N. (Nos. 1 and 2)

v.

WHO

130th Session **Judgment No. 4306**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Ms S. L. N. against the World Health Organization (WHO) on 29 October 2018 and corrected on 4 December 2018, WHO's single reply of 6 March 2019, the complainant's rejoinders of 26 April and WHO's surrejoinder of 26 July 2019;

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 cases may be summed up as follows:

The complainant challenges the effective date which has been set for the retroactive reclassification of her post and the undue delay in the reclassification procedure.

The complainant joined WHO in June 2012 on a temporary appointment at grade P.4 which was renewed under the same terms. In July 2013 her post was advertised under a vacancy notice. On 1 December 2013 she was appointed to it on a fixed-term contract for a period of one year during which she was on probation.

On 1 April 2014 her then second-level supervisor submitted a request for reclassification of her post to grade P.5, which was received by the Human Resources Classification Unit on 23 May. On 30 July 2014 the request was rejected as premature because the

complainant was still on probation and had not yet served for two years in her post. Reference was made to paragraph 110 of Section III.2.1 of the WHO eManual, which provides that "[n]ormally, positions will not be reviewed more than once every two years, unless there are significant changes in the level of duties and responsibilities".

On 18 February 2015, following a second request for reclassification, the complainant's second-level supervisor was informed that no action could be taken until 1 December 2015, i.e. the date on which the complainant would have performed two years in her position. The complainant contacted the Administration asking for instructions regarding her assigned duties and responsibilities and requesting among other things the applicable provisions upon which the decision of 30 July 2014 was based. On 27 February, referring to paragraph 110 of Section III.2.1 of the eManual, the Administration confirmed that no reclassification would be possible until a two-year period had been completed.

On 1 April 2015 the complainant met with the Ombudsman to discuss the reclassification matter. The latter contacted the Human Resources Classification Unit, which exceptionally agreed to undertake a desk audit on her post. The desk audit commenced on 12 June 2015. The final report was signed by the complainant and her new first-level supervisor on 12 January 2016, and on 28 January the complainant was informed that her position had been upgraded to grade P.5 with effect from 1 December 2015. On 29 March she requested a review by the Classification Review Standing Committee (CRSC) of the 28 January decision seeking the retroactive reclassification of her post as of 12 June 2012 with all applicable adjustments to pay and entitlements.

By a memorandum of 13 May 2016 the Director of Human Resource Development informed the complainant that 1 December 2015 remained the effective date of retroactive reclassification. On 7 July 2016 the complainant filed a Notice of Intention to Appeal to the Headquarters Board of Appeal (HBA) against the decision of 13 May. Shortly thereafter, the Administration and the complainant agreed to suspend the proceedings with a view to exploring an amicable settlement.

As they did not reach any agreement, on 13 September 2016 the Administration informed the HBA that a request for the reclassification review had been sent to the CRSC. On 26 September 2016 the complainant submitted a "complementary statement" to the Committee

requesting that her position be reclassified to the P.5 level effective from no later than 1 April 2014. She also sought financial compensation for the errors that had been made in dealing with her case, the breach of her rights and the loss of pay. The Administration contacted her to further explore amicable settlement.

On 16 February 2017 the complainant asked that the suspension be lifted so that the CRSC could review her case. On 24 March the CRSC issued its recommendation to the Director-General to set the effective date of reclassification to 23 May 2014, which she endorsed on 7 April 2017, and the complainant was informed by a memorandum of 12 April. By a decision dated 8 August the complainant, who had submitted a request for review against the decision of 7 April, was informed by the Assistant Director-General, General Management, that the Director-General's decision was upheld.

On 9 September 2017 she filed her statement of appeal to the HBA alleging that the memorandum of 13 May 2016 by which the Director of Human Resource Development failed to forward the request for review to the CRSC breached her procedural rights. She requested the reclassification of her post as of 1 December 2013 due to the exceptional circumstances in the changes of her duties, the retroactive payment as of the same date, as well as of 12 June 2012 and 1 April 2014, an amount of 10,000 Swiss francs as compensation for the breach of her procedural rights and reimbursement of the legal fees she incurred. In its report transmitted to the Director-General on 19 April 2018, the majority of the HBA found that the decision of 13 May 2016 constituted a breach of WHO's rules for which the Administration had expressed its regrets. The Board considered that the claim for 10,000 Swiss francs was not reasonable because the Administration had remedied the contested decision. However, the majority recommended that the complainant be granted reasonable legal costs related to her appeal until 13 September 2016, the date on which the request for review had been forwarded to the CRSC.

