

The Administrative Tribunal,

Considering the complaint filed by Mr M. M. against the World Health Organization (WHO) on 13 March 2003 and corrected on 10 April, the WHO's reply of 26 June, the complainant's rejoinder of 4 September and the Organization's surrejoinder of 15 October 2003;

Considering Articles II, paragraph 5, and VII 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 was born in 1964 and is of British nationality. On 8 August 2001 he joined the International Computing Centre (ICC), of which the WHO is the host organisation for administrative purposes. He was assigned to the Office of the Iraq Programme (OIP) in New York, his duty station, on a fixed-term appointment for one year as a Lotus Notes Developer, at grade P.3. That year was considered to be probationary. The post he occupied was provided for under a Memorandum of Understanding (MOU) between the ICC and the OIP for the provision of technical services, which ran from 1 May 2001 to 30 June 2002.

As a result of a discussion regarding training opportunities, on 10 January 2002 the complainant e-mailed a formal complaint to the Deputy Director of ICC in Geneva, criticising his first-level supervisor in New York. The following day the complainant claimed that someone had illegally accessed that e-mail from the secure server room at OIP in New York. On 16 January the Director of ICC in Geneva received an anonymous e-mail criticising the complainant's supervisor, of which the complainant made it clear he had no knowledge. In early February both the Director and Deputy Director of ICC met with the complainant in New York to discuss his grievances.

By a letter of 28 January 2002 the Director of ICC informed the complainant that as an interim measure he had decided to assign him to another ICC programme in the Department of Peace Keeping Operations (DPKO). The complainant moved to ICC/DPKO on 1 February. The Deputy Director had meanwhile taken over as Director of ICC. He wrote to the complainant on 6 March, saying that it had been decided it would be "in the best interest of all parties" if he continued with the DPKO "until further notice".

The Director wrote to the complainant again on 1 May 2002, informing him that there were to be changes to the Memorandum of Understanding which covered his services, and that upon its expiry there would be no further funding for the complainant's post. For that reason, in accordance with Staff Rule 1040 - concerning the completion of temporary appointments - the complainant's service would be terminated as from 7 August 2002. On 28 May 2002 the complainant contacted the Ombudsman. Following a meeting with the Ombudsman, the Director confirmed the earlier decision. On 24 June the complainant notified the Headquarters Board of Appeal of his intention to appeal against the decision not to renew his contract. He requested a suspension of the time limit for filing his formal statement of appeal to allow for the completion of an investigation into the alleged breach of e-mail security. The ICC Security and Planning Officer who had conducted the investigation issued his report on 5 July. The complainant submitted his statement of appeal on 26 July.

On 1 July the complainant had learnt that his performance appraisal report had to be completed by 4 July. On 3 July he received a copy of the report completed by his first-level supervisor, which included negative comments.

A new Memorandum of Understanding between ICC and OIP came into effect on 11 July 2002. The complainant was separated from service on 7 August 2002.

The Headquarters Board of Appeal issued its report on 14 November, recommending the dismissal of the complainant's claims. It made two additional recommendations relating to appraisal reports and offers of appointment. By a letter of 17 December 2002, the Director-General dismissed his appeal, noting that the only decision impugned was that of 1 May 2002 and that consequently other issues he raised in his appeal, such as his probationary performance appraisal, were either immaterial to the challenged decision, or were time-barred and thus irreceivable. That is the impugned decision.

B. Citing the case law, the complainant submits that the Administration has a duty to explain why an appointment is being terminated. He does not accept the reason regarding lack of funding for his post, because by 1 May 2002 he was no longer assigned to OIP and his new position in DPKO was covered by a different Memorandum of Understanding. Given the circumstances of his reassignment it could not be viewed as a temporary measure. Although the Organization ended his service under Staff Rule 1040, he considers that it is Staff Rule 1050, concerning abolition of post and reduction in force, which applied in his case. He believes the post of Lotus Notes Developer was clearly one of indefinite duration and as his post was abolished the WHO was obliged to make every effort to reassign him. His post clearly continued to exist after he was separated; it was merely downgraded and given a different name. He submits that if the Organization deems a staff member to be unsuitable for any new post created in that way it has a duty to state the reasons.

Likewise, precedent has it that before taking a decision not to renew a contract the Organization has a duty to consider the staff member's relevant performance appraisal. In his case he did not learn of the need to complete the performance appraisal until seven weeks after he had received notice of the termination of his appointment. He was disadvantaged by the timing and unfair nature of the report. His first-level supervisor's comments were biased and unsubstantiated, and the Administration failed to take full consideration of the facts. To achieve a balanced appraisal there should have been a greater input from his supervisor in DPKO, since he worked longer in that department than he did in OIP.

