L. M.

v.

WHO

123rd Session **Judgment No. 3754**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. L. M. against the World Health Organization (WHO) on 3 June 2014 and corrected on 28 July, WHO's reply of 12 November, the complainant's rejoinder of 24 December 2014 and WHO's surrejoinder of 13 April 2015;

Considering Articles II, paragraph 5, and VII 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 decision to terminate his continuing appointment pursuant to the abolition of his post.

In the context of a wide-scale restructuring at Headquarters, WHO issued Information Note 03/2011 in January 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.

By a letter of 13 January 2012 the complainant, who held a continuing appointment, was informed that following the completion of

the reprofiling exercise it had not been possible to match him against any of the longer-term positions in the new structure. He was also informed that it had been decided to abolish his post following a programmatic, financial and strategic review, but that, in accordance with the provisions of 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 Reassignment Committee. In late February he fell at work and subsequently went on sick leave for several months, either on a full-time or half-time basis.

On 17 August he was notified that no suitable alternative assignment had been identified for him, and that the Director-General had decided to terminate his appointment effective 16 November 2012. On 1 October 2012 he filed an appeal with the Headquarters Board of Appeal (HBA) contesting the decisions of 13 January and 17 August 2012.

A clearance certificate was issued on 4 October 2012 that indicated that his last day of duty was 31 December 2012, and that he would be placed on leave without pay (LWOP) from 1 January 2013 to 31 July 2014 in order to be allowed to contribute to the Pension Fund up to 55 years of age. On 24 December 2012 he was informed that the effective date of separation was indeed 31 December 2012 owing to his sick leave status, which had been recognised up to 17 December 2012. Nothing was said regarding his request for LWOP.

On 13 March 2013 the Human Resources Department (HRD), replying to the complainant's queries, indicated that he had separated from service on 31 December 2012. On the same day he replied expressing his surprise at the fact that he was separated from service while on sick leave; he stressed that he had sent his medical certificates and referred to Staff Rule 750.3, which provided that a staff member on sick leave under insurance cover may not leave the duty station without prior approval of the Staff Physician. He wondered how the Staff Physician could have issued the clearance certificate despite the fact that he was on sick leave. The complainant wrote to the Director of HRD in April 2013 requesting to be placed on LWOP, but his request was rejected in June. He then asked the Director-General, on 2 October 2013, to extend his appointment for the purpose of granting him leave without pay from

1 January 2013 to 31 July 2014. He emphasised that his appointment was terminated while he was still on sick leave and that all communications regarding his termination occurred after he had separated from service.

In its report of 6 January 2014 the HBA considered that the appeal was irreceivable *ratione temporis* insofar as the complainant challenged the decision of 13 January 2012. With respect to the decision of 17 August 2012 to terminate his appointment and not to reassign him, the HBA rejected the allegations of personal prejudice as unsubstantiated. The majority held that the Reassignment Committee erred in not reassigning him to the position of Assistant Multi-Media considering that he had the necessary skills and experience to perform the required duties, and therefore recommended that he be paid two years' salary plus allowances. The minority however considered that he did not have the required skills and experience and that the Reassignment Committee took the correct decision. The HBA also considered the complainant's request of 2 October 2013 and found that he had been unable to take action to request LWOP "on time" given that the communications relating to his termination occurred after he had actually separated from service. The HBA recommended, based on elementary considerations of humanity, that WHO extend his contract for the purpose of granting him the requested LWOP, and award him 5,000 Swiss francs in moral damages.

By a letter of 5 March 2014 the Director-General informed the complainant that his appeal was rejected. She agreed with the HBA's finding that the appeal was irreceivable insofar as he challenged the letter of 13 January 2012. She further considered that the claim concerning the refusal to place him on LWOP fell outside the scope of the appeal. She agreed with the minority opinion that the reassignment process was properly carried out and that the decision not to reassign him was based on objective reasons. On 3 June the complainant filed a complaint with the Tribunal challenging that decision.

In July 2014 the complainant's representative asked WHO to provide some documents pertaining to the restructuring and matching exercise to better understand WHO's legal position and to substantiate the complaint filed with the Tribunal. WHO provided some of the requested documents.

The complainant asks the Tribunal to annul the decisions to abolish his post and to terminate his appointment, to award him at least 20,000 Swiss francs in moral damages and 20,000 Swiss francs in costs. In addition he asks the Tribunal to order that he be reassigned to a G.6 post that matches his grade, education and experience and that he be compensated for the losses resulting from the decisions to abolish his post and terminate his appointment while he was on sick leave, from the date of termination until the date of reinstatement; or, in the alternative, to be paid two years' gross salary including post adjustment and benefits such as pension fund and health insurance contributions.

