Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

U.

v.

WHO

121st Session **Judgment No. 3588**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. C. U. against the World Health Organization (WHO) on 4 October 2013 and corrected on 3 January 2014, WHO's reply of 16 April, the complainant's rejoinder of 26 July and WHO's surrejoinder of 27 October 2014;

Considering Article II, paragraph 5, 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 amount of material and moral damages awarded by WHO following his internal appeal against the decision not to match him to a new position after the abolition of his post and to terminate his appointment with effect from 15 April 2011.

The complainant joined WHO in 1997 under a short-term contract as a Systems Analyst at grade P4. As from January 2004, he worked under a series of short-term appointments at Headquarters and in the field, including as a Senior Technical Architect in the Director General's Situation Room, at grade P5. Between 2005 and 2007 he worked outside WHO in the private sector on mobile health applications. In March 2007 the complainant was recruited as a Technical Expert under a temporary appointment at grade P5 in the Health Metrics Network (HMN)

Secretariat, which is hosted by WHO. From July 2008 to February 2010, the complainant also assumed the role of acting Chief, Information Systems Framework, at grade P6. In 2009, his temporary appointment was converted to a fixed-term and in February 2010 he resumed his duties as Technical Expert at grade P5 in the HMN Secretariat. HMN, which ceased its activities in 2013, was a global health partnership with its own governance structure (the Executive Board). The administration of HMN was nevertheless provided by WHO, and its staff were subject to Staff Regulations and Staff Rules.

The present complaint arose in the context of the restructuring of HMN initiated in August 2010 and the "rematching" of the partnership's staff in the new structure. On 1 December 2010, staff members were informed that the old structure had been abolished and that a new structure had been approved by the Executive Board. They were asked to "express interest" within 7 days in any of the 11 posts in the new HMN structure for which they considered themselves qualified. The ad hoc Review Committee on the HMN "reprofiling" met on 16 December to review the expressions of interest. It submitted its recommendations to the Director-General the following day.

The complainant expressed an interest in 6 positions within the new structure, including that of Technical Officer, Health Informatics, at grade P4. He was informed on 20 December that he was not matched to a position in the new HRM structure. In relation to the P4 position, the ad hoc Review Committee considered that he did not meet the requirements in terms of relevant experience. By a letter of 23 December 2010, the complainant was notified of the decision to abolish his position and to terminate his appointment with effect from 15 April 2011. He was placed on special leave with pay for the duration of the notice period. He lodged an internal appeal against that decision in February 2011.

In its report of 21 May 2013, the Headquarters Board of Appeals (HBA) found that the reprofiling process had been *ultra vires*, as the relevant Information Notes had not been formally communicated to HMN staff at the time of their application. It also found that the lateral transfers of two HMN staff members to WHO positions immediately prior to and after the reprofiling/matching exercise amounted to unequal

treatment. The HBA considered that the complainant fulfilled the requirements of the new P4 position and should therefore have been matched to it. It recommended that the complainant be awarded his P5 salary, including all benefits and entitlements, until the expiration of his fixed-term contract on 30 November 2011. The HBA did not recommend reinstatement in the P4 position, as that position had since been abolished. However, it recommended that WHO pay him moral damages in the amount of 10,000 Swiss francs, as well as costs, with interest at 5 per cent on all sums.

In the impugned decision of 12 July 2013 the Director-General indicated that she disagreed with the HBA's reckoning of the complainant's relevant experience. She highlighted that the P4 and the P5 positions were not similar and, therefore, she could not agree with the HBA that the complainant should have been matched to the new P4 position. However, in view of the procedural flaw and the possible unequal treatment, she decided to award the complainant material damages amounting to the net base salary plus post adjustment and applicable allowances that he would have received until the expiration of his contract on 30 November 2011, moral damages in the amount of 10,000 United States dollars, as well as costs not otherwise reimbursable under insurance and not exceeding 3,000 francs. That is the impugned decision.

In execution of the Director-General's decision, the complainant was paid 124,021.32 dollars on 19 November 2013.