He explains the circumstances of his complaint against his first-level supervisor at OIP. He believes that the e-mail security breach was not fully investigated and that the decision to terminate his appointment was tainted by personal prejudice and incomplete consideration of the facts.

In addition, he objects to the late filing of the statement of the Administration in the internal appeal process, asserting that his appeal was not processed with due diligence.

If the quashing of the impugned decision and reinstatement are not possible the complainant seeks material damages equal to 18 months' salary and benefits, less any earnings during the period from 8 August 2002 to February 2004. He also claims 100,000 United States dollars in moral damages on grounds of "character assassination" by his supervisors and stress suffered; the expunging of the probationary performance appraisal from his personnel record; a "U.N. investigation" into the breach of e-mail confidentiality; and costs.

C. The WHO submits that the complaint is devoid of merit. The decision not to offer the complainant an extension of appointment was lawful. It was a discretionary decision, and was taken in accordance with the WHO Staff Rules. It was taken for objective programmatic and financial reasons. He could infer no contractual right to the extension of his appointment. As indicated on his offer of appointment the length of his appointment was "limited by the duration of [the] MOU". He was on a time-limited project post and remained assigned to it throughout his appointment, even when he was performing other duties in DPKO. He was moved there to preserve harmonious working relations. A new MOU was signed in July 2002, but his post was not continued thereunder. As held by the Board of Appeal, the ICC was under no obligation to renew his contract or to find another assignment for him. As required under Staff Rule 1040, the complainant was given three months' notice of non-renewal. Personal prejudice played no part in the decision not to renew his contract.

The WHO considers that certain matters raised by the complainant are unrelated to the decision not to extend his contract, and go beyond the scope of his appeal. This applies, *inter alia*, to his performance appraisal. It does not accept that there was any failure to consider an essential fact. It is of no consequence that the complainant received notification of the decision not to extend his appointment before the appraisal was conducted, because he was not separated on grounds of performance. Concerning the complainant's claim for a further investigation into the breach of e-mail security, it states that although the complainant has shown disregard for the report prepared by the ICC security officer, the fact remains that an investigation was carried out. It also explains that the matter of the anonymous e-mail was not pursued as it played no part in any employment-related decision affecting the

complainant.

Additionally, it submits that the complainant's claim for moral damages for stress is an unacceptable expansion of the claim for financial damages that he put forward in his internal appeal, and as such is irreceivable. It also gives the reasons why the Board of Appeal accepted the filing of the statement of the Administration, even though it was filed four days late.

D. In his rejoinder the complainant presses his pleas. Since the Organization argues that he continued in a single post throughout the duration of his employment with ICC he asks the Tribunal to request the production of certain annual reports and invoices related to the relevant MOU, which will make clear who was financing his salary at each point and will also serve to reinforce his argument that there was prejudice against him.

In his opinion, since the first year of his appointment was probationary, it gave him a legitimate expectation of renewal if his performance was satisfactory. He reasserts his belief that his post was of an indefinite nature.

E. In its surrejoinder the Organization reaffirms its pleas. It says that it would serve no purpose to produce the invoices requested by the complainant, and explains how payment arrangements were made. It argues that the complainant is wrong in his assumption that he occupied a post of indefinite duration that continued after he was separated from service. Moreover, he accepted the contract he signed, including its contractual term.

It adds that the complainant was well aware of his supervisors' opinion on his performance.

## CONSIDERATIONS

1. The complainant held a one-year fixed-term appointment with the International Computing Centre (ICC) of which the WHO is the host organisation for administrative purposes. He joined the ICC on 8 August 2001 in the Office of the Iraq Programme (OIP) after accepting an offer of appointment as a Lotus Notes Developer.

2. The letter of appointment stated that the appointment was "time-limited", and that the first year would be treated as a probationary year. It further stated that the appointment "would automatically terminate after one year [...] unless an offer of extension of contract be made and accepted". The contract form, which accompanied the letter, specified that the "offer of appointment [did] not imply an expectation of automatic renewal". Further, the contract contained two notes. The first specified that "the respective Memorandum of Understanding (MOU) is applicable". The second stated: "This [t]ime-limited appointment is funded by the Memorandum of Understanding [...] between OIP and ICC for the provision of technical services. Its length is limited by the duration of this MOU."

3. On 1 May 2002 the complainant was informed that his appointment with the ICC would be terminated on 7 August 2002. The reason given was:

"the Office of [the] Iraq Programme has advised ICC of changes to the Memorandum of Understanding (MOU) for the provision of technical services and the time-limited post to which you are assigned under this MOU will cease to be funded on its expiry date".

