring document" and the third was a "programmatic, financial and strategic

review document". The first document was said to contain reasons as to why her post was to be abolished and the other two documents contained the details on restructuring, with "the latter being cited upon which the [abolition] decision was based".

9. The complainant was informed in writing of the abolition of her post by a letter dated 10 August 2011. To the extent that it addressed the reasons for the abolition, it commenced by stating: "[a]s you have been informed, following completion of a programmatic, financial, and strategic review of the Division [in which you work], I regret to inform you that the post which you are currently occupying will not continue and is no longer required". In its pleas WHO does not seek to establish any factual foundation for the statement "as you have been informed" and thus establish reasons which had earlier been given for the abolition of the post beyond the reasons in the letter of 10 August 2011.

10. It is well settled in the Tribunal's case law that if a decision is taken to abolish a post, then the staff member occupying the post is entitled to know the reasons for that decision in a manner that safeguards the individual's rights (see, for example, Judgments 3290, consideration 14, and 3041, consideration 8). It may be doubted that the letter of 10 August 2011 adequately explains the reason for the abolition of the complainant's post. There are documents in evidence (documents dated 10 July 2011 and 13 July 2011) that point to specific reasons for what proved ultimately to be the rationale for the abolition of the complainant's post. If those were the reasons, they were not communicated in any form to the complainant.

11. However, the legal argument advanced by the complainant in her pleas presently being addressed, is whether WHO was legally obliged to provide the complainant with copies of the specific documents referred to in consideration 8 above, presumably to discharge, wholly or in part, its duty to inform the complainant of the reasons why the post was abolished. The short answer is that WHO was not legally obliged to provide those documents. If, as a matter of practice or by operation of staff rules, regulations or other normative legal documents, internal

documents are created by management proposing the abolition of a post and the post is abolished, the organisation is not under a legal obligation to provide those documents to the person whose post is to be abolished (see Judgment 2885, consideration 6). Nevertheless, the organisation is obliged to inform the affected staff member of the reasons for the abolition of the post. That obligation can be discharged (though it was not in the present case) by setting out in another document, as is often the case in a letter informing the staff member that the post is abolished, reasons which may have been discussed in internal management documents created in the lead-up to the decision to abolish the post. Accordingly, the first argument of the complainant, which only concerns the non-disclosure of the three specific documents referred to in consideration 8 above, is unfounded.

12. The Tribunal notes that one of the documents referred to in consideration 10 above (a Note for the Record dated 10 July 2011) was provided, on a confidential basis, by WHO to the HBA and not provided to the complainant during the internal appeal procedure. WHO appears to acknowledge in its surrejoinder that, having regard to the Tribunal's case law and in particular Judgment 3585 (a case involving WHO), this should not have occurred. Even if a document is confidential, this ordinarily does not provide a basis for not providing the complainant with a copy of it, which might potentially be an important document, in adversarial proceedings such as the internal appeal procedure where the document is relied on by the organization (see, for example, Judgment 3862, consideration 11). The complainant, in this case, was entitled to see the evidence advanced by the Organization in the internal appeal procedure in order to equip her to provide rebutting evidence or to otherwise challenge the evidence or comment on it. These legal principles are rooted in judgments of the Tribunal made well before these proceedings commenced (see, for example, Judgment 2700, consideration 6). While it is not an issue raised directly by the complainant in her pleas, this failure to uphold the complainant's due process rights warrants an award of moral damages which the Tribunal assesses in the sum of 15,000 United States dollars.

13. The second legal argument of the complainant is that the abolition of her post was invalid because WHO failed to demonstrate that it was driven by organizational needs based in fact. In discussing this issue, the Tribunal puts to one side for the moment the complainant's third legal argument, namely that the abolition of her post was based on personal prejudice. The starting point in considering this issue is that when a post is abolished for financial reasons it is incumbent on the organisation to demonstrate that this was genuine, given that the relevant facts are within the knowledge of the organisation (see Judgment 3688, consideration 18).

14. However it is tolerably clear that WHO can establish that the abolition of the complainant's post was genuine. The complainant was stationed in EMRO. WHO contends in its reply, and the complainant, in the main, does not dispute in her rejoinder, that a wide-ranging analysis of the programmatic needs and priorities at EMRO was undertaken against the backdrop of the budgetary constraints facing WHO at the time. This included an in-depth review of the work of the Division in which the complainant was then employed. Specifically, she was employed in the Fellowship Unit (FEL). At the relevant time, the number of fellowship requests received from Member States had fallen markedly as a result of the global financial crisis. The review of the work of the Division focussed particularly on FEL and revealed that there was a duplication of work amongst the existing staff. Contemporaneous documents in evidence support this account. For this reason, at least initially, the reassignment of the complainant was proposed, though ultimately a decision was taken to abolish her post.

This account is challenged by the complainant in her rejoinder only in relation to some matters of detail, but they are irrelevant in the sense that they do not detract from the foregoing reasons advanced by the Organization. The first is that the duplication of work came about as early as June 2010 as a result of "intentional prejudicial actions" by officers in the complainant's Division towards her. The second is that the decrease in fellowship numbers was known in early 2010 when she was reassigned to FEL. She also contends, incorrectly, that she was the

only staff member in the region to lose her livelihood. The complainant's second legal argument is unfounded.

