Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N. (No. 2)

v.

WHO

127th Session **Judgment No. 4097**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms N. N. against the World Health Organization (WHO) on 22 May 2016 and corrected on 10 October 2016, WHO's reply of 27 February 2017, the complainant's rejoinder of 13 April and WHO's surrejoinder of 7 August 2017;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant contests the decisions to end her participation in the reassignment process and to terminate her fixed-term appointment further to the abolition of her post.

The complainant joined the WHO Regional Office for the Eastern Mediterranean (EMRO) in Cairo, Egypt, on secondment from the Suez Canal University, in January 2005 under a Special Services Agreement. In May 2005 she was appointed to a post in the National Professional Officer category under a fixed-term contract which was subsequently extended for periods of varying duration until 13 June 2012.

By a letter of 10 August 2011 she was informed that "following completion of a programmatic, financial, and strategic review" of the Division in which she worked, her post would be abolished effective

1 January 2012 and that efforts would be made to find her an alternative assignment through a formal process conducted by the Regional Reassignment Committee (RRC). She was also informed that the formal reassignment process, which would commence on the date of receipt of the 10 August letter and would normally end within six months from its commencement, would be limited to her current duty station, i.e. Cairo, as the post she occupied was subject to local recruitment.

In a memorandum of 4 March 2012 to the Regional Director, the Secretary of the RRC advised that only three National Professional Officer posts had become available in the duty station since the RRC had started dealing with the complainant's case on 13 September 2011, but her profile did not match the requirements of any of these posts. Noting that it was not planned to have future fixed-term National Professional Officer posts in the Regional Office or the Egypt Country Office, the Secretary stated that the RRC members were satisfied that all reasonable reassignment options had been exhausted and recommended that the three months' notice of termination provided for in the Staff Rules be served on the complainant on 4 March 2012 or shortly after, i.e. on completion of the six-month reassignment period foreseen under Staff Rule 1050.6. Alternatively, in the event that there was a potential reassignment possibility for the complainant in the structure to be announced, the RRC members suggested that the Regional Director exceptionally consider extending the complainant's reassignment period by two months to allow for this potential reassignment.

In a letter of 11 March 2012, the complainant was informed that no suitable assignment had been identified for her and, consequently, the Regional Director had decided to end her participation in the reassignment process and to terminate her appointment effective 13 June 2012. The letter indicated that the complainant's last medical examination would be considered as her exit medical examination. The complainant submitted a notice of intention to appeal that decision to the Regional Board of Appeal (RBA) on 10 May 2012, and on 10 October 2012 she submitted her statement of appeal requesting, inter alia, that the decisions of 10 August 2011 and 11 March 2012 be quashed, that she be reinstated retroactively, that she be awarded material, moral and exemplary damages

and that her fixed-term contract be restored to its original date, i.e. 4 May 2013. She also claimed costs and requested the disclosure of a number of documents relevant to the abolition of her post and her reassignment.

In its report of 1 September 2013, the RBA concluded that the reassignment process had been properly conducted and that the RRC's inability to reassign the complainant was due to the fact that none of the posts that were vacant during the reassignment period was suitable for her. Consequently, the decision to terminate her contract was in accordance with the Staff Regulations and Staff Rules. By a letter of 28 November 2013, the Regional Director informed the complainant that he had decided to endorse the RBA's recommendation and to dismiss her appeal.