4. The complainant maintains in his complaint to the Tribunal the contention advanced before the Headquarters Board of Appeal that the decision not to renew his contract was the result of personal prejudice and incomplete consideration of the facts. So far as concerns his claim of personal prejudice, he relies on the events surrounding his formal complaint against his first-level supervisor at OIP. He contends, in addition, that his allegations regarding the opening of his e-mail were not properly investigated and that the new MOU with OIP, of 11 July 2002, was irrelevant to the decision not to renew his contract because he was not working for that programme at the relevant time, but with the DPKO. Additionally, he claims that, notwithstanding the new MOU, there was a continuing need in OIP for a Lotus Notes Developer or, at the very least, a person with his skills.

5. So far as concerns the complainant's claim that relevant facts were not considered, he contends that due regard was not given to his performance or skills as the probationary appraisal report was not available at the time of the decision not to renew his appointment. Moreover, he asserts that there were other areas in ICC in which his skills could be utilised but that, in this regard, he was "severely disadvantaged by both the timing and unfair nature of [his probationary appraisal] report".

6. The complainant principally seeks material damages equal to 18 months' salary and benefits, less any earnings during the period from 8 August 2002 to February 2004; moral damages equivalent to 100,000 United States dollars; the expunging of his probationary performance appraisal from his personnel record; a "U.N. investigation" into the breach of e-mail confidentiality; and costs.

7. The WHO denies that the decision not to renew the complainant's appointment was the result of personal prejudice. It claims that it investigated his grievances appropriately and temporarily moved him out of OIP in the interests of that programme, and not in retribution for his complaints against his first-level supervisor or because of personal prejudice. It maintains that the decision not to renew his appointment was taken solely because of the proposed changes to the MOU under which his post was funded. Additionally, the WHO contends that, given that the complainant was appointed to a position in OIP on a fixed-term contract which expressly provided that there was no expectation of renewal, it was under no obligation to consider alternative assignments.

8. So far as concerns the performance appraisal report, the WHO contends that that issue is irrelevant. In this regard, it maintains that the decision not to renew the complainant's appointment was not performance-related.

9. The WHO does not contend that the complaint is irreceivable. Nevertheless, it should be noted that the complaint is concerned solely with the decision not to renew the complainant's appointment, as was his appeal to the Headquarters Board of Appeal.

10. As the appraisal report is not the subject of the complaint, the Tribunal cannot order that it be struck from the record. Moreover, as the competence of the Tribunal is limited to complaints alleging non-observance of the terms of appointment and the provisions of Staff Regulations, it cannot order a further investigation into the alleged breach of e-mail security.

11. It is well settled, as stated in Judgment 1418, that a decision not to renew a fixed-term contract is discretionary and will be set aside only if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority.

12. A decision which is taken out of personal prejudice or for some other improper motive may properly be described both as a decision taken without authority and, also, as an abuse of authority. The question whether some fact that has been overlooked is "essential" is, however, one that can only be answered by regard to the nature of the decision reached and the reasons for that decision.

13. It is clear that, by the time the complainant was reassigned to DPKO on 1 February 2002, his attitude to his supervisor at OIP could not be described either as cordial or conciliatory. The situation seems to have been exacerbated by the discovery that someone had opened his e-mail to the Deputy Director of ICC. And it is implicit in his subsequent statements relating to the presence of his first-level supervisor in the server room that he harboured some suspicion that that official had been involved. Given that no other staff member in OIP advanced any complaint against that supervisor in answer to the telephone enquiries made by the Director of ICC in Geneva in January 2002, the decision to reassign the complainant to DPKO until further enquiries could be made was a reasonable response to a difficult situation from which no inference of personal prejudice can be drawn.

14. Nor is an inference of personal prejudice to be drawn from the fact, if it was true, that the complainant was not immediately given appropriate work and facilities when he first moved to DPKO. The move occurred at short notice and it is fair to assume that some little time was necessary to accommodate him.

15. There is nothing to suggest that the formal complaint made by the complainant with respect to his first-level supervisor was not taken seriously. Indeed, the fact that both the Director of ICC and the Deputy Director, travelled to New York in February 2002 to meet with him indicates that it was treated seriously. Nor is there anything to suggest that it was not appropriately investigated. The Deputy Director spoke to other staff in OIP and to one staff member in particular. It was revealed in his discussions with the latter official that the complainant had taken it upon himself to write to OIP criticising the services provided by ICC. That was a serious breach of protocol which, if the complainant had returned to OIP, could have exacerbated the situation between him and his supervisor, against whom no other staff member had voiced a complaint. In those circumstances, the decision of 6 March 2002 that the complainant should remain with DPKO until further notice was entirely reasonable and provides no basis for an inference of personal prejudice.