WHO asks the Tribunal to reject the complaint as irreceivable insofar as the complainant contests the decision of 13 January 2012. The claims made with respect to the refusal to place him on LWOP are also irreceivable for failure to exhaust internal means of redress as are the claims concerning the date of his separation. It adds that the complaint is otherwise devoid of merit.

CONSIDERATIONS

1. The complainant commenced employment with WHO in 1982. In July 2007 the complainant's appointment was converted to a continuing appointment. He was then employed as a Systems Operator (Platform Services) at the G.6 level in the Department of Information Technology and Training (ITT), within the General Manager Cluster (GMG). He was based at Headquarters in Geneva. 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. Ultimately he was separated from service on 31 December 2012.

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 (which followed a report from an external consulting firm), 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 Ad Hoc Review Committee (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.

3. On 12 December 2011 the AHRC provided the Assistant Director-General of GMG with its recommendations arising from the reprofiling exercise. It did not recommend that the complainant be matched to any of the positions in the new structure. The recommendations were approved by the Assistant Director-General on 13 December 2011 and also, on the same day, by the Director-General. The complainant was informed orally and in writing on 13 January 2012 that it had not been possible to match him to any of the available longer-term positions either at grade or below grade. As noted earlier, he was also informed by the letter of 13 January 2012 that his post had been abolished but that attempts would be made to reassign him pursuant to, inter alia, Staff Rule 1050.2. By letter dated 17 August 2012, the complainant was informed that a suitable alternative assignment had not been identified and, accordingly, a decision had been made to terminate his employment effective 16 November 2012 though that this was later revised to 31 December 2012 which was when the complainant actually separated from service.

4. On 1 October 2012, the complainant commenced an internal appeal to the HBA that ultimately reported on 6 January 2014. In the notice of intention to appeal of 1 October 2012, the complainant sought to impugn the decisions contained in the letter of 13 January 2012 notifying him of the abolition of his post and that he had not been matched to any of the newly created posts in the revised ITT structure and, additionally, the decisions contained in the 17 August 2012 letter notifying him that his employment would be terminated and that no suitable alternative assignment had been found for him.

5. The HBA concluded that the internal appeal was irreceivable, as time-barred, insofar as it sought to impugn the decisions in the letter

of 13 January 2012. As to the merits of the appeal against the decisions in the letter of 17 August 2012, it is sufficient to note, at this point, that the members of the HBA reached differing conclusions about whether there had been flaws in the reassignment process. The majority concluded the process had been flawed, the minority concluded it had not been.

6. The HBA also addressed, in its report, an application the complainant had made for LWOP in a letter dated 8 April 2013 to the Director of HRD. LWOP was sought for the period 1 January 2013 to 31 July 2014 to enable the complainant to continue to make pension contributions. This request was refused in June 2013 though the request was repeated in a letter from the complainant to the Director-General dated 2 October 2013. That letter came to the attention of the HBA which recommended that the request for LWOP be granted.

7. By letter dated 5 March 2014 to the complainant, the Director-General set out her views on the internal appeal. She accepted the conclusion of the HBA that the complainant's appeal, as it concerned the letter of 13 January 2012, was time-barred and irreceivable. The Director-General rejected the conclusion of the majority that the reassignment process had been flawed and adopted the conclusion of the minority that it had not been. She rejected the conclusion of the HBA in relation to the request for LWOP and, in the result, dismissed the appeal. This is the decision impugned in these proceedings.

8. WHO challenges the receivability of the complaint in several, but not all, respects. It is convenient to deal with this issue at the outset. Firstly, WHO contends the complainant cannot challenge before the Tribunal the decision to abolish his post and the failure to match him to one of the new positions. *Prima facie* this is correct because the complainant was told of these decisions on 13 January 2012 and did not lodge an internal appeal against them within the sixty days' time specified in Staff Rule 1230.8.3. The jurisprudence of the Tribunal is clear. As the Tribunal said in Judgment 3439, consideration 4, when referring to Judgment 2933:

> "[t]his judgment provides clear authority supporting the argument of WHO that the complainant in this case cannot challenge the abolition decision.

> This is not a mere technical approach. The Tribunal has consistently said that time limits serve the purpose of, amongst other things, creating finality and certainty in relation to the legal effect of decisions."

Thus, WHO contends, the complainant has not exhausted internal means of redress and his complaint, in this respect, is not receivable having regard to Article VII of the Tribunal's Statute.

9. The complainant's response in his rejoinder is fourfold. First he contends that when he acknowledged having received the letter by signing it, he expressly reserved, in writing, the right "for a possible later appeal, depending on the outcome of your reassignment efforts" and this reservation was legally efficacious. Secondly, and in any event, WHO was under a duty to inform him that he was legally obliged to lodge an appeal then and it breached that duty. Thirdly the reassignment process was delayed and, accordingly, his right of appeal was likewise delayed. Fourthly, the letter of 13 January 2012 was not a final decision but merely an indication that a process would commence intended to secure his reassignment to a new post. Each of these propositions is contested by WHO.

