P.-M. (No. 2)

v.

WHO

122nd Session **Judgment No. 3688**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms E. P.-M. against the World Health Organization (WHO) on 9 December 2013 and corrected on 7 April 2014, WHO's reply of 24 July, the complainant's rejoinder of 3 October and WHO's surrejoinder of 18 December 2014;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the decision to abolish her post and to separate her from service.

The complainant joined WHO in 1996. Between January 2006 and February 2008 she worked as a freelance consultant, during which time she also performed work for WHO under short-term assignments. In March 2008 she was appointed to the P-5 post of Advisor, Human Resources for Health, Systems Strengthening for HIV (SSH) Unit, HIV/AIDS Department, at WHO Headquarters. In October 2009 she filed a formal complaint of harassment against her first-level supervisor, Mr P., and Ms G., Leader of the Integrated Management of Adult and Adolescent Illness in the HIV (IMAI) team in the SSH Unit. On 13 July 2010 she filed her first complaint with the Tribunal, impugning the

decision to dismiss her allegations of harassment that the Director-General had taken on the basis of the Headquarters Grievance Panel's findings.

Prior to that, by a letter of 27 November 2009, the complainant was notified of the decision to abolish her post as a result of a restructuring within the HIV/AIDS Department and that her last day of service would be 16 March 2010. As the complainant had gone on sick leave and had exhausted her sick leave entitlements on 22 June 2010, she was placed on special leave with pay between 22 June and 25 July, her physician having certified her fitness to return to work as of 26 July 2010. She underwent the exit medical examination on 10 August and was separated on 11 August 2010.

In December 2010 the Administration requested the Headquarters Board of Appeal (HBA) to suspend the appeal proceedings the complainant had initiated on 8 December 2009 against the decision to abolish her post and to separate her from service, pending the outcome of her case before the Tribunal. In a memorandum of 14 June 2011 both parties were informed that the request for suspension of the appeal had been denied. On 6 February 2013 the Tribunal delivered Judgment 3192 dismissing the complainant's first complaint on the grounds that she had failed to establish that harassment had occurred. It also found her claims regarding the abolition of her post irreceivable for failure to exhaust internal remedies.

In its report of 28 June 2013 the HBA found that there was no evidence to indicate that there was personal prejudice in the decision to abolish the complainant's post and that if a post is abolished for financial reasons, "no new recruitment, especially fixed term, should take place to carry out similar functions of the abolished post". The HBA considered that while the complainant was not entitled to participate in a reassignment process under Staff Rule 1050.2, she should have been considered for a P-4 post involving duties similar to hers, as she possessed the requisite qualifications and experience, and that WHO had thus breached its duty of care. It therefore recommended that the complainant be awarded moral damages "in the high range", as determined by the Director-General, as well as costs. By a letter of 9 September 2013 the

Director-General informed the complainant that she was satisfied that the abolition of her post was made in the context of a departmental reorganization and financial constraints and that it was based on objective grounds. She also agreed with the HBA's observation that the complainant was not eligible for the reassignment process. She dismissed the appeal and all related claims for redress. That is the decision impugned.

On 20 February 2014 the complainant was selected for a P-5 post under a one-year fixed-term contract at WHO's Regional Office for Africa in Abuja, Nigeria.

The complainant asks the Tribunal to set aside the impugned decision and to order that her post be re-established and that she be immediately reinstated with full retroactive effect from 26 July 2010, with all salary, benefits and emoluments. Alternatively, she asks the Tribunal to order that she be transferred to a new regular budget post at Headquarters commensurate with her grade, qualifications and experience, also with full retroactive effect. She also asks that her title, role and functions be modified transparently and objectively in accordance with her competencies and that she be granted a fixed-term contract that expires on her statutory date of retirement. She seeks reimbursement for the leave deducted from her terminal payments, "actual" and moral damages, as well as costs in the amount of 65,000 Swiss francs, with interest at the rate of 8 per cent per annum on all sums awarded from 10 July 2010. In her submissions the complainant requests the Tribunal to order that "all pertinent evidence" relating to the abolition of her post be produced by WHO, including the formal request for abolition of post, and claims moral and exemplary damages for the excessive delay in the internal appeal proceedings.