15. The complainant's third legal argument is that the abolition of her post was based on personal prejudice. As part of that argument, the complainant invites the Tribunal to take into account her experiences as a staff member going back as far as her application for a promotion in, it appears, 2007. The complainant contends that these experiences demonstrate a pattern of personal prejudice which informs a consideration of the reason why her post was abolished. The complainant cites in her brief Judgment 3221 in support of the use of this historical material. The complainant identifies twelve events or situations (though two are expressed with considerable generality) she had experienced during her employment that, so the complainant argues, point to the decision to abolish her post being tainted by personal prejudice. Some details of these events are set out in the first part of the complainant's brief as part of the chronology of relevant facts and supplemented in her rejoinder. The account of those events, even if accepted as factually correct, does not warrant the drawing of an inference that those who made the decision to abolish the complainant's post were influenced by personal prejudice towards the complainant. It was abolished for the reasons discussed earlier.

16. Three further matters in the complainant's pleas need to be addressed and are accepted by WHO as within the scope of these proceedings. The first concerns the competition for a position for which the complainant applied on 2 February 2011 and which was cancelled. The competition concerned a position of Regional Adviser at grade P.5. The Tribunal recalls that a decision to abolish the complainant's post was made and communicated to her in a letter dated 10 August 2011 (received on 5 September 2011) and her employment was terminated on 11 March 2012, effective 13 June 2012.

17. On 12 October 2011 the complainant sent a memorandum to the Regional Director effectively protesting about the decision to abolish the post she then held and asking for a reversal of that decision.

The complainant was sent an email on 17 October 2011 informing her that "due to organizational changes this [competition] ha[d] been cancelled". This was a reference to the P.5 position of Regional Adviser for which the complainant had applied much earlier that year. In her pleas, she suggests that in the 12 October 2011 memorandum she again expressed interest in that position. If she did, it is a little cryptically expressed and not obvious from the text of the memorandum. The complainant points to this sequence of events to suggest that the cancellation of the competition was a manifestation of the personal prejudice towards her. The Tribunal does not accept this.

18. Nonetheless the cancellation of the competition is not insignificant. The reason given in the email of 17 October 2011 for the cancellation was that it was "due to organizational changes". In her brief, the complainant said that she met with the Administration after the competition had been cancelled. The Administration told her that it had promised to promote to the position another staff member who had also applied for it, without "issuing a new vacancy". In its reply and surrejoinder, WHO does not deny this account of the conversation. The substance of WHO's response is threefold. Firstly, it says that an organisation has discretionary power to make such decisions, citing Judgments 1982 and 2116. Secondly, it says that the complainant had not been shortlisted for the position and, lastly, that the decision to cancel the competition was taken in good faith for objective programmatic reasons. No details of programmatic reasons were identified in the contemporaneous documents or in WHO's pleas.

The Tribunal observed in Judgment 3647, consideration 9, that: "[t]he Tribunal's case law recognises that the executive head of an international organisation may cancel a competition in the interest of the organisation if, among other reasons, it becomes apparent that the competition will not enable the post concerned to be filled, and that she or he may, if need be, decide to hold a new competition on different terms (see, for example, Judgments 1223, under 31, 1771, under 4(e), 1982, under 5(a), and 2075, under 3). However, the condition relating to the interests of the organisation must actually be met, so that the

cancellation of the initial process is based on a legitimate reason. In this matter as in any other, arbitrary decision-making is unacceptable."

The reason for the cancellation of the competition given to the complainant in her conversation with the Administration was not a legitimate one. In most of the rules of the international organizations which have accepted the Tribunal's jurisdiction, competitions are a fundamental mechanism of the selection of international civil servants for positions within international organizations and their integrity must be protected. However, in the present case, the complainant had not been shortlisted because she did not have the requisite years of experience. Thus, she suffered no detriment as a result of the cancellation of the competition.

19. The second matter the Tribunal will address deals with a plea of the complainant concerning the offer of an SMA in October 2011. Her argument contains two elements. The first is that no attempt was made by WHO to negotiate the terms of that agreement in a context where she was being asked to indicate her acceptance in a time frame that she believed put her under undue pressure. The second was that the agreement proposed by WHO included a term that would have prevented her from working for all bodies and entities administered by WHO under any type of contractual arrangement for two years following her separation. As to the first element, there is no legal principle flowing from the Tribunal's case law that requires an organisation to negotiate a separation agreement on an individual basis with any employee who was separating from the organisation. As to the second element, it was a component in an overall package which included the payment of a significant amount of money to the complainant. The inclusion of this component was not unlawful.

20. The last matter the Tribunal will address is the complainant's plea that her appointment should have been extended by two years and not eight months. The short answer is that WHO was not under any legal obligation to extend her appointment for any specified period including two years. It was open to WHO to extend the appointment by the period the complainant now challenges.

21. The complainant has generally been unsuccessful in her complaint though successful on one limited issue. She is entitled to 1,000 United States dollars as costs.

DECISION

For the above reasons,

1. WHO shall pay the complainant 15,000 United States dollars by way of moral damages.
2. WHO shall pay the complainant 1,000 United States dollars in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