The complainant asks the Tribunal to set aside the impugned decision to the extent that it did not award him adequate material, moral and consequential damages. He seeks reinstatement in a position at the P5 level with retroactive payment of all salaries, benefits and emoluments from his date of separation to the date of reinstatement, including retroactive reaffiliation to the UN Joint Staff Pension Fund. Should such retroactive reaffiliation prove impossible, he requests payment of a lump sum equal to WHO's share of his pension contributions for the period between his separation from service and the date of his reinstatement. Alternatively, he claims material damages corresponding to what he would have earned had his appointment

been extended for an additional two-year period at grade P5, including all benefits and emoluments, plus the lump-sum payment mentioned above, with interest on all these amounts at the rate of 8 per cent per annum. In all events, he claims material damages in an amount equal to the value of his home leave for 2011, with interest; a further 100,000 euros in material damages for loss of enhanced earning capacity; consequential damages for the costs of health insurance for the period between his separation and his reinstatement, with interest; moral damages for breach of due process and delay in the internal appeal proceedings; and an award of costs for both these and the internal appeal proceedings.

WHO invites the Tribunal to reject the complainant's claims as unfounded.

CONSIDERATIONS

1. The complainant commenced employment with WHO in June 1997. He was employed as a Systems Analyst on a short-term appointment at grade P4 in the IT Department. He worked in various positions within WHO between then and April 2011 though there was a break in his employment with WHO between 2005 and 2007. In March 2007 the complainant commenced working as a Technical Expert in the Health Metrics Network (HMN) Secretariat (a position graded P5), and, in September 2007, he secured a two-year temporary appointment to that post. In the pleas HMN was described in various ways. At base, it was an unincorporated entity with its own Executive Board and governance structure that operated in partnership with WHO. HMN made decisions on its direction, work plans and budget. However its staff were staff of WHO and their employment was regulated by WHO's Financial and Staff Regulations and Rules, Manual provisions and practices.

In July 2008, the complainant assumed the role of acting Chief, Information Systems Framework (a position graded P6). In December 2009 the complainant's appointment status was converted to fixed-term. In February 2010, the complainant resumed his duties as a Technical

Expert at the P5 level after having acted in the P6 position for 19 months. In late 2010 decisions were being made by the HMN Executive Board about the restructuring of HMN. The staffing arrangements arising from restructuring of HMN were addressed by a Roadmap Review Committee (RMRC). The RMRC reported, in writing, to the Director-General on 1 December 2010. The report was approved by the Director-General that day. In its report the RMRC agreed that all positions should be abolished and new ones created but noted that there was a "*need to carry out the matching exercise* [to determine whether existing staff could fill the newly created positions] *in an objective and fair manner and to also explore other alternatives to find jobs for affected staff*". It would appear that the Acting Executive Secretary for HMN sent an email to HMN staff, also on 1 December 2010, informing them of the new structure and inviting staff to express interest within seven days for any of the transmitted 11 posts.

2. In the result, the complainant submitted his expression of interest in relation to six positions. Of central importance to these proceedings is one of the six positions, Technical Officer (Health Informatics) graded P4 (the new P4 position). An ad hoc Review Committee had been established to assess whether the existing staff in HMN who had expressed interest in particular positions had the qualifications, skills and experience required for appointment to the newly created positions. In some of the documentation the ad hoc Review Committee's task was described as a matching exercise. On 20 December 2010 the complainant was informed by the Acting Executive Secretary that he had not been matched to a position in the new structure. On 23 December 2010 he received a letter from the Administration informing him that a decision had been made that his post was abolished and his appointment was being terminated, effective 15 April 2011. He was, in the meantime, to be placed on special leave with full pay.

3. On 21 February 2011 the complainant lodged an appeal with the Headquarters Board of Appeal (HBA) which, on 21 May 2013, reported to the Director-General making several recommendations

favourable to the complainant. The Director-General's response to those recommendations and her decision on the appeal were communicated to the complainant by letter dated 12 July 2013. This is the impugned decision. The Director-General did not accept several of the favourable recommendations.