On 26 January 2014 the complainant submitted a notice of intention to appeal the Regional Director's decision to the Headquarters Board of Appeal (HBA) and on 30 June 2014 she submitted her statement of appeal. In its report of 15 January 2016, the HBA recommended that the appeal be dismissed in its entirety. By a letter of 26 February 2016, the Director-General informed the complainant that she had decided to accept the HBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and the earlier decision dated 28 November 2013. She also asks the Tribunal to set aside the decision to abolish her post and the decision to terminate her appointment and to separate her from service effective 13 June 2012. In addition, she asks the Tribunal to set aside the decision of 29 July 2012 dismissing an earlier appeal and to restore her two-year fixed-term contract to its original date, i.e. 4 May 2013. She requests that she be reinstated retroactively and that her case be "re-routed" back to the Global Reassignment Committee or, alternatively, that she be reinstated to a post of commensurate responsibility, grade and step with full retroactive effect. She claims damages for the injury she suffered due to the termination of her appointment in an amount equal to at least two years' gross salary and benefits, including all emoluments, pension contributions and step increases with the total amount increased by 50 per cent for the loss of career prospects. She also claims 500,000 United States dollars in moral and exemplary damages for the wrongful abolition of her post, termination of her appointment and her separation

from WHO, and 500,000 United States dollars in moral damages for the discrimination and prejudice to which she was subjected during her employment with WHO. She also claims costs and such other relief as the Tribunal deems just, necessary and equitable. She seeks interest at the rate of 8 per cent per annum on all amounts paid to her. Lastly, she seeks an order that no retaliatory action be taken against her.

WHO asks the Tribunal to dismiss the complaint as being devoid of merit.

CONSIDERATIONS

1. On 22 May 2016 the complainant filed her second complaint with the Tribunal. This complaint concerns not only the termination of the complainant's employment with WHO effective 13 June 2012 but raises issues about other matters, some directly related to the termination, others not. The complainant's brief is almost 70 pages long (not including annexures) and traverses a multitude of issues. In its reply WHO argues that, while some of the issues raised by the complainant can legitimately be canvassed in these proceedings, others cannot.

2. It is convenient to address the question of what issues can be raised in these proceedings by the complainant at the outset. The Tribunal notes that the complainant has annexed to her brief the statement of appeal and rejoinder she filed with the RBA and also the statement of appeal and rejoinder she filed with the HBA. To the extent that she relies on these documents to advance in the present proceedings arguments contained in those documents and advanced in the proceedings before the RBA and the HBA, her reliance is misplaced as the Tribunal will only have regard to the pleas contained in the complainant's brief and rejoinder to the Tribunal and will disregard any pleas incorporated by reference to documents created for the purposes of internal review and appeal (see, for example, Judgment 3951, consideration 6).

3. WHO argues that in the resolution of the complainant's first complaint in Judgment 3920 the Tribunal effectively dealt with a number of the issues she seeks to raise in her second complaint in these

proceedings and the principle of *res judicata* operates to prevent her from doing so. This is correct. In consideration 3 of that earlier judgment the Tribunal identified what matters the HBA had viewed as receivable and were accepted by the Director-General as receivable in her decision of 23 December 2014, which was the decision impugned in those proceedings. In consideration 4 of the same judgment the Tribunal made it clear that those receivable matters were the subject matter of the complaint the Tribunal was then determining in Judgment 3920. They included the complainant's challenge to the abolition of her post involving several arguments. One was that the abolition of her post was not driven by organizational needs and another was that it was based on personal prejudice.

4. While the complainant succeeded on one limited issue for which she was awarded moral damages, she failed to demonstrate that, in any respect, the abolition of her post was unlawful. One of the orders made by the Tribunal was that "[a]ll other claims are dismissed". This order reflected a final determination by the Tribunal, in WHO's favour, of the complainant's challenge to the abolition of her post. The complainant is bound by that final determination and cannot challenge it in subsequent proceedings (see, for example, Judgment 3248, consideration 3). In the result, the complainant's pleas in these proceedings are to be assessed on the footing that, and against the background that, the abolition of her post was lawful.

5. From the complainant's lengthy pleas, three matters or issues appear to emerge which should be addressed by the Tribunal in this judgment. The first concerns the attempts by WHO to reassign the complainant. The second concerns the termination of the complainant's employment. The third concerns the question of whether there should have been a medical examination of the complainant upon her separation from the Organization.