Meanwhile, on 30 November 2017, the complainant had filed an appeal with the Global Board of Appeal (GBA) – the new internal appeal body introduced by WHO to replace the Regional and Headquarters Boards of Appeal – against the decision of 8 August confirming the effective date of reclassification of her post. In its report of 6 June 2018 the GBA found that, in accepting the CRSC's

recommendation, the Director-General had applied the correct effective date, and it recommended that the appeal be dismissed.

By a single letter dated 3 August 2018, the Director-General issued his decisions on the two appeals filed by the complainant. He endorsed the HBA's recommendations (this decision is impugned in the first complaint), as well as the GBA's recommendation (this decision is impugned in the second complaint).

In her first complaint, the complainant asks the Tribunal to quash the impugned decision. She also claims moral damages and requests the payment of costs, together with interest.

In her second complaint, she asks the Tribunal to quash the impugned decision, order full retroactive payment of salary and all related benefits at the P.5 level from 12 June 2012 through the date she subsequently attained that grade, as well as full retroactive payment of salary at step 6 starting from 12 June 2012 with subsequent within-grade increments as per Staff Regulations and Rules in effect each year through the date of the judgment. She further seeks moral damages and the reimbursement of costs, together with interest.

WHO asks the Tribunal to dismiss both complaints in their entirety as devoid of merit and, in the event that reimbursement for costs should be granted, it requests that a maximum amount of costs and fees be established and that payment be conditional upon the receipt of invoices, proof of payment and upon the complainant not being eligible for reimbursement from other sources.

CONSIDERATIONS

1. Inasmuch as these complaints arise from the same background; raise issues which are intricately entwined; are the subject of identical briefs and rejoinders and a single reply and surrejoinder, and impugn decisions contained in the same letter of 3 August 2018, they are joined and the Tribunal will rule on them in a single judgment.

2. Various pleas have been proffered in the internal appeal proceedings which underlie these complaints. However, their scope is clearly captured in the requests for redress in the complainant's briefs, which state as follows:

> "[...] the [c]omplainant respectfully requests the Tribunal to decide that the effective date of the reclassification of her post to the P.5 level be retroactively changed to 12 June 2012 with all applicable retroactive adjustments to pay and entitlements, including pension contributions, step increases (starting from grade P.5, step 6) and all other applicable emoluments. The [c]omplainant also requests moral damages in the amount of 100,000 [United States dollars], as well as [...] 10,000 [Swiss francs] for additional moral damages for the failure of WHO to promptly prosecute her reclassification demand, and that she be reimbursed for all legal fees expended in bringing [her] appeal[s], as well as interest at the rate of five (5) percent per annum on all amounts awarded pursuant to [her] appeal[s], from 12 June 2012 through the date all such sums awarded pursuant to [her] appeal[s] are paid in full."

3. In her appeal to the HBA the complainant requested the reclassification of her post as of 1 December 2013 due to the exceptional circumstances in the changes of her duties; retroactive payment of the difference in remuneration resulting from the reclassification of her post, calculated from 1 April 2014, when she submitted her position description leading to the decision to reclassify her post to the P.5 level; retroactive payment of the difference in remuneration as of 1 December 2013 on the ground that she had been performing the duties contained in that position description leading to the reclassification decision since that date; retroactive payment of the difference in remuneration as of 12 June 2012, on the ground that she had been performing the duties contained in the position description leading to the reclassification decision at a P.5 level since that date. The HBA however noted that the parties informed it that matters relating to the final decision concerning the reclassification of the post were before the GBA. The HBA therefore decided not to consider the matters related to the reclassification process and the final decision so as not to violate the general principle of law that the same matter should not be litigated before separate bodies. It accordingly decided that the scope of the appeal before it was limited to reviewing the Director of Human Resource Development's decision of 13 May 2016. The complainant's challenge to those aspects of the impugned decision in which the Director-General accepted the HBA's recommendations on the internal appeal is the subject of her first complaint, which will be considered later.