4. The principal recommendation of the HBA was that the complainant should be awarded his P5 salary (including all benefits, entitlements and compensation for home leave), plus interest, from 16 April 2011 until the expiration of his P5 fixed-term contract on 30 November 2011. This recommendation was based on a conclusion of the HBA that the complainant had been wrongly separated from WHO. That was because he should have been matched to the new P4 position. However they did not recommend reinstatement to that position because the position had since been abolished. Payment at the P5 salary was recommended because the reprofiling exercise was conducted on a guiding principle that matched staff would "retain their personal grade". In its recommendation the HBA recognised that an adjustment should be made to this payment if any salary had been gained from another employment during that period.

5. The Director-General rejected the conclusion of the HBA that the complainant "should have been matched to [the new P4 position]" because, in her view, the complainant did not satisfy essential criteria for the position. The description of the new P4 position was annexed to the complainant's legal brief in the proceedings before the Tribunal.

6. The position description contained, relevantly, two essential criteria. An essential education qualification criterion was an "Advanced university degree in informatics or related discipline". An essential experience criterion was "[a]t least seven years experience in the field of health informatics, including experience at the international level". The HBA analysed the complainant's work experience for a number of periods (eight in all) between June 1997 and December 2010. The

first such period was June 1997 to December 2003. The HBA said (at paragraph 17(a) of its report):

> "[The HBA] found that from June 1997 to December 2003, the [complainant] worked as a Systems Analyst at WHO where he listed, as one of his key achievements, his contribution '*on an on-going basis, to the development of organization Web policies and guidelines with a view towards promoting useful ICT, information architecture and internet systems support to WHO's global health dissemination and standards setting functions'*. The [HBA] recognised this as 6 years and 6 months of experience in health informatics."

The HBA, after analysing this period and the seven other periods of the complainant's work between June 1997 and December 2010, concluded that the complainant had had 12 years and 8 1/2 months of experience in health informatics at the time of the reprofiling exercise. It noted that, in consequence, the complainant possessed the requisite seven years of international health informatics experience and, additionally, a further five years and 8 1/2 months "to offset the four extra years of experience needed to substitute the lack of an advanced degree in informatics or related discipline, pursuant to *Information Note 13/2010*" (the Note). This last conclusion was based, it seems, on an assessment by the HBA that the complainant had not satisfied the essential education criterion of an advanced university degree in informatics.

The Note contained guidelines published by WHO in April 2010 setting out standard minimum experience and educational requirements for professional positions. The relevant provision in the Note, alluded to by the HBA, stated:

> "For internal WHO and UN system candidates with a first university degree, 4 years of work experience relevant to the vacancy may be substituted for a Master's level degree. These years cannot then also be included in calculating required relevant work experience."

7. In the Director-General's letter of 12 July 2013 she addressed these conclusions of the HBA in the following passage:

> "Firstly, I do not agree with the reckoning of the HBA that you had a total of 12 years and 8 1/2 months of 'essential experience' in *health informatics* at the time of reprofiling and, therefore, that you should have been matched to that position on that basis only. Your Personal History Form (PHF)

> reveals a mix of working experience either on *health informatics* or as *Information Technology (IT) specialist*. For instance, your experience from June 1997 to December 2003 (6 years and six months) as Systems Analyst/Internet Engineer in WHO/ITT should be counted as experience as an IT specialist and not as experience in health informatics (see § 17(a) of the HBA report). Setting aside other examples in the HBA's report of confusion between the two types of functions, on this basis alone, you did not satisfy the requirement of a minimum of eleven years work experience 'in the field of health informatics, including experience at the international level'. The RMRC was therefore correct not to match you on the P4 position since you lacked the essential requirement of the post of at least eleven years of experience in health informatics."