6. The Tribunal addresses the second issue immediately. Ordinarily, when a post is lawfully abolished and reasonable and appropriate steps are undertaken, albeit without success, to reassign the

official who held the post to another position within the organization, then the ensuing termination of employment can be taken to have been lawful. As will be discussed shortly, there were failings in the processes adopted by WHO to reassign the complainant which will sound in an award of material damages. But as the complainant's position was lawfully abolished, it was open to WHO to terminate her employment given that she was not appointed to another position.

7. The Tribunal notes that at the time of its abolition, the complainant's post was a National Professional Officer post subject to local recruitment. Its status as such influenced the approach of WHO having regard to Staff Rule 1050 "Abolition of post". There is a subsidiary issue in these proceedings about which version of the Staff Regulations and Staff Rules was applicable at relevant times, though it concerns only the third issue, namely whether there should have been an exit medical examination.

8. The first issue in these proceedings, as already noted in consideration 5, above, concerns reassignment in the face of the abolition of a post. It is convenient to repeat what has been said by the Tribunal in another judgment, also adopted at this session (Judgment 4094), concerning the same organization, as it is apt to this matter. The central issue in these proceedings is whether WHO took adequate steps to try and reassign the complainant. In its pleas WHO seeks to establish that the complainant was afforded such opportunities for reassignment as required under Staff Rule 1050.

9. The Tribunal recently addressed the question of what were an organization's obligations in relation to reassignment in Judgment 4036, considerations 7 and 8, citing Judgment 3908. Several propositions emerge from Judgment 4036 which are consistent with earlier case law. The first is that normative legal documents promulgated within an organization cannot alone circumscribe the obligation of the organization to explore other employment options within the organization for staff whose positions have been abolished. The second is that an organization has a duty to apply processes biased in favour of the staff member

whose position has been abolished and which are likely to promote appointment to another position. The third and related proposition is that an organization has an obligation to deal fairly with staff who occupy an abolished position which ordinarily extends to finding, if they exist, other positions within the organization for which those staff have the experience and qualifications. This last proposition is qualified by matters referred to in consideration 16 of Judgment 3908. The fourth proposition is that it is not the Tribunal's role to actually assess whether a staff member whose position has been abolished was suitable for another position to which they might have been reassigned. Rather, it is to ascertain whether any or adequate consideration was given to the fact that the complainant was then a member of staff whose post had been abolished and was facing the termination of her or his employment.

10. Moreover, the provisions in Staff Rule 1050.5.1 and Staff Rule 1050.5.3 that for locally recruited staff limited reassignment to a post at the same grade as the post abolished, or one grade lower, within the locality of the abolished post did not exhaustively identify the Organization's obligations concerning the reassignment of the complainant. Staff Rule 1050 in the version applicable at the material time relevantly provided:

> "1050. ABOLITION OF POST
>
> 1050.1 The fixed-term appointment of a staff member with less than five years of service may be terminated prior to its expiration date if the post he occupies is abolished.
>
> 1050.2 When a post held by a staff member with a continuing appointment, or by a staff member who has served on a fixed-term appointment for a continuous and uninterrupted period of five years or more, 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.
>
> 1050.3 The paramount consideration for reassignment 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.
>
> 1050.4 The Director-General may establish priorities for reassigning staff members.

1050.5 The reassignment process shall be coordinated by a Reassignment Committee established by the Director-General as follows:

1050.5.1 the process will extend to all offices if the abolished post is in the professional category or above; if the abolished post is subject to local recruitment, the reassignment process shall be limited to the locality of the abolished post;

1050.5.2 staff members shall be given due preference for vacancies during the reassignment period, within the context of Staff Rule 1050.3;

1050.5.3 staff members may be reassigned to vacant posts at the same grade as the post to be abolished, or one grade lower.

1050.6 The reassignment period will end within six months from its commencement. This period may only be exceptionally extended by the Director-General for up to an additional six months.

1050.7 During the reassignment period, the staff member may be provided with training to enhance specific existing qualifications.

1050.8 The staff member's appointment shall be terminated if no reassignment decision is made during the reassignment period or if the staff member refuses a reassignment pursuant to Staff Rule 1050.5.3.

[...]"

The extent of WHO's obligations in relation to the complainant's reassignment is plainly influenced by the fact that she had been appointed to a National Professional Officer post on the basis of local recruitment. It could not be expected that WHO assess whether within the entire Organization there was any available position for which the complainant was qualified and suitable. The complainant refers in her pleas to the Tribunal's judgments which emphasise the need for an organization to apply rules concerning the abolition of posts and the reassignment of staff with considerable generosity towards the affected staff members (see, for example, Judgments 133 and 388). While these and many other judgments of the Tribunal concerned permanent staff, they were judgments given at a time when the preponderance of staff in international organizations were permanent staff. There is, presently, a greater mix of staff of differing status in international organizations. However, simply because some staff are not permanent, it does not

follow that those other classes of staff of differing status should be afforded no protection by principles developed by the Tribunal in circumstances where their post is abolished and attempts are being made to reassign them.

11. Staff Rule 1050.5 should be applied according to its terms, which are clear. That is to say, the significant constraints it imposes when considering the reassignment of a locally recruited National Professional Officer should be taken by the Tribunal as the benchmark to measure, at a general level, the lawfulness of the reassignment process.

12. However, the complainant raises what she characterises as a number of procedural and other flaws in that reassignment process. One is of greater significance, in the Tribunal's view, than the others and concerns the duration of the reassignment process. It can be seen from Staff Rule 1050.6 set out above that the reassignment period ends within six months from its commencement, though the Director-General has a power to "exceptionally extend" it for up to an additional period of six months. In a memorandum dated 4 March 2012 to the Regional Director signed by at least some of the members of the RRC (it is put this way because there is an issue in these proceedings about the composition of the RRC that is unnecessary to resolve), the recommendations of the RRC were in the following terms:

> "In view of the above and the fact that it is not planned to have future fixed-term [National Professional Officers] positions in the Regional Office or the Egypt Country Office, the [RRC] members are satisfied that all reasonable reassignment options have been exhausted and have, accordingly, decided to recommend to the Regional Director that the three months notice for separation under [Staff Rule] 1050.3 be served on 4 March 2012, or shortly after, i.e. on completion of the six months period indicated for the reassignment process under [Staff Rule] 1050.6.
>
> Alternatively, the [RRC] members would like to suggest that, **if** the forthcoming restructure to be announced by the Regional Director will have a potential reassignment possibility for this staff member, the Regional Director might wish to consider to, exceptionally, extend the reassignment process by an additional two months to allow for this potential reassignment. If not, the notice for separation should be served as mentioned above."

To the left of the first of these paragraphs there is what appears to be a handwritten vertical line along the side of the paragraph and the Regional Director's signature, together with the notation "Agreed" as well as the date, 8 March 2012.

13. It can be seen from the preceding commentary that within a maximum of four days, the Regional Director decided to reject the recommendation contained in the second paragraph. The complainant argues, in substance, in her brief that having regard to, inter alia, her long service and the fact that there was a restructuring going on, the Regional Director should have given genuine consideration to the alternative proposal and that the decision he actually made was arbitrary. In her rejoinder she characterises that decision as inappropriate and arbitrary. In its reply WHO states: "[a]s the Regional Director did not foresee any suitable post arising for the complainant in the new structure, bearing in mind her qualifications and experience, he decided to accept the [RRC]'s [first] recommendation". It also states: "It was ultimately the Regional Director's view that the restructuring did not offer an opportunity for the complainant to continue in the service of the Organization." What is meant by "ultimately" is unclear. It is of some considerable significance that there are no contemporaneous records in the material provided by WHO which would found, factually, this submission. Moreover, WHO argues that a decision whether to extend a reassignment period is a discretionary decision which arises when "special circumstances exist" and goes on to say that "any extension of the reassignment period was unlikely to have the effect of producing a successful outcome for the complainant".