4. The second complaint revolves around the matters that the GBA considered, concerning the complainant's appeal against the Assistant Director-General, General Management's decision of 8 August 2017 (conveyed to her on 10 August 2017). That decision confirmed the retroactive effective date of the reclassification of her post to the P.5 grade level as 23 May 2014. It also rejected her request to adjust her step in that grade to step 6. The complainant had been notified by a memorandum dated 28 January 2016 that her post, which was at the P.4 grade level, was reclassified to the P.5 level with the new title of Scientist, with effect from 1 December 2015. By a memorandum of 29 March 2016 she asked the Director of Human Resource Development to submit that decision to the CRSC requesting that that date be changed to 12 June 2012 (i.e. the effective date of her temporary appointment with WHO) with all applicable adjustments to pay and entitlements retroactively to that date. She stated the basis of her request as follows:

> "The Classification Report [stemming from the desk audit undertaken by the Human Resources Classification Unit] established that the post I have encumbered since 12 June 2012 has always been at the P.05 level. Although it was artificially downgraded in 2011 due to insufficient funds, the nature of the work remained the same. As it has been confirmed that I assumed the duties of the P.05 post in question since my recruitment on 12 June 2012, and in keeping with the principles of duty of care and 'equal pay for work of equal value', I request that the effective date of the upgrade be changed with retroactive effect to 12 June 2012, with all related retroactive adjustments."

5. Rather than submit the request to the CRSC, the Director of Human Resource Development replied by the memorandum dated 13 May 2016. She therein stated that she was informed by the Classification team that managed the review of the post which resulted in its reclassification that the retroactive effective date was explained to the complainant in great detail; that the complainant as well as her supervisor had agreed to 1 December 2015 as it was two years to the day after the complainant had taken up her appointment with WHO on a fixed-term contract, and, accordingly, she regretted to inform the complainant that she did not see any possibility nor any compelling need to change that date. The request was however transmitted to the CRSC after the complainant filed a Notice of Intention to Appeal to the HBA on 7 July 2016. By a memorandum dated 12 April 2017, the complainant was informed that the Director-General, accepting the

CRSC's recommendation of 24 March 2017, had decided that the retroactive effective date of the reclassification of her post was changed from 1 December 2015 to 23 May 2014.

6. The CRSC had relevantly stated that it "understood that the effective date of promotion of the incumbent shall normally be the date of the signature of the second-level supervisor on the final signed position description submitted for reclassification". This was a reference particularly to paragraph 60 of Section III.5.8 of the eManual. The complainant asks the Tribunal to find that the Director-General should have set 12 June 2012 as the retroactive effective date of her promotion to the P.5 level because she performed duties at that level from this date. She submitted that just and fair remuneration for work performed forms part of the terms and conditions of her employment "as assured by the relevant Staff Regulations, Staff Rules and eManual provisions, as well as the universally recognized labour principle of equal pay for equal work [of] equal value, which has been upheld by the Tribunal".

7. WHO has specific rules by which the effective date of the reclassification of a post within the same category of posts and the step in grade at which the staff member is to be appointed are to be determined. The irrefutable fact is that, quite apart from the question whether the complainant performed duties and responsibilities which were at the P.5 grade level from the time that she was employed by WHO or whether the reclassification process was delayed, the complainant held the P.4 level post of Technical Officer in WHO Press Unit and Secretary of the Guidelines Review Committee from the inception. She had successfully applied for and effectively assumed it on 12 June 2012 on a temporary appointment at the P.4 level. She subsequently applied for and was appointed to the said post on a fixed-term contract from 1 December 2013. It was at her request that the post was eventually reclassified to the P.5 level with the new title of Scientist following the 2015/2016 reclassification exercise. Under the relevant rules, it was then that she was promoted to that P.5 position with the attendant consequences regarding the retroactive effective date of the reclassification, as well as for the step in grade at which she was appointed.