10. The last two propositions are devoid of legal substance. Quite plainly the letter of 13 January 2012 unequivocally informed the complainant that WHO had decided to abolish the position he then occupied and the reprofiling exercise had not resulted in him being matched to any of the longer-term positions arising from the restructure either at his grade or one grade lower (see Judgment 3290, consideration 12). As to the first contention, the Tribunal has recognised that in certain circumstances reservations made by an official are legally efficacious. They include a reservation about an amendment to an employment contract that was potentially discriminatory (see Judgment 2276), and a reservation of the right to pursue further claims notwithstanding a financial settlement (see Judgment 1313). However, in the present case, the obligation to appeal (against the final decision to abolish his post and the decision not to match him) within a specified time was mandated by a Staff Rule. The obligation was not one expressed to be amenable to

the unilateral act of an official on whom the obligation is cast to effectively suspend its operation.

11. As to the second contention, the Tribunal's case law does establish a duty of care on an organisation which, in relation to the exercise of the right of appeal, obliges the organisation to help a staff member who is mistaken in the exercise of the right (see, for example, Judgment 2345, consideration 1). Equally, however, there is corresponding obligation on members of staff to inform themselves of the rules and regulations concerning dispute resolution (see Judgment 1734, consideration 3). In the present matter, it is not demonstrably the case that the complainant was mistaken about his right to appeal against the decision to abolish his post and not to match him. Rather the terms in which the written reservation were cast, suggest an intention to appeal in due course against any decision to terminate his appointment if the reassignment process was unsuccessful. WHO was entitled to proceed on the basis that this is what the complainant intended and it was not incumbent on the organisation to point out that the complainant had to appeal then against the decision to abolish his post. In the result, WHO has established that the complaint is irreceivable insofar as it seeks to impugn the decision to abolish the complainant's post and the decision not to match him to a position in the new structure.

12. The second issue concerning receivability raised by WHO concerns the complainant's request for LWOP. The third concerns an issue raised by the complainant in his brief that his employment should not have been terminated while he was on sick leave, as he was on 31 December 2012. The first matter, LWOP, was clearly not raised in the notice of intention to appeal filed on 1 October 2012 and, indeed, only arose, initially, as the result of a request made by the complainant on 8 April 2013 and refused in June 2013. It is true that the topic was addressed by the HBA but it appears that this may have occurred as a result of mistaken understanding of the HBA of the significance of a letter of 2 October 2013 (which came to the HBA's attention on 11 October 2013) from the complainant to the Director-General repeating the request for LWOP. However the fact that it was considered by the HBA is not

decisive if it was not a matter lawfully raised in an internal appeal (see Judgment 2675, consideration 6). The Tribunal is satisfied that, in relation to this issue, the complainant has not exhausted internal means of redress. Staff Rule 1205 was amended in February 2013 to enable former staff members to file an internal appeal in respect of a final decision of which they are aggrieved. Accordingly the complainant could have filed an internal appeal against the decision of June 2013 to refuse his request for LWOP, but did not. Thus his complaint is, in this respect, irreceivable.

13. It is unnecessary to determine whether the complaint is irreceivable insofar as it alleges the termination of the complainant's appointment was illegal because he was then on sick leave. The complainant alleges this is but an additional argument supporting the more general contention that the termination of his appointment was illegal and, accordingly, can be raised in those proceedings. It is unnecessary to determine this because it is a point of no substance. The complainant took full-time sick leave between 20 February 2012 and 27 May 2012. On 17 August 2012, when he was then on part-time sick leave, he was informed a decision had been made to terminate his appointment, effective 16 November 2012. On 17 November 2012 he took full-time sick leave until 17 December 2012. On 24 December 2012 the complainant was informed that his separation date was 31 December 2012. He separated on this date.

14. Early judgments of the Tribunal, such as Judgment 938 relied on by the complainant, may have been thought to establish a principle of general application that an official's employment could not be terminated while the official was on sick leave. However it is clear that no such principle of general application has been established by the Tribunal's case law. This issue was discussed by the Tribunal in Judgment 3175, consideration 14. In the present case, not only was the complainant not on full-time sick leave when he was informed in August 2012 that his employment would be terminated at the end of the year, he was not on full-time sick leave when, in fact, it was terminated on 31 December 2012. Neither as a matter of logic or fairness, can it be

said that WHO could not have, by reference to periods of sick leave taken in 2012, terminated the complainant's employment on the appointed day of 31 December 2012.

15. It is now necessary to address the main issue of substance raised in these proceedings and which resulted in a division of opinion amongst the members of the HBA, namely whether the process of reassignment undertaken in the first half of 2012 was flawed.