WHO asks the Tribunal to dismiss the complainant's claims as devoid of merit. It submits that her claims based on her allegation of retaliation are irreceivable for failure to exhaust internal remedies. It points out that some of her requests are not claims that the Tribunal should entertain.

CONSIDERATIONS

1. Notwithstanding that the complaint contains extensive references to harassment, and, in particular, to acts of prejudice and bias, retaliation and malice allegedly perpetrated against the complainant, it is centrally concerned with the alleged wrongful abolition of her post. Her central claim is that her post was wrongfully abolished and she was eventually unlawfully separated from WHO on 11 August 2010. In Judgment 3192 the Tribunal dismissed her harassment complaint on the grounds that she had failed to establish that harassment had occurred. WHO contends that her allegations of prejudice and bias, retaliation and malice in the present complaint are irreceivable. However, the Tribunal holds that those allegations are not claims, but pleas to support her argument that these were some of the factors which influenced the abolition of her post and separation (see, for example, Judgments 2837, consideration 3, and 3617, consideration 2).

2. The complainant requests an oral hearing under Article 12, paragraph 1, of the Tribunal's Rules. This Article provides that a party that so applies shall identify any witness whom that party wants the Tribunal to hear and the issues that the witness is to address. The complainant states that she herself wishes to be heard in relation to all issues raised in the complaint, and any other witnesses identified after reviewing WHO's reply and surrejoinder. She has provided two witness statements as Annexes to her rejoinder, which cannot assist with resolving any of the issues raised in the present complaint. The complainant had initially requested a hearing before the HBA, but subsequently decided to forego it and requested that her internal appeal be examined *in camera* based on the written pleadings and documents. The Tribunal determines that it is unnecessary to have an oral hearing in the terms of the complainant's request given the detailed nature of the evidence, including documents, which she has provided. Accordingly, an oral hearing will not be ordered. The complainant's request for the disclosure of documents will be considered later in this judgment.

3. On the merits, so far as the allegations or pleas of prejudice and bias, retaliation and malice are concerned, it is noted that there were very tense and strained personal relationships in the HIV (SSH) Unit (the Unit) of the HIV/AIDS Department (the Department) to which the complainant was attached. It is apparent that there were personality and inter-departmental conflicts. These circumstances existed, in particular, among the complainant, Mr J.P. and Ms S.G. The evidence which the complainant presents, particularly relating to the strained relationships in the Unit, may raise speculation as to whether the reorganization was merely a device to be rid of the complainant. However, there is not sufficient or sufficiently cogent evidence, as against speculation or surmise, to link the abolition of the complainant's post and her separation from office to the alleged acts of prejudice and bias, retaliation, malice or bad faith perpetrated against her. These pleas are therefore unfounded and must accordingly be dismissed. By extension, that aspect of the complainant's plea that the HBA's report and recommendations contained errors of fact relating to the allegation of prejudice that infected the impugned decision thus rendering the latter null and void must also be dismissed.

4. The following claims remain for consideration:

1) Whether the reasons provided for the abolition of the complainant's post were illusory;
2) Whether the WHO failed to take reasonable steps to re-assign the complainant, thereby violating its duty of care to her and/or breaching its Staff Regulations and Staff Rules. Relatedly, whether the HBA's report and recommendations contained errors of fact in relation to the reassignment process that infected the impugned decision thus rendering the latter null and void;
3) Whether the complainant is entitled to compensation for any violations that may be found in relation to 1 and 2 foregoing, and, additionally, compensation for undue delay in the internal appeal process; and
4) The issue concerning the request for the disclosure of documents.

5. Considering first the issue of undue delay in the internal appeal proceedings, it is noted that forty-five months elapsed between 8 December 2009, when the complainant filed her Notification of Intention to Appeal against the formal decision to abolish her post contained in the letter dated 27 November 2009, and 9 September 2013 when the Director-General issued the impugned decision. The complainant contends that this period was "egregious and unjustifiable, in violation of the duty of care owed to her" for which she should be awarded substantial moral damages.

6. The Tribunal has consistently stated that fairness to an appellant requires that the internal appeal process must be efficient. Accordingly, the following was stated in Judgment 2904, consideration 15, for example:

> "As for the internal appeal process, the Tribunal recalls that the Organization has a duty to maintain a fully functional internal appeals body. Thus, the Committee's statement that 'the alleged delays could not be ascribed to it as they were due to the need for arranging election of new members to the Appeals Committee and the time requirements for this' does not relieve the Organization from responsibility for the delay in the process. According to well-established case law, '[s]ince compliance with internal appeals procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed' (see Judgment 2197, under 33)."

7. WHO accepts that the internal appeal process was long. However, it submits that no damages should be awarded to the complainant because of the circumstances that caused the delay. Accordingly, WHO states that after the Notification of Intention to Appeal was filed on 8 December 2009, the internal review was completed on 25 February 2010 after which discussions ensued between the complainant and the Human Resources Management Department (HRD) on her possible continued employment. These were the circumstances, according to WHO, in which the complainant's Statement of Appeal was submitted only on 11 October 2010, some ten months after the process had commenced. The Tribunal accepts that WHO was not responsible for the delay up to that point.

8. However, it is observed that after 11 October 2010 there followed an eight month period of inactivity on the complainant's internal appeal against the decision to abolish her post. That delay lasted until 14 June 2011 when the HBA decided to pursue the matter and set the timelines for it. The Tribunal does not accept WHO's explanation that this delay may be justified because of the complexity of the case and the fact that it was thought necessary to await the Tribunal's determination of her harassment complaint. WHO seeks to justify this contention by stating that the complainant's appeal against the decision to abolish her post contained facts, pleas, information and arguments relating to her allegations of harassment and that their complexity and significant overlap resulted in the decision to hold the abolition appeal in abeyance pending the Tribunal's judgment in the harassment case. WHO states that this course of action was considered necessary to avoid conflicting conclusions being reached by the HBA and the Tribunal.

9. It is however noted that it was by a memorandum of December 2010 that WHO requested the HBA to suspend the proceedings in the abolition appeal pending the Tribunal's decision on the complainant's harassment complaint. In its correspondence dated 14 June 2011, the HBA informed WHO of its intention to pursue the review of the appeal. The Tribunal considers that it was unnecessary to have had the proceedings suspended for the reasons which WHO gave as the two matters raised separate issues for determination notwithstanding the overlapping information and arguments. In the end, the HBA correctly decided to pursue its review to determine the lawfulness of the abolition of the complainant's post.

10. It is further observed that the HBA issued its report and recommendations to the Director-General on 28 June 2013. This was two years after its decision to continue the internal appeal proceedings. This period was excessive. The HBA's report shows that the last pleading was filed on 19 October 2011. The HBA had its first meeting on the matter about one year later on 4 October 2012, but then had three meetings, on 29 November 2012, 30 January 2013 and 18 March 2013, to consider the appeal. The HBA's report shows that it had to request

additional information and documents from WHO after each meeting. These requests were made on six occasions between 15 October 2012 and 4 June 2013. WHO should have provided all information that was necessary to assist the HBA to determine whether the complainant's post was lawfully abolished and whether she was lawfully separated as that information was peculiarly within WHO's knowledge and possession.

11. Having received the HBA's report of 28 June 2013, the Director-General issued the impugned decision on 9 September 2013. This was outside of the sixty calendar days within which Staff Rule 1230.3.1 mandates the Director-General to inform the complainant of her decision on the HBA's report. This was a delay in breach of a Staff Rule.

The delays in the HBA proceedings were unreasonable and were not caused by wrongful procedural conduct on the part of the complainant and there is no indication that the HBA's workload justified it. The delay before the HBA was mainly caused by the necessity to request information and documents from WHO, which should have been provided early in the process.

The delay entitles the complainant to an award of moral damages for the defendant's breach of its duties of due diligence and care (see Judgments 2522, under 7, 3160, under 16, and 3188, under 25).

12. It was stated in Judgment 3582, consideration 4, for example, that the amount of damages awarded for the injury caused by an unreasonable delay in processing an internal appeal depends on the length of the delay and its consequences. The consequences vary depending on the subject matter of the dispute so that a delay in resolving a matter of limited seriousness in its impact on the appellant will ordinarily be less injurious than a delay in resolving a matter which has a severe impact. The relevant period of unreasonable delay, including the delay in breach of a Staff Rule, was from October 2010 to September 2013 when the complainant received the impugned decision. The consequences were injurious to the complainant in that the matter concerned the abolition of her post and her separation from WHO and she was in a

state of uncertainty for the period of about three years. These factors will be considered when the quantum of moral damages to be awarded is determined later in this judgment, noting, however, that there is no warrant, as requested by the complainant, for exemplary damages in relation to the delay in the internal appeal.

13. WHO states that the complainant's post was abolished for programmatic and financial reasons. However, the complainant contends that these reasons played no part in the abolition of her post, but were used as an "illusory justification for the irregular motivations that ultimately resulted in [her] wrongful removal […] from the unit by way of an illegal post abolition". This plea means, in effect, that the reasons which WHO gave for the abolition of the post were baseless and that the restructuring was not a genuine one.

14. Under Article 9.2, of the Staff Regulations, the Director-General has discretion to terminate the appointment of a staff member if, among other things, the necessities of the service require the abolition of the post. Abolition of a post is normally the result of a restructuring and must be a genuine process based on objective grounds. Accordingly, it was stated as follows, for example, in Judgment 3582, consideration 6:

> "According to firm precedent, a decision concerning the restructuring of an international organisation's services, which leads to the abolition of a post, may be taken at the discretion of its executive head and is subject to only limited review by the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence. The Tribunal may not, however, supplant an organisation's view with its own (see, for example, Judgments 1131, under 5, 2510, under 10, and 2933, under 10). Nevertheless, any decision to abolish a post must be based on objective grounds and its purpose may never be to remove a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17)."

15. WHO insists that the complainant's post was abolished on objective grounds in a restructuring exercise within the HIV/AIDS Department because of the need to re-focus programmes in the light of changing strategic priorities of the Department and also because of financial constraints. The complainant, however, insists that there was sufficient funding for the post because, as far as she is aware, a funding proposal for the Department for 2010 to 2013 was approved at the time that her post was abolished. This statement has gone unanswered by WHO. That information would peculiarly be within its knowledge, but it would not necessarily mean that the funding was earmarked for her post.

16. WHO states that the restructuring was prompted by changing strategic priorities of the Department and led to the amalgamation of teams with compatible areas of responsibility and the redistribution of functions between Units within the Department, as well as the transfer of particular responsibilities and duties outside the Department. According to WHO, insofar as the process applied to the complainant's post, it entailed the phasing out of work in the technical area of Human Resources for Health and the transfer of residual planning functions to the more appropriate location in the Health Systems and Services (HSS) Cluster where a Human Resources for Health, Health Workforce already existed. WHO admits that the decision to relocate the Human Resources for Health functions took place in the context of on-going tensions within the Department concerning the division of work and the overlap of responsibilities as they related to the Treat, Train and Retain (TTR) initiative. The complainant insists that the programmatic rationales which WHO gave were illusory and she could have been retained in the IMAI Team. She states, however, that her supervisors worked covertly to reduce her level of responsibility and to divert her tasks to colleagues in the IMAI Team so that it would be easier to justify the abolition of her post in the restructuring process and that the removal of the responsibilities was in itself unlawful.

17. The HBA considered whether the complainant's post was abolished in accordance with the WHO Staff Regulations and Staff Rules. The HBA stated that it looked at the request to abolish the post and "noted that it was made further to a restructuring exercise and financial constraints. (See 7 October 2009 memorandum-Chronology.) The HBA then considered the letter of abolition and the reasons provided, as well as the memorandum outlining the proposed re-organization of the HIV/AIDS Department." The HBA further considered the possible reassignment of the complainant, but stated in its conclusion that "[w]hile there was nothing to indicate that the [complainant's] position was abolished in contravention of the WHO SRR, the Board concluded that the [complainant's] department could not justify abolishing the [complainant's] post while at the same time recruiting a fixed-term position to undertake the duties similar to those of the complainant". The HBA had earlier stated, in reliance on Judgment 2634, that "if a post is abolished further to financial reasons, no new recruitment, especially fixed-term, should take place to carry out similar functions of the abolished post". The foregoing statement by the HBA seems to be an acceptance, among other things, that the abolition of the complainant's post was unjustifiable on the ground of financial constraints.

18. Relatedly, it is noted that the Director-General stated, in the impugned decision, that the P-4 position vacancy arose "in the context of an older history and did not affect the rationale for abolishing the [complainant's] P-5 post [...] because the two positions did not overlap in funding". In the Tribunal's view, however, WHO has not presented sufficient evidence to support its assertion that the restructuring was for financial reasons.

Whether the post was abolished for financial reasons is a question of fact. Those facts were within the knowledge of WHO and it must show that when it advanced financial reasons as a ground for the abolition of the complainant's post this was genuine. It has not done so. In the absence of that evidence, it is determined that the complainant's post was unlawfully abolished and the claim on this ground is well founded. The result is that the impugned decision will be set aside and the

complainant will be awarded material damages for the loss of a valuable opportunity to have her employment continued.

19. Moreover, the evidence shows that the complainant was employed in March 2008. About six months later, by an email dated 17 October 2008, she requested her first-level supervisor and the Coordinator of the SSH Unit to consider the intervention of the Ombudsman to resolve an impasse between her and Ms G. Allegations that she made in February 2009 about her first-level supervisor led to a number of meetings with the Ombudsman and all persons concerned in attempts to resolve the issues. There followed the advertisement of Vacancy Notice HQ/09/HQ/Technical Resources (HTM)/FT42 in the SSH Unit for a fixed-term P-4 position of Medical Officer on 26 June 2009. The duties of this post replicated many of those of the complainant's post. In an email of 4 August 2009 the Director ad interim, HIV/AIDS, informed all staff of the Department that in light of upcoming departmental changes, the number of staff would be reduced from 88 to 72. WHO states that the HIV/AIDS Department had suffered a 20.5 per cent reduction in its budget, which necessitated the reduction in its established posts through retirements, non-renewal of appointments and abolition of posts. These statements have not been supported by the relevant statistical information, which only WHO holds. In the end, only the complainant's fixed-term post and a temporary post were abolished.

20. The complainant states that she was first informed that her post was to be abolished on 4 September 2009 while she was at a meeting with the Ombudsman to explore her secondment to the Human Resources for Health Department. It was thereafter that the Director ad interim, HIV/AIDS, submitted the memorandum, dated 9 September 2009, regarding the proposed reorganization of the Department to the Director-General, who approved it on 24 September 2009. That communication stated, among other things, that the reduction of staff would only result in the non-renewal of the appointments of one fixed-term and one temporary staff member. There followed the memorandum of 7 October 2009 formally requesting the abolition of the complainant's post, which

was approved on 9 October 2009. It was on that same day that interviews were conducted for the P-4 post which was advertised on 26 June 2009.

21. In addition to the fact that WHO has presented insufficient evidence to support its assertion that the complainant's post was abolished for financial reasons, it is also evident that it failed to care for the complainant's dignity or to guard her against unnecessary personal distress and disappointment where it could have been avoided. In this regard, the following statement, in Judgment 3353, consideration 26, is recalled:

> "The Tribunal's case law states that the relations between an international organisation and a staff member must be governed by good faith, respect, transparency and consideration for their dignity (see Judgment 1479, under 12). Accordingly, an organisation is required to treat its staff with due consideration and to avoid causing them undue injury. An organisation must care for the dignity of its staff members and not cause them unnecessary personal distress and disappointment where this could be avoided. In particular, good faith requires an organisation to inform a staff member in advance of any action that it might take which may impair a staff member's rights or rightful interest."

22. There is no reason why the complainant was informed on 4 September 2009, in the presence of others, that her post was to be abolished while she was at a meeting with the Ombudsman to explore her secondment to another department. That action was insensitive and inappropriate. This failure entitles the complainant to an award of moral damages.

23. It is also found, as the HBA correctly did, that WHO breached its duty of care to the complainant by abolishing her post while at the same time recruiting someone to fill the P-4 position the duties of which the complainant was qualified to undertake. The Tribunal notes the statement in the impugned decision that the duties of this post were not similar to those of the complainant's P-5 post in that, while the complainant was responsible for capacity-building, the P-4 post focussed on IMAI-related functions, particularly on the development of pre-service education content. The critical consideration, however, is that the complainant, whose post was being abolished, was qualified to undertake

the duties of the P-4 post but was never considered. This was in breach of WHO's duty of care, which also entitles the complainant to an award of moral damages. It is noteworthy that although the P-4 post was advertised on 26 June 2009, the interviews were not conducted until 9 October 2009, the same day on which the request to abolish the complainant's post was approved.

24. The complainant claims that WHO erred when it failed to make a reasonable offer to reassign her, thereby violating its duty of care to her. On the other hand, WHO contends that the complainant had no right to reassignment. This, according to WHO, is because under Staff Rule 1050.2, she had not been in its service for five continuous and uninterrupted years. Staff Rule 1050.2 relevantly states as follows:

> "When a post held 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 the procedures established by the Director-General […]."

25. At the time when the complainant was separated she had been in WHO's service for some thirteen years, except for a break from January 2006 to February 2008. During that period she worked as an international consultant, including for WHO under short-term assignments. The complainant argues that this break should not be considered as a gap in the continuity of her service with WHO as the non-renewal of her employment in November 2005 occurred through no fault of her own. She states that it resulted solely from unforeseen administrative delay in concluding the extension of her contract. It is noted that she had reported to work for about two months after that contract ended. The complainant states that this was "until continuing and maintaining a home-base in Nairobi without income became untenable". On the other hand, WHO insists that the break occurred because funding could not be secured and so it was not possible to offer her another appointment.

26. The Tribunal finds that in the foregoing circumstances WHO had a duty under Staff Rule 1050.2 to make reasonable efforts to reassign the complainant, as explained in Judgment 3582, consideration 13:

> "The French version differs somewhat from the English text in that, instead of the phrase "served on a fixed-term appointment for a continuous and uninterrupted period of five years or more", it reads "*engagé pour une durée déterminée et qui compte au moins cinq années de service continu et ininterrompu"*. The English version of the text, on which Judgment 3159 rests, therefore appears to be more rigorous than the French version, which indicates that a staff member may benefit from the reassignment procedure after the expiry of her or his appointment or the abolition of her or his post, provided that she or he was employed under a continuing or fixed-term appointment at the material time and had then been in the Organization's service continuously and uninterruptedly for at least five years.
>
> The Tribunal has consistently held that any ambiguity in the regulations or rules established by an international organisation should, in principle, be construed in favour of the staff and not of the organisation (see Judgment 3369, under 12). Hence the complainant, who at the material time met both of the conditions which had to be satisfied under the French version of Staff Rule 1050.2, belonged to the category of staff members covered by the provisions on reassignment."

27. WHO appreciated the long established principle that an international organization owes a duty of care to an employee whose post is abolished to consider that person for other posts for which that person is qualified. Accordingly, in its letter dated 27 November 2009, which informed the complainant of the abolition of her post, she was offered preferential consideration for twelve months after her separation if she wished to be considered for vacancies for which she was qualified. The complainant refers to the HBA's finding that, in breach of its duty of care towards her, WHO did not properly consider her for other posts for which she was qualified. The Tribunal however notes that, in the impugned decision, the Director-General rejected this finding on the ground that the complainant was not qualified to fill the posts which became available. She had applied for a number of posts, but her applications were unsuccessful for various reasons.

28. While the focal point in consideration 23 above was that there was a post for which the complainant was qualified but for which

she was not considered, the focus of the present issue is that she was subsequently given some opportunities to apply for other posts. Whether the complainant's applications to fill those positions succeeded was within the discretion of the Director-General and the outcome of the recruitment procedures. In the absence of evidence that the procedures were unlawful and that the discretion was wrongly exercised, the claim of breach of duty of care on this ground is unfounded. It must therefore be dismissed.

29. A detailed reproduction of considerations 16, 17 and 20 of Judgment 3586 is a precursor to considering the issue of non-disclosure:

> "16. The Tribunal has consistently stated, in Judgment 2700, under 6, and Judgment 3295, under 13, for example, that a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. According to this principle, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers. The Tribunal sees nothing in the circumstances of this matter that establishes a special case which justified withholding the document that WHO provided to the HBA from the complainant.
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> 17. The Tribunal has consistently stated that the principle of equality of arms must be observed by ensuring that all parties in a case are provided with all of the materials an adjudicating body such as the HBA uses in an internal appeal, and that the failure to do so constitutes a breach of due process. WHO breached due process by not having provided the relevant documents to the complainant. It also breached due process by not disclosing all of the agreements and related information, which could have assisted the HBA to have made a properly informed determination whether financial constraint was a valid reason for not extending the complainant's contract.
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> […]
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> 20. The Tribunal considers that because WHO did not disclose all of the relevant materials to the HBA, its investigation was incomplete. The failure to disclose all of the relevant materials prevented the HBA from properly considering the facts. Accordingly, the decision not to extend the complainant's contract not only violated due process but also WHO's duty of care and the impugned decision should be set aside. The complainant is entitled to moral damages. The decision also caused the complainant the loss of the opportunity to have his contract renewed and the loss of career opportunity entitling him to material damages."

30. It was noted earlier in this Judgment that the HBA requested further information and documents from WHO on six occasions. WHO provided the information and documents to the HBA on a confidential basis for the HBA's use only. They have not been provided to the complainant, who has requested disclosure to her. She states that as WHO is in the sole possession of the information and documents which could show whether or not her post was unlawfully abolished, WHO should be asked to disclose them to the Tribunal and to her. She asks that WHO be ordered to produce "all pertinent evidence and information that would show that [the abolition of her post] was necessary and regular, and that the Administration did everything possible to reassign [her] to an open or advertised post for which she [was] qualified". The relevant information and documents could have assisted the HBA and the Tribunal to determine these issues. It was therefore in WHO's interest to provide them. It was also necessary to have provided them to the complainant as well to assist her to prepare her case. However, the foregoing request as formulated by the complainant is too wide.

31. More specifically, the complainant has requested that WHO be ordered to disclose the request which Manual Part III, Section 3, paragraph 150 requires to be sent to the Director-General justifying the abolition of her post. While the complainant was not entitled to have minutes and records of the deliberations, she was entitled to have this document, and, in fact, all of the documents that were disclosed to the HBA, appropriately redacted where necessary to protect third parties. WHO is willing to produce the documents that it provided to the HBA to the Tribunal and the Tribunal has requested them. Given that the impugned decision will be set aside and the complainant will be awarded damages, it is unnecessary to order disclosure to the complainant. However, WHO's failure to disclose the relevant documents to the complainant in the internal appeal proceedings breached the adversarial principle or the principle of equality of arms, which constitutes a breach of due process entitling the complainant to moral damages.

32. The complainant seeks an order that WHO should reinstate her to her post which was unlawfully abolished. It was however stated,

in Judgment 3353, consideration 35, for example, that the reinstatement of a person on a fixed-term contract can be ordered in only exceptional cases. The circumstances in the present case are not of an exceptional character, but the complainant will be awarded 90,000 euros in material damages for the loss of a valuable opportunity to have her contract renewed, the loss of career opportunity as a result of the unlawful abolition of her post, and for WHO's failure to make reasonable efforts to reassign her under Staff Rule 1050.2. The complainant will also be awarded 70,000 euros in moral damages for the affront to her dignity, the breaches of due process and of WHO's duty of care to her, and for the unreasonable delay in the internal appeal proceedings. These sums should be paid to her within 30 days of the date of delivery of this judgment, failing which they shall bear interest at the rate of 5 per cent per annum from that date until the date of payment. She will also be awarded 7,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. WHO shall pay the complainant material damages in the amount of 90,000 euros.
3. WHO shall also pay the complainant moral damages in the amount of 70,000 euros.
4. WHO shall pay interest on the sums referred to in points 2 and 3 at the rate of 5 per cent per annum from the date of public delivery of this judgment until the date of payment, unless these sums are paid within 30 days of the date of public delivery of this judgment.
5. WHO shall also pay the complainant costs in the amount of 7,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