8. Regarding the effective date of the reclassification of a post within the same category, paragraphs 10, 30 and 60 of Section III.5.8 of the eManual relevantly state as follows:

> "10. Promotion is the advancement of a staff member with a continuing or fixed-term appointment to a position of a higher grade [...] by reclassification of current duties. [...]
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> [...]
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> 30. If an occupied position is reclassified by one grade within the same category, the incumbent is promoted [...].
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> [...]
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> 60. [...] In the case of reclassification of the position, the effective date of promotion of the incumbent shall normally be the date of the signature of the second level supervisor on the final signed position description submitted for reclassification."

Additionally, according to paragraph 210 of Section III.2.1 of the eManual, the rules that govern the classification in the general services and professional categories are not applicable to staff members holding temporary appointments. Prior to 1 December 2013 these rules were not applicable for the purpose of reclassifying the complainant's post. The evidence shows that it was on 1 April 2014 that the complainant's second-level supervisor first submitted the request to the Assistant Director-General, Health Systems and Innovation, to reclassify the complainant's post to grade P.5. On 23 May 2014 the latter approved the proposed position description and the request was sent to the Human Resources Classification Unit which, at first, rejected the request for reclassification. However, the Classification Unit later exceptionally accepted to undertake a desk audit on the complainant's post. The desk audit, which recommended the reclassification of the post to the P.5 grade level, commenced on 12 June 2015. The report, which is dated 12 January 2016, makes it clear that the desk audit was conducted on the position description which the complainant's second-level supervisor had signed on 23 May 2014. This was the effective retroactive date of promotion by way of the reclassification of her post under paragraph 60 of Section III.5.8 of the eManual. Accordingly, her plea that the impugned decision in her second complaint wrongly determined that the effective date of the reclassification of her post to the P.5 level was 23 May 2014 is unfounded.

9. The following statement in the complainant's briefs succinctly summarizes her submissions supporting her plea that she was entitled to commence her employment with WHO at grade level P.5, step 6, as well as her claim for full retroactive payment of salary and all related benefits at that level from 12 June 2012, with subsequent within-grade increments through to the date of this judgment:

> "Given the [c]omplainant's argument that she was in any event entitled to equal pay for work of equal value from the first day of her appointment at WHO [on] 12 June 2012, she maintains that she was entitled to start employment at P.5 [grade level,] [s]tep 6. This is consistent [with paragraph 30 of Section] III.2.1 [...]; [and of Section] III.3.3 [of the eManual]; Staff Regulation 2.1; Staff Rules 210 and 220 which all form part of the WHO classification framework. The [c]omplainant achieved (retroactively) a starting step of 5 (P.4) because of her education and number of years of experience. The [complainant] is therefore eligible for starting [on] 12 June 2012 at P.5 [grade level,] step 6."

The GBA had also noted the complainant's plea which suggested that WHO breached its duty of care towards her but took heed of the Organization's counter-argument that she did not allege that she had been humiliated and suffered a loss of reputation. WHO had also stated that she did not substantiate how the Administration failed to uphold its duty of care towards her.

10. Noting the complainant's reliance on the principle of equal pay for work of equal value, the Tribunal recalls its case law which states, in consideration 22 of Judgment 2314, for example, that the principle of equality directs equal pay for work of equal value and that an employer is not absolved from the requirement to ensure equal treatment and equal pay for work of equal value merely because an employee has the right to seek reclassification of her or his post. It is however noteworthy that the complainant relies on the principle merely to support her pleas that the effective date of the reclassification of her post was 12 June 2012 and that she was entitled to start her employment on that date at grade level P.5, step 6. However, except for Section III.3.3 of the eManual, the rules cited by the complainant in the passage reproduced in consideration 9 above are not applicable to resolve her plea that she was entitled to commence her employment with WHO at grade level P.5, step 6. They are general rules governing aspects of the classification process. They do not govern steps in grade entitlements upon the commencement of employment with WHO.