8. Several observations can be made about this passage. The first is that the Director-General created a binary choice between work in the field of health informatics and work as an IT specialist. She did so without explaining or justifying the creation of that choice or explaining her understanding of the work undertaken in these fields. This was of particular importance in this case because the HBA had noted in its report that the RMRC had earlier said "[t]here are some similarities between one of the existing Technical Officer, P5, positions and the new Technical Officer (Health Informatics), P4, position. There is, however, a shift in focus of this technical work as well as the different grades of the two positions". The Tribunal infers from all the material before it, that the P5 position the RMRC was referring to, was the position held by the complainant. Thus it is not logical to say that all work as an IT specialist was, of necessity, not work comprehended in the tasks undertaken by a specialist in the field of health informatics.

In addition, the Director-General proceeded on the assumption that it was necessary for the complainant to have had 11 years of experience satisfying the essential experience criterion of the job description of the new position (experience in the field of health informatics, including experience at the international level). It is true that seven years of such experience was essential. However the remaining four years (of the 11 in total) was not to satisfy this criterion but rather to satisfy the guideline in Information Note 13/2010. All that guideline required was that there was "work experience relevant to the vacancy". Thus the question the guideline posed, in relation to the complainant,

was whether four years of his experience was relevant work experience. There may be cases where such relevant experience can appropriately be treated as only the work identified in a job description criterion as the required work experience. However, there could well be other cases where relevant experience need not be precisely the same as the work identified in a job description. In the present case and particularly having regard to the observations of the RMRC quoted in the previous consideration, this situation falls within the latter category. Thus the Director-General did not ask the relevant question namely was four years of the work undertaken by the complainant work experience relevant to the P4 vacancy. The Tribunal is not satisfied that the limited reasoning of the Director-General should displace the more fully explained reasoning of the HBA about the characterisation of the complainant's work experience. Accordingly the Tribunal accepts the conclusion of the HBA that the complainant should have been appointed to the newly established P4 position.

9. This conclusion is fortified by the Director-General's approach to one other aspect of the complainant's suitability for the new position. She said in the letter of 12 July 2013:

> "Secondly, the HBA noted that the Reprofiling Process [when discussing the Guiding Principles published by WHO for the reprofiling and contained in Information Note 05/2011 of February 2011] provided that, when there was "no significant change" between a position abolished and a position reviewed for a potential match, the incumbent of the abolished position 'will be matched to the position'. [...] The Board found that there were no significant changes between the two positions and that you should have been matched to the P4 position. However, I note that the P4 position for which you expressed interest at the time of the reprofiling had more managerial content than your P5 position, which was more technical in scope. The P4 position also had a shift of focus on the technical duties to mainly work on two selected Priority Strategic Initiatives, namely 'MoVE-IT' and 'PTT/SWISH'. These elements explain also the reason for not matching you to the said position."

While the Guiding Principles did, literally, talk about a comparison between the existing job description of the incumbent and the job description of the new position, the substance of this principle was that if a person was performing or had performed a suite of tasks, she

or he should be appointed to one of the new positions if there were no significant changes between those suite of tasks and the suite of tasks required of the new position. The complainant had worked between July 2008 and February 2010 as the acting Chief, Information Systems Framework. It is likely that, having regard to the title, this position had managerial content. Indeed the complainant said as much in his rejoinder which was not denied in WHO's surrejoinder. If so, the complainant would have had experience in management. It would have been appropriate for the Director-General to have considered whether the complainant had had earlier managerial experience and if he had, to give him the benefit of having had that experience rather than undertaking a comparatively formalistic comparison between the complainant's existing job description and the job description of the new P4 position. To have done so would have resulted in the Organisation acting in good faith in relation to the complainant in circumstances where the position he then held was about to be abolished (see, for example, Judgment 3159, under 19).

10. In the result, the Tribunal concludes that the Director-General's rejection of the HBA's recommendation was unfounded. The assessment of the HBA was that the complainant should have been appointed to the new P4 position and that a reinstatement order would have been appropriate save for the fact that the new P4 position had been abolished by the time the HBA published its report in May 2013. Accordingly, the HBA's recommendation that the complainant be awarded his P5 salary, including all benefits, entitlements and compensation for home leave as of 16 April 2011 until the expiration of his P5 fixed-term contract on 30 November 2011 was an appropriate approach to the material damages which should have been awarded to the complainant. From that amount should be deducted any monies earned from other employment during that period. The complainant says there was none. However this assessment of the material damages would not include the WHO component of the health insurance contribution payable over that period nor the amounts which otherwise would have been payable by way of pension contributions (see, for

example, Judgment 3153, under 4-6). The complainant is entitled to interest on these material damages.

11. However, and in addition, because the complainant was not appointed to the new P4 position, he lost the valuable benefit of furthering his career in WHO for which he is entitled to material damages. Due allowance has to be made for the fact that at some point and for some reason he might not be offered further contracts though he had, for a period of almost 12 years (interrupted by a short period of employment elsewhere), secured employment with WHO in a variety of positions consistent with his expertise. The Tribunal assesses, as a global figure, material damages for this loss in the sum of 60,000 United States dollars.

12. The complainant was awarded 10,000 United States dollars in moral damages by the Director-General. The complainant submits that this amount is inadequate given that there had been a lack of good faith, unequal treatment (acknowledged by the Director-General at least as a matter of perception) and a failure to follow applicable rules (again acknowledged by the Director-General at least in certain respects). Additionally, the complainant seeks moral damages for the delay in the internal appeal proceedings and for the refusal of WHO to provide a document he sought for the purpose of his internal appeal and which, in fact, was relied on by the HBA, by the Director-General and by WHO in the proceedings before the Tribunal. The Tribunal is satisfied that moral damages should have been awarded in a greater amount and awards the complainant an additional 20,000 United States dollars.

13. There remain two further matters to be considered. The first is legal fees. The HBA recommended that the complainant be fully reimbursed for his legal costs for, we infer, the internal appeal. This recommendation was not followed by the Director-General, who said that she agreed to the payment of reasonable legal fees incurred in pursuing the internal appeal to the extent that they were otherwise not reimbursable under insurance, up to a maximum of 3,000 Swiss francs. She provided no explanation for departing from the recommendation of the HBA by capping those costs. There will often be instances

where full reimbursement is not appropriate. However, in this case, it is tolerably clear that the HBA had considerable sympathy, on a proper basis, for the way the complainant had been treated by WHO. Its recommendation for the full reimbursement of legal costs was a considered and, in the circumstances, understandable recommendation. In the absence of justification by the Director-General for departing from that recommendation, its effect should be reinstated by an order of the Tribunal. Also, the Tribunal awards the complainant 8,000 Swiss francs for the costs of the proceedings before the Tribunal.

The last matter, one of detail, is whether the complainant was entitled to a termination indemnity under Staff Rule 1050.10 on the basis that he had 11 years of service (interrupted by a period of employment outside WHO) rather than four years of relevant service, which was the basis upon which WHO assessed his entitlement. It is unlikely that the years of service referred to is the entire period of service broken by other employment. That is because a staff member who was terminated would be entitled to payment under the provision by reference to prior uninterrupted service, but if re-employed and again later terminated would, on the complainant's approach, be entitled to termination indemnity on the second occasion by reference to the period for which such a payment had already been made.

DECISION

For the above reasons,

1. WHO shall pay the complainant an amount equal to his P5 salary, including all benefits, entitlements and compensation for home leave as of 16 April 2011 until the expiration of his P5 fixed-term contract on 30 November 2011 in the manner discussed in consideration 10, above.

2. WHO shall pay the complainant interest at the rate of 5 per cent on the amounts referred to in paragraph 1 of this order as and from the date they would have been payable had the complainant's employment not be terminated, until the monies are paid.

3. WHO shall pay the complainant 60,000 United States dollars in further material damages.

4. WHO shall pay the complainant 20,000 United States dollars in moral damages.

5. WHO shall reimburse the complainant the costs incurred in bringing the internal appeal upon the production of invoices, less any amounts already paid either by WHO and any amounts paid or payable under any policy of insurance applicable to the circumstances of the complainant.

6. WHO shall pay the complainant 8,000 Swiss francs in costs for the proceedings before the Tribunal.

7. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2015, Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