Whether and to what extent the Regional Director gave genuine and substantial consideration in the three or four days preceding his decision to the alternative recommendation of extending the period by two months is, from the material before the Tribunal, entirely unclear. However, what does emerge from that material is that it was not until 13 May 2012 that the new structure for EMRO was announced. The Regional Director's Circular announcing the new structure included the observation that "[t]he reorganization has been done without any negative impact on staff members and all existing staff have been

placed in the new structure". It can be inferred that the restructuring was intended to have this result in addition to meeting the broader objectives of the Organization concerning its functioning.

The Tribunal is satisfied that the decision not to extend the complainant's reassignment period was flawed. It is not a question of whether it was likely or not that the complainant would be placed in a position emerging from the reorganization. The power to extend a reassignment period is a discretionary power but it is not unfettered. It must be exercised having regard to the principles developed by the Tribunal. An organization that is endeavouring to reassign a staff member whose position has been abolished is obliged to do all that it can to find another position. It has been stated in one judgment of the Tribunal that the organization must do "its utmost" to find another position (see Judgment 3754, consideration 16, citing Judgment 2830, consideration 9). Indeed, the Tribunal has said that it is incumbent on the organization to prove that the affected staff member was not able to remain in the organization's service (see Judgment 2830, consideration 9). These concepts are comprehended by the expression "reasonable efforts" in Staff Rule 1050.2. Even if it was only remotely possible, in the circumstances of a case such as the present when the reorganization was incomplete, that the reorganization might create a position to which the complainant could have been appointed, the complainant was entitled to the benefit of an extension of the reassignment period, as proposed by the RRC or for an even longer period.

14. Finally, it is necessary to deal with the complainant's argument that the reassignment process was tainted by bias. The complainant bears the burden of proof in establishing bias or personal prejudice (see, for example, Judgment 3753, consideration 13). She has not done so. Moreover, much of the argumentation in her pleadings concerning bias or prejudice related to the abolition of her position. As noted earlier, this plea was raised and rejected in the proceedings involving the complainant's first complaint.

15. The third and final substantive issue is whether WHO failed to undertake a medical examination of the complainant at the time of her separation. The complainant argues WHO should have and refers to judgments of the Tribunal in which it has concluded such an examination should have taken place, namely Judgments 2840 and 2895. However, in the Staff Regulations and Staff Rules applicable at the time of the complainant's separation from the Organization, WHO's obligation to undertake such an examination was not expressed in mandatory terms, unlike in earlier versions of the relevant rules. In these circumstances, there has been no breach by WHO of its duty to ensure that such an examination takes place.

16. Two procedural issues should be noted. The first is that the complainant sought the production of documents concerning the abolition of her post and the restructuring of the service. As a challenge to the abolition of the post is not a matter the complainant can advance in these proceedings, these documents need not be produced. She also sought the production of documents concerning the reassignment process. Having regard to the conclusion in considerations 8 to 13, above, the production of those documents is unnecessary.

17. This leads to a consideration of relief. The complainant seeks reinstatement. Having regard to the fact that the complainant's position was lawfully abolished, the effluxion of time and the absence of the complainant pointing to a position that, demonstrably, she could occupy, reinstatement is inappropriate. WHO points out, correctly, that the complainant bears the evidentiary burden of establishing material damage (see, for example, Judgment 3778, consideration 4) and, in relation to any losses following her separation (such as lost income), no relevant evidence is provided. However, the complainant did lose a valuable opportunity to secure and remain in employment in WHO because of the too narrowly focused reassignment process. While the value of that loss is difficult to quantify, it is nonetheless of value. In the result, the Tribunal awards the complainant 20,000 United States dollars as material damages. Moral damages and exemplary damages are not warranted.

18. The complainant, who represented herself in these proceedings, is entitled to a modest amount for legal costs which the Tribunal assesses in the sum of 1,000 United States dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant 20,000 United States dollars as material 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 5 November 2018, 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 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