11. Paragraph 300 of Section III.3.3 of the eManual, as well as paragraph 320, which the complainant subsequently also cites, state as follows:

> "300 On initial appointment, the net base salary of staff members shall normally be fixed at step 1 of the grade of the position or function to be occupied in accordance with Staff Rule 320.1. However, in accordance with guidelines established by the Director-General, as delegated to Director [of Human Resource Development], it may be fixed at a higher step in the grade in order to take into account a staff member's qualifications, skills and experience in relation to the requirements of the position or function.
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> [...]
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> 320 Additional steps may be awarded on initial appointment up to step six (6). The step in grade is arrived at by determining the number of years of relevant and progressive experience and the level of the candidate's relevant qualifications."

12. The complainant relevantly proffers the following arguments to support the subject plea: she was appointed on 12 June 2012 at grade level P.4, step 6, due to her experience and the number of post-graduate degrees she then held. The same criteria for the initial step assignment upon appointment apply regardless of the P-level of the post in question. Thus, if her post had been correctly classified as a P.5 post when she was initially appointed, she would have started at grade level P.5, step 6, pursuant to Section III.3.3 of the eManual, with annual within-grade increases since that time. She would thus have been at grade level P.5, step 12, in April 2019, instead of grade level P.5, step 5.

These arguments are unsustainable as the actuality is that the complainant was appointed to the P.4 level post of Technical Officer in WHO Press Unit and Secretary of the Guidelines Review Committee from the inception of her employment in June 2012 and was correctly appointed at step 6. She was not entitled to be appointed at grade level P.5, step 6, as of 12 January 2012 because that post was at the P.4 level. Under paragraph 30 of Section III.5.8 of the eManual, she was promoted upon the reclassification of her post to the P.5 level. Staff Rule 320.2 provides that, for the setting of a step on promotion to a higher grade, the net base salary of a staff member with a continuing or a fixed-term appointment is to be fixed at the lowest step in the new grade. The complainant was therefore correctly appointed at grade P.5, step 1, upon her promotion that resulted from the reclassification of

her post. Accordingly, her plea that she was entitled to commence her employment at grade level P.5, step 6, and her related claim for relief are unfounded.

The complainant's plea that WHO breached its duty of care towards her, which is primarily premised on its alleged failures, based as it is on the foregoing pleas that are unmeritorious, and which has not otherwise been substantiated, is also unfounded.

13. Regarding remedies, the GBA noted that the complainant sought 100,000 United States dollars in damages; the reimbursement of legal fees, as well as interest on the amounts awarded from 12 June 2012. She had alleged that WHO had failed to observe the principle of equal pay for work of equal value and thus it had failed to observe the provisions of the Staff Rules in the reclassification process, particularly relating to the retroactive effective date of her promotion and her step in grade. In light of its recommendation to dismiss the complainant's appeal against the Assistant Director-General, General Management's decision of 8 August 2017, which confirmed the retroactive effective date of the reclassification as 23 May 2014, and to reject her request to adjust her step in grade upwards, the GBA correctly made no recommendation for the award of damages. Neither did the Director-General who accepted the GBA's recommendation. In any event the complainant's claim for damages is unfounded because the alleged breaches on which it is based are not established.

14. In the foregoing premises, the second complaint is unfounded and will be dismissed, as will the other claims which the complainant makes in that complaint.

15. The HBA had determined that the scope of the underlying internal appeal to the first complaint was limited to reviewing the Director of Human Resource Development's decision of 13 May 2016, which informed the complainant that there would have been no change to the retroactive effective date (1 December 2015) of the reclassification of her post. The complainant states that, in that appeal, she alleged abuse of authority and breach of procedure committed by the Director of Human Resource Development, who failed to refer her request to review the reclassification of her post to the CRSC (29 March 2016) until after she filed her Notice of Intention to Appeal

(on 7 July 2016). The HBA also noted the complainant's plea that the decision of 13 May 2016 breached the Administration's duty of care owed to her. She repeats these pleas before the Tribunal. The Tribunal however finds that the HBA correctly dismissed the complainant's plea of breach of duty of care on the ground that she provided no evidence to support it. Neither has the complainant provided evidence that the 13 May 2016 decision was motivated by an improper purpose on which to ground her plea of abuse of authority (see, for example, Judgments 3939, consideration 10, and 3172, consideration 16). That plea is therefore also unfounded.

16. Regarding the plea of breach of procedure, the memorandum of 13 May 2016 was the Director of Human Resource Development's reply to the complainant's 29 March 2016 request for the CRSC to review the decision of 28 January 2016 that had informed her that the retroactive effective date of the reclassification of her post was 1 December 2015. The complainant asked the CRSC to change that date to 12 June 2012. The Director did not refer it to the CRSC but replied on 13 May 2016 that she saw no possibility or compelling need to change the date. This, she stated, was because the statement in paragraph 110 of Section III.2.1 of the eManual that "[n]ormally, positions will not be reviewed more than once every two years, unless there are significant changes in the level of duties and responsibilities" meant that 1 December 2015 was the date on which the complainant would have completed two years in a fixed-term position so that a request to reclassify her post had to await that date.

17. The Tribunal determines that the majority of the HBA correctly found that this statement was wrong. It is plain that the words "normally" and "unless there are significant changes in the level of duties and responsibilities" contemplate that there would be circumstances which may require the reclassification of a post to be undertaken in less than two years. It was the Director of Human Resource Development's incorrect interpretation of this rule that caused her not to refer the complainant's request to the CRSC. This was in breach of paragraph 2 of Information Note 22/2015 of 26 June 2015 on procedures and membership of the CRSC, which required the "HRD/GTM/ODC", upon receiving the request for review, to prepare all the background papers and convene a meeting of the CRSC which

"will review the material to ascertain whether all the facts were taken into account by the classifiers and correct procedures were followed" and make a recommendation to the Director-General for decision. The majority of the HBA noted that, in its reply, WHO implicitly acknowledged that the 13 May 2016 decision was in breach of its rules and took immediate action to modify it (by sending the request for review to the CRSC).

18. The HBA stated that "any remedy it recommended must be limited to remedying the harm suffered by the [complainant] due to the decision not to submit the review request to the CRSC until the [complainant] had filed a [Notice of Intention to Appeal]". The HBA noted that the complainant requested 10,000 Swiss francs as compensation for the breach of her procedural rights and the reimbursement of all legal fees incurred in the internal appeal proceedings. It found that the complainant's claim for 10,000 Swiss francs was not reasonable because the Administration took steps to remedy the breach when it promptly submitted the request for review to the CRSC and in light of the subsequent suspension of the proceedings in the case to facilitate settlement. The HBA therefore did not recommend the award of any compensation for the breach and neither did the Director-General in the impugned decision in the first complaint award damages to the complainant.

19. The evidence shows that the complainant filed her Notice of Intention to Appeal to the HBA on 7 July 2016. The parties agreed on 14 July 2016 to suspend the proceedings to explore an amicable settlement. As they did not reach an agreement, on 13 September the Administration informed the HBA that a request for the reclassification review had been sent to the CRSC. On 26 September 2016 the complainant submitted her "complementary statement" to the CRSC, but two days later the Administration contacted her to further explore an amicable settlement. That having failed, on 16 February 2017 the complainant requested that the suspension be lifted. The CRSC met and on 24 March it recommended to the Director-General that the retroactive effective date of reclassification be changed to 23 May 2014. The Director-General accepted it and the complainant was informed by a memorandum of 12 April 2017. The complainant provides no evidence that she suffered financial loss as a result of the delayed

referral of her request for review to the CRSC and the concomitant breach of Information Note 22/2015. In effect, the eventual decision entitled her to receive all financial benefits attached to the P.5 post from 23 May 2014. As well, she provides no evidence of emotional distress or of any other injury or loss suffered. The case law, for example in consideration 5 of Judgment 4156, requires a complainant to provide evidence of the injury suffered as a result of alleged unlawful acts. In the premises, the Tribunal finds that the complainant is not entitled to an award of moral damages either for the breach of Information Note 22/2015 or for the delayed referral of the request for review to the CRSC.

The complainant does not contest the fact that she was reimbursed her reasonable legal fees for the period from 13 May 2016 to 13 September 2016: the date on which she was notified that her request for review had been referred to the CRSC. In her first complaint she claims "[r]eimbursement of legal fees incurred in bringing [her] appeal". That request is rejected since the Tribunal has found that her substantive pleas in the first complaint are unfounded. The first complaint will therefore also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 2 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