16. Staff Rule 1050.2 required WHO to make "reasonable efforts" to reassign a staff member occupying a post which has been abolished. What is reasonable will doubtless depend on a variety of factors which might include the number of years the official whose position has been abolished, has served with the organisation and the age of the official. A very long-standing official such as the complainant could expect WHO to use its best endeavours to find an alternative position by reassignment in the face of the abolition of the official's current position. The loss of employment by the abolition of a post can be particularly acute for a person who has been employed by the one organisation for a very lengthy period and is of advancing years. It could be all the more acute if the area or field of employment has a significant technological component in which the technology is evolving continuously. At a high-level of generality, an organisation's duty has, in relation to reassignment an official whose post has been abolished, been described as "[doing] its utmost to find a post matching the complainant's qualifications" (see Judgment 2830, consideration 9), or "[doing] all that it can" to reassign the official (see Judgment 3437, consideration 6).

17. It must be accepted that Staff Rule 1050.3 identifies the paramount consideration for reassignment as "the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned". Equally, however, it must be accepted that Staff Rule 1050.7 provides that the affected staff member "may be provided with training to enhance specific existing qualifications". WHO contends in its reply that the use of the term "may be provided"

denotes a possibility only and "certainly not an obligation to offer training". This is true but the comment misses the point. This provision is more appropriately viewed as creating a tool that is available to WHO to facilitate reassignment in circumstances where an official may, with some retraining, be reassigned but without it, faces separation because the official's post has been abolished. Also, Staff Rule 1050.7 should not be taken to impliedly limit WHO's overarching obligation to make "reasonable efforts" to reassign. The type of training is, in this provision, cast in fairly narrow terms (to enhance specific existing qualifications). However, there may be cases where training of a broader character might appropriately be provided by WHO as part of the process of making "reasonable efforts" to reassign.

18. This is particularly important in the present case. The focus of the HBA's consideration of the reassignment process was whether the complainant should have been reassigned to the position of Assistant Multi-Media G.6 – vacancy notice HQ/11/HSE/FT352. The majority thought he should have been while the minority concluded otherwise. The complainant annexed to his brief several documents relating or referring to this vacancy. This included email correspondence on 8 June 2012 between a Human Resources specialist, Mr K., taking part in the recruitment process for the position, and Ms N., the Director of Global Capacities Alert and Response (GCAR), being the organisational area in which the position was located. In his email, Mr K. forwarded the complainant's curriculum vitae as well as another curriculum vitae and said of the complainant: "Given his comprehensive experience operating all kind[s] of systems and equipment, the complexity of which is likely to exceed the one of typical 'multi-media' equipment, he should be worth looking at (given that, in this case, gaps could probably be filled through training)."

19. A little under three hours later Ms N. responded in an email saying they had reviewed the two curricula vitae carefully and enclosed a document identifying "the deficiencies in the Candidates Experience, Skills and Trainings". As to the complainant, two areas of essential experience were identified as lacking and three areas in which skills and

training were identified as lacking. Nothing was said about the proposal of the Human Resources specialist that "gaps could probably be filled through training". It is improbable that this proposal relating to training was, in the short time it took for Ms N. to respond, given serious or concerted consideration if it was considered at all. It should have been and this failure to do so either at this precise time or subsequently evidences a flaw in the reassignment process.

20. In a memorandum of 25 July 2012 from the Reassignment Committee to the Director-General, the Committee addressed the circumstances of the complainant. The Committee referred, in particular, to the fact that the profile of the complainant had been sent to GCAR and noted that an assessment had been provided by Ms N. that the complainant was not suitable for the position and lacked the essential experience, skills and training required for the position. Again, nothing is said about the explicit proposal that "gaps could probably be filled through training". Indeed it is possible that the Committee was not aware of this proposal though all the documentation concerning this episode available to the Committee (and referred to as annexes to the Committee's memorandum) is not before the Tribunal. It appears that it was this memorandum that led directly to the letter of 17 August 2012 informing the complainant that his employment was terminated.

21. It is not the role of the Tribunal to determine or assess whether the complainant was suitable for reassignment to the position of Assistant Multi-Media G.6 – vacancy notice HQ/11/HSE/FT352 (or any other position) and, if not, whether he could have been rendered suitable by appropriate training of the type contemplated by Staff Rule 1050 or more generally. However what the complainant has established to the Tribunal's satisfaction is a flaw in the reassignment process that, potentially, had the result that he did not secure another position within WHO in the face of the abolition of the position he then held. The complainant lost the opportunity of maintaining continuing employment and, in this respect, is entitled to material damages. 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. The complainant is also entitled to moral damages which the Tribunal assesses in the sum of 15,000 Swiss francs and costs in the sum of 8,000 Swiss francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant 120,000 Swiss francs by way of material damages.
2. WHO shall pay the complainant 15,000 Swiss francs by way of moral damages.
3. WHO shall pay the complainant 8,000 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