16. Further, personal prejudice is not to be inferred from the way in which the complainant was employed and accommodated in DPKO after 6 March 2002. He was, by then, working on a project for the development of a progress reporting system on management reforms, on which he continued to work until his contract expired. The complainant makes no complaint about that work or the conditions under which he was required to perform it. Moreover, the probationary performance appraisal report noted that "[h]e ha[d] contributed to the project's success and ha[d] delivered the services adequately and in a timely manner".

17. The opening of his e-mail has obviously assumed critical importance for the complainant. He claims that the investigation was inadequate. In this respect, it is clear that he was not requested to provide his evidence that the e-mail had been opened. Further, no enquiry was made with respect to the logs relating to the server room.

18. The importance of the e-mail investigation, according to the complainant, is "to prove that [the new Director of ICC] had demonstrated prejudice by not conducting a proper investigation that may well have identified the guilty party". Nevertheless, that Director did organise for an enquiry to be conducted by the ICC security officer and there is nothing to suggest that the Director interfered in any way with that investigation. More to the point, there is nothing to suggest that the e-mail issue featured in any way either in the Director's decision that the complainant should remain with DPKO or in the later decision not to renew the complainant's contract. In these circumstances, it is not possible to infer personal prejudice on the part of the new Director of ICC from the fact that the e-mail investigation failed to resolve the questions raised regarding the opening of the complainant's e-mail.

19. It is not in issue that the MOU under which the complainant's post was funded provided for two Lotus Notes Developers whereas the new MOU provided for none. Instead, the new MOU provided for a "Systems Support Specialist". In this context, it is appropriate to note that the contract of the other Lotus Notes Developer was not renewed when it expired in October 2002 and, ultimately, a new post of Systems Support Specialist came into existence at a lower grade than the post formerly occupied by the complainant.

20. There is nothing to suggest that the new MOU was anything other than a genuine reflection of the OIP's assessment of its future needs. Nor is there anything to suggest that the staff changes which thereafter occurred in OIP were not the direct consequence of the new MOU. In particular, there is nothing to suggest that the two Lotus Notes Developer posts came to an end for any reason other than the terms of that MOU. That being so, the only other matters that call for consideration on the question of personal prejudice are the fact that the complainant was not working in OIP after 1 February 2002, that he was not offered an alternative post and that he expressed concerns relating to his appraisal report.

21. It is true, as the complainant points out, that he had not worked in OIP since February 2002 and there was no suggestion that he would be returning to the programme when he was informed of the decision not to renew his appointment. The new MOU was, in one sense, quite irrelevant to his continued employment. However, the post which he formally occupied was a post in OIP. Moreover, his reassignment to DPKO first as an interim measure and then "until further notice" was, as already pointed out, a reasonable response to a difficult situation. If the situation had not arisen, the complainant almost certainly would have still been working in OIP when it became known that the new MOU would not provide for a Lotus Notes Developer. Given that and given, also, that he was formally appointed to a MOU-funded post in OIP and was never formally appointed to any other post, the new MOU necessarily had a direct bearing on the question whether his appointment would be renewed.

22. As the complainant was employed under a fixed-term contract of limited duration which expressly provided that the appointment did not imply any expectation of renewal, failure to renew involved no breach of his contractual rights. In those circumstances, there was no obligation on the part of the ICC to consider whether there were other posts to which he might be appointed, whether in OIP or in some other programme. It is difficult, if not impossible, to infer personal prejudice from the failure to do something which the ICC had no obligation to do.

23. In general terms, the probationary performance appraisal report contained no criticism of the complainant's technical abilities or expertise, only of his attitude towards supervision and his ability to work in a collaborative environment. In view of the difficulties which developed between the complainant and his first-level supervisor, it is understandable that the latter might honestly and reasonably hold the views which he expressed in the report. That being so, the appraisal report provides no basis for an inference of personal prejudice.

24. As already indicated, none of the matters upon which the complainant relies to establish personal prejudice is,

of itself, sufficient to found an inference of personal prejudice. Nor is that inference warranted if the matters are considered in combination. Accordingly, the claim of personal prejudice is not sustained.

25. Once it is accepted that the claim of personal prejudice has not been substantiated, it must also be accepted that the sole reason for the non-renewal of the complainant's appointment was the new MOU which did not provide funding for his post. There being no funding, the question of the complainant's performance had no relevance. Thus, failure to consider that matter was not a failure to consider an essential fact. Similarly, there being no obligation to consider alternative posts to which the complainant might be appointed, the failure to do so was not a failure to consider an essential fact. The complainant's arguments to the contrary must be rejected.

## DECISION

For the above reason,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet