H.

v.

WHO

123rd Session **Judgment No. 3752**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. H. against the World Health Organization (WHO) on 16 May 2014 and corrected on 1 July, WHO's reply of 13 October, the complainant's rejoinder of 14 November 2014 and WHO's surrejoinder of 6 February 2015;

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, a former WHO staff member, challenges the decisions to abolish his post and to terminate his continuing appointment.

A wide-scale restructuring was initiated at WHO Headquarters in 2011. In January WHO issued Information Note 03/2011 informing staff that the Director-General had decided to establish a Road Map Review Committee (RMRC) to review proposals for the abolition of a significant number of longer-term positions, and in February, it issued Information Note 05/2011 that set out a reprofiling process to be followed in order for staff to be matched to positions in the new structure, and established an Ad Hoc Review Committee (AHRC) to carry out the reprofiling process.

By a letter of 13 January 2012 the complainant, who held a continuing appointment at grade P.3, was informed that following the

completion of the reprofiling process it had not been possible to match him against any of the longer-term positions, either at grade or below grade, within the new structure. He was also informed that for programmatic, financial and strategic reasons his post was abolished, but that, in accordance with Staff Rule 1050.2 and e-Manual III.10.11, efforts would be made to find him an alternative reassignment through a formal process conducted by the Global Reassignment Committee (GRC) or that he could explore separation by mutual agreement. On 12 March he filed an appeal with the Headquarters Board of Appeal (HBA) against that decision. On 8 July he was placed on sick leave pursuant to a motor vehicle accident.

By a letter of 12 November 2012 he was notified that no suitable assignment had been identified and that the Director-General had decided to terminate his appointment with effect from 15 February 2013. His last day of service was subsequently postponed to 31 March 2013 owing to him being on sick leave. Before separating from service, he filed a second appeal on 7 January 2013 with the HBA contesting the decision of 12 November 2012.

The complainant's first and second appeals were joined, and the HBA transmitted its report on 17 December 2013 to the Director-General. It held in particular that, in the context of the reprofiling process, the AHRC had failed to examine the suitability of the complainant to a P.2 position in Malaysia (position IT 011 P2), which constituted a "missed opportunity" for him. The AHRC had indeed an obligation to examine the suitability of staff to all vacant positions irrespective of whether they had applied or not. The HBA also noted that some posts of National Professional Officer (NPO) were created in Malaysia, and opened to Malaysian nationals only, without fulfilling the fundamental requirement of having a national content. The creation of these posts rather constituted a transfer of functions from Switzerland to Malaysia, and the complainant was barred from being matched to any posts as he was not Malaysian. The HBA therefore recommended that WHO pay him an amount equivalent to two years' salary plus allowances together with legal fees up to 10,000 Swiss francs upon review of receipts.

By a letter of 12 February 2014 the Director-General notified the complainant that she had decided to pay him 25,000 Swiss francs in

damages as a full and fair compensation for all aspect of his appeal together with legal fees in an amount up to 5,000 Swiss francs. She accepted that during the reprofiling process "more could have been done" to facilitate the matching of staff members who held a continuing appointment. With respect to the reassignment process, she considered that his rights pursuant to Staff Rule 1050.2 and associated e-Manual provisions should have been respected in a timely manner. Accordingly she concluded that he should be paid damages by way of remedy and explained that to determine the appropriate amount of damages she took into account, that after the inconclusive outcome of the reprofiling process he was straightaway included in the reassignment process set up under Staff Rule 1050.2, that diligent efforts were made to reassign him but no suitable reassignment was found, that he was given three months' notice of termination and that he had been employed with WHO for less than five years when he was informed that his post was to be abolished. The complainant impugns that decision before the Tribunal.

The complainant asks the Tribunal to order payment of his salary and allowances, including "full pension rights", for two years as from the date of his termination on 31 March 2013 "without prejudice to the sums due on termination of contract", reimbursement of legal expenses incurred, and payment of any other expenses related to the abolition of his post and the termination of his appointment. In addition he requests that WHO be required to submit the reports of the AHRC and the GRC, and documents referred to in the HBA's report, redacted if necessary.

WHO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant commenced employment with WHO in February 2008 as a Network Engineer, grade P.3, in the Network Services Unit (NTW), Department of Information Technology and Training (ITT) within the General Management Cluster (GMG). He was based at Headquarters in Geneva, Switzerland. On 1 January 2011, the complainant's appointment was converted to a continuing appointment. Commencing in early 2011, reviews were undertaken of WHO's structures and staffing. In the result, by letter dated 13 January 2012, the complainant was

informed that his post had been abolished. He was told he could participate in a reassignment process or explore separation by mutual agreement. No suitable post was found for him either through a matching process or reassignment process. Ultimately he was separated from service on 31 March 2013.

2. The abolition of the complainant's post arose from a review of the structure of departments within WHO by a RMRC whose report, in relation to ITT, was approved by the Director-General on 9 September 2011. Earlier, on 1 February 2011, Information Note 05/2011 was issued outlining the process which would be followed in order to allow staff to be matched to positions in a new structure. Information Note 05/2011 contemplated the creation of an AHRC to undertake a matching process to review the position of each member of staff affected by the restructuring and assess their suitability for matching to positions within the new structure. As part of this process, staff could provide an expression of interest in positions in the new structure. The complainant did so on 18 November 2011, expressing interest in five positions.

3. On 12 December 2011 the AHRC provided the Assistant Director-General of GMG with its recommendations arising from the ITT reprofiling exercise. It did not recommend that the complainant be matched to any of the positions in the new ITT structure. The recommendations were approved by the Assistant Director-General the following day as they also were by the Director-General.

4. As noted earlier, the complainant was informed in January 2012 that a decision had been made to abolish his position and that it had not been possible to match him to a position in the new ITT structure. On 12 March 2012 the complainant lodged an internal appeal against the decision to abolish his post.

5. Because the complainant held a continuing appointment and his position had been abolished but no new position was identified in the matching process, it was incumbent upon WHO under Staff Rule 1050.2 to endeavour to find an alternative reassignment. This task was undertaken

by the GRC that reviewed a total of 70 vacant positions but, in the end, was not able to make a recommendation for reassignment and reported this on 30 October 2012. The complainant was informed of this in a letter dated 12 November 2012 from the Director of Human Resources Management and also that a decision had been made to terminate his appointment. He was also informed that his contract would end on 15 February 2013 though, as a matter of fact, he was separated on 31 March 2013 at the end of a lengthy period of sick leave which had commenced in July 2012 when the complainant had been involved in a motor vehicle accident. On 7 January 2013 the complainant lodged an internal appeal against the decision to terminate his appointment.

6. Both of the complainant's appeals were heard by the HBA. It provided its report and recommendations to the Director-General on 17 December 2013. The HBA addressed three arguments the complainant had advanced. The first was that there had been a failure to match the complainant in the reprofiling process. Accordingly the HBA reviewed the reprofiling exercise undertaken by the AHRC and, in particular, its consideration of the five positions for which the complainant had expressed interest. Three of the positions were in Geneva, Switzerland, and, in relation to each, the HBA noted the scores of the complainant and that in relation to each position another candidate received a higher score and had been awarded the position. It also noted that the AHRC concluded that the complainant had not met the essential requirements of each of these three positions in Geneva. The HBA later said that it "agreed [...] on the outcomes of [the] matching exercise in respect of [these three] positions" and that it could not observe any error in the evaluation done by the AHRC in relation to them.

The remaining two positions for which the complainant expressed interest were based in Kuala Lumpur, Malaysia. The HBA noted that the AHRC concluded that the complainant was not eligible to apply for them. However the HBA also noted that there had been another IT position in Kuala Lumpur (Post IT 011 P2) that had remained vacant after the matching exercise. The HBA said that while the complainant had not expressed interest in that position, the AHRC was obliged to examine the suitability of staff for all positions whether they expressed interest

or not. Thus it should have considered the complainant's suitability for that position. The HBA examined the description of that post and the complainant's curriculum vitae and said "there was a possibility that he could have been matched to this post". This it described as a "missed opportunity".

7. The HBA then addressed a second argument of the complainant that there had been an erroneous characterisation of several positions as NPO positions in Kuala Lumpur. It discussed the legal framework for the use of NPO positions. The HBA concluded they were positions established for nationals of the country in which they arose and for which local knowledge, expertise and experience of a national dimension as opposed to international dimension were required as well as full proficiency in the working language of the country concerned. The HBA said it had examined the post description of the NPO positions created in the new structure in Kuala Lumpur and could not find any "national content in these post-descriptions" and noted that "no national language skills were required". It also noted that the complainant had been barred from applying for the Kuala Lumpur posts that had no national content but which constituted "a transfer of functions from Geneva to Kuala Lumpur". It concluded that the complainant would have had the "right to be matched against these posts had they not been advertised as NPO posts" and he should have been able to apply for them.

8. The third of the complainant's arguments considered by the HBA was that the Administration had failed to observe or apply correctly the provisions of Staff Rules 1050.2 and 1050.5.2 in relation to the reassignment process. It rejected this argument.

9. In the result the HBA concluded that while the Administration had the managerial prerogative to create or transfer posts in or to Kuala Lumpur it had, in substance, unnecessarily created them as NPO posts, which effectively prejudiced the complainant because he was not a Malaysian national and had been precluded from applying or being matched to the positions. It also concluded that the failure of the AHRC to consider the suitability of the applicant for post IT 011 P2 was a missed

opportunity. It recommended to the Director-General that the complainant be paid two years' salary plus allowances and legal fees up to a maximum of 10,000 Swiss francs.

10. In a letter dated 12 February 2014 the Director-General responded to the conclusions and recommendations of the HBA. Most were rejected. It is unnecessary to summarise the approach adopted by the Director-General as it is mostly reflected in the pleas of WHO in these proceedings. However one important matter should be mentioned. In relation to the creation of various IT NPO positions in Malaysia, the Director-General drew attention to Staff Rule 1330 which authorised their creation. However she said she disagreed with the conclusion of the HBA that the complainant had been "barred from applying to Kuala Lumpur posts that had no national content but constituted a transfer of functions from Geneva to Kuala Lumpur". The Director-General then explained why but, importantly, did not say that the positions required particular national knowledge or knowledge of the Malaysian language, though she did say the positions were not "intrinsically international". She said:

> "The decision to establish NPO positions in Kuala Lumpur was made several years ago, taking into account not only the need to reduce costs but also the fact that the functions of the positions would only be performed in Kuala Lumpur and in no other location in WHO. It is noted that, unlike staff members in the professional category, who are subject to assignment to any office, NPOs are not subject to assignment to any official station outside the home country. The appointment of NPOs to perform functions exclusively in their home country takes into account the specificity of the conditions of service."

11. The Director-General said that in relation to the reprofiling exercise, it had not been her intention that the acceptance of the RMRC's recommendations would constitute decisions on the abolition of particular offices. Ultimately the Director-General accepted that "more could have been done to facilitate the matching of staff members who, like [the complainant], held continuing appointments". What might additionally have been done is not identified beyond a concession that the requirement in Staff Rule 1050.2 that WHO make reasonable efforts to reassign the staff member and allied obligations "should have been

respected in a timely manner". For this she decided the complainant was entitled to damages assessed in the sum of 25,000 Swiss francs though this decision appears also to have been influenced by the fact that the complainant was not reassigned. She also agreed to the payment of legal fees otherwise not reimbursable under insurance up to a maximum of 5,000 Swiss francs. The decision of 12 February 2014 is the impugned decision in these proceedings.

12. The relief sought by the complainant in his complaint is the payment of his salary and allowances for two years including full pension rights as from the date of his termination (31 March 2013) "as compensation for the severe professional and moral damage caused by [WHO] without prejudice to the sums due on termination of contract", costs and "any other expenses related to the abolition of post and termination of employment".

13. It is not easy to discern with absolute precision what are the legal arguments of the complainant in his pleas. Under a heading "The Organisation's right to restructure" he sets out a legal framework in which WHO could have restructured. Reference is made to Judgment 2907, consideration 13, that recognises an organisation's right to restructure though on the basis that "every individual decision adopted in the context of such restructuring must respect all the pertinent legal rules and in particular the fundamental rights of the staff concerned". Reference is also made to Staff Rule 1050 which imposed a duty on the Organization to make reasonable efforts to reassign a staff member occupying an abolished post, that the reassignment may be at the same grade or one grade lower and that within that framework, preference for vacancies is to be given to staff whose position has been abolished.

However what follows in the pleas in the brief is a bare assertion that the "[c]omplainant cannot accept that the [GRC] did not find at least one post including the P.2 [post identified by the HBA, namely IT011 Project Officer P2, Kuala Lumpur] and the other 70 posts examined for which the [c]omplainant's qualifications and experience could be found acceptable". It is then said that this shows the reassignment process was flawed. However the HBA found to the contrary. This contention

should be rejected as unfounded, constituting nothing other than a bare assertion though this conclusion is subject to what will be shortly about the creation of NPO posts.

14. The next heading in the pleas in the brief is: "The failure to provide information to the [c]omplainant." The complainant points to principles established in the Tribunal's case law concerning the obligations of organisations and internal appeals bodies to ensure that an aggrieved member of staff is provided with material relied on by the organisation particularly in an internal appeal (see, for example, Judgments 3214, consideration 24, and 3216, consideration 6). A request is made that the complainant be provided with, amongst other documents, a copy of the AHRC report, the report of the GRC and documents referred to in the HBA report. While in other circumstances an order might be made requiring production of these documents or parts of them (perhaps in a redacted form), it is unnecessary to make such an order in these proceedings given the Tribunal's conclusion in relation to the creation of the NPO posts.

15. The next heading raises that issue: "The issue of the National Professional Officers." As noted earlier, the Director-General did not challenge, in the impugned decision, the finding of the HBA that having examined the post description of the NPO positions created in the new structure in Kuala Lumpur it could not find any "national content in these post-descriptions" and that "no national language skills were required". Nor did the WHO challenge it in its pleas in these proceedings. Rather it points to Staff Rule 1330.1 which, in terms, authorises the Director-General to appoint NPOs "to perform work at the professional level without regard to the provisions of any other sections of the rules" and the Tribunal's case law concerning the prerogative of management to redefine the functions of a post (see Judgment 2373, consideration 7). Staff Rule 1330.1 provides that appointments to the NPO category are subject to local recruitment.

16. However the scope of Staff Rule 1330.1 will be influenced by what is comprehended by the expression "National Professional Officers". One possibility is that it is simply a position ascribed that designation

or description by the Organization. Another possibility is that it is a position with particular characteristics. This latter approach is supported by WHO Manual, Part II, Section 10, Annex A, that sets out criteria for the employment of NPOs. Importantly, for present purposes, two characteristics of such positions are identified. One is that "[t]he work performed by [NPOs] should have a national content". The other is that "[t]he functions of all [NPO] posts should be justified within the overall efforts of the United Nations system to increase national development and other related categories. NPOs should bring to bear in the job national experience and knowledge of local culture, language traditions and institutions." Similar commentary, of more general application, is found in the publications of the International Civil Service Commission (see, for example, the report of the Commission on "Review of National Professional Officers: terms and conditions of service" (Doc. ICSC/70/R.10)). There is a compelling argument that the power conferred by Staff Rule 1330.1 is limited to appointing NPOs to posts where these characteristics are an essential feature of the work required. If so, the creation of the two IT positions in Kuala Lumpur as NPO positions was not authorised by that rule.

17. However it is unnecessary to determine conclusively whether this is so. At best for WHO, the creation of those positions is at the margins of what is authorised by the rule. It was certainly not necessary that these positions be created as NPO positions other than, perhaps and from WHO's perspective, as a mechanism to create economies through local pay scales and other conditions of employment. But these last mentioned matters are not the rationale for the creation of NPO positions but rather the consequences of doing so. Their creation as part of the new structure with a requirement that they be filled locally either would or should have been understood by senior management as derogating from the rights of appropriately qualified staff whose positions would be abolished in the new structure to obtain another position through the matching process or through the re-assignment process and diminishing the obligations of WHO to facilitate that outcome. Accordingly the actions of WHO in creating those positions as NPO positions had a direct effect of diminishing the rights of the complainant to secure further employment

within WHO, particularly through the matching process, for which the complainant is entitled to damages, both moral and material.

Having regard, amongst other things, to the complainant's age, grade and the status of his employment (continuing appointment) and the circumstances giving rise to the flaw in the process identified in the reasoning of the Tribunal, the Tribunal will award material damages in the sum of 120,000 Swiss francs. From this amount should be deducted any amounts paid to him as a result of the impugned decision. The complainant is also entitled to moral damages. They are assessed in the sum of 25,000 Swiss francs. The complainant, who was represented, is entitled to an order for legal costs in these proceedings which the Tribunal assesses as 4,000 Swiss francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant, by way of material damages, a sum of 120,000 Swiss francs less any amounts paid to the complainant as a result of the impugned decision.
2. WHO shall pay the complainant 25,000 Swiss francs by way of moral damages.
3. WHO shall pay the complainant 4,000 Swiss francs costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