113th Session **Judgment No. 3137**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D.M. C. against the World Health Organization (WHO) on 20 April 2010 and corrected on 28 May, WHO's reply of 27 August 2010, the complainant's rejoinder of 18 January 2011 and the Organization's surrejoinder of 21 April 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Swazi national born in 1962, joined WHO in August 2001 under a two-year fixed-term contract as an Administrative Officer based in Swaziland. His responsibilities included managing administrative, personnel and financial aspects of the WHO Country Office in Swaziland, under the supervision of the WHO Representative. His contract was renewed several times on a two-year basis and in October 2006 he was promoted to grade P.2. and reassigned to the WHO Office in Liberia until 31 July 2007.

By a memorandum of 15 November 2006 the WHO Representative in Swaziland reported to the Regional Director for Africa that

lawyers acting for a private company had presented the Country Office with an unexpected claim for payment of approximately 185,000 United States dollars in respect of medical supplies allegedly ordered by WHO Swaziland further to a local purchase order (LPO) numbered 1439 and dated 20 October 2005. He stated that the signature on the LPO was unrecognisable and he asked the Regional Director for guidance in dealing with this matter. On 12 December 2006 he sent a further memorandum to the Regional Director to report the disappearance of 14 air conditioning units following the relocation of the Country Office to new premises in January 2006. He added that the complainant had arranged to have these units stored in a private location but that the then WHO Representative in Swaziland had not been informed of this arrangement.

In the course of a meeting on 2 April 2007 between the WHO Representative in Swaziland and the lawyers acting for the private company, the latter asserted that they had dealt with the complainant in connection with LPO No. 1439. On 10 April the Regional Human Resources Officer sent an e-mail to the complainant enclosing a memorandum from the Regional Officer informing him of the company's claim for payment with respect to LPO No. 1439 and requesting any information or explanation he might be able to provide. The latter replied, expressing his surprise at the claim and denying all knowledge thereof. He also questioned the unusual delay with which the claim had been made. The private company subsequently withdrew the claim.

In May 2007 the Organization instructed its Office of Internal Oversight Services (OIOS) to investigate the matter as well as the disappearance of the air conditioning units. An investigation by the OIOS took place in Swaziland in June 2007 and the complainant was interviewed three times. According to the OIOS report, which was forwarded to the Regional Director in July 2007, the complainant had arranged to have the air conditioning units stored in a private school, without obtaining the prior authorisation of the then WHO Representative in Swaziland but had mentioned it during a meeting held a few days later where senior staff were present. The OIOS also

noted that the staff member to whom the complainant had handed over his responsibilities upon being reassigned to Liberia claimed that she had not been informed, and the complainant had not obtained any document from the owner of the school acknowledging receipt of the air conditioning units. With regard to LPO No. 1439, the report stated inter alia that it was a fake, that the complainant appeared to have written and signed it, that he had admitted to having "made a mistake" and that he was "prepared to [do] a plea bargain". The complainant's contract which was due to expire on 31 July 2007 was extended until 31 October 2007 pending the outcome of the investigation process.

By a memorandum dated 21 August 2007 the complainant was informed that the OIOS report contained serious allegations indicating that he might have committed improper action warranting disciplinary action under Staff Rule 1110. He provided the complainant with sections of the report and invited him to submit his written comments within eight calendar days. The first allegation made against the complainant was: "Non compliance with WHO Rules and Regulations in the area of asset management: the disappearance of 14 air conditioners". The second was: "Wrongdoing putting WHO at a high financial risk and tarnishing its image and negatively affecting its credibility towards business partners".

The complainant replied on 29 August 2007, denying the allegations. Regarding the air conditioning units, he explained that the acting officer-in-charge was aware of their location and had even sent an Information Technology officer to verify and count the units stored. He asserted that he had handed over "all [l]egitimate WHO inventory" to the WHO Representative and the Administrative Assistant prior to his departure. Regarding LPO No. 1439, the complainant explained that he had proposed a plea bargain whereby he would sign a document stating that he had written the LPO, on condition that it could not be used against him for disciplinary purposes, because "no explanation would satisfy the [investigator]" and "[a]s a means to put the matter [to] rest". Lastly, he accepted responsibility for acting negligently as regards the issuance of LPO

No. 1439, stating that he had made a "human error", but denied having signed it.

Considering that the complainant's explanations were neither convincing nor credible, the Regional Director decided to dismiss him for misconduct with effect from 1 November 2007 and to pay him one month's salary in lieu of notice; the complainant was so informed by a memorandum dated 24 October 2007. As the complainant did not acknowledge receipt of that memorandum, a second identical one dated 2 November 2007 was sent, of which he did acknowledge receipt. For that reason his contract was further extended until 9 November 2007.

After appealing unsuccessfully to the Regional Board of Appeal, the complainant brought the matter before the Headquarters Board of Appeal, which found that the Administration had failed to prove misconduct and that the decision to dismiss him was therefore unjustified. In particular, the Board felt that other staff members in the Country Office had been involved in, or aware of, the removal of the air conditioning units and their storage off-site. It observed that copies of the minutes of a meeting held between the complainant and the then WHO Representative in January 2006 were requested but declined by the Administration. With regard to LPO No. 1439, the Board found that the OIOS investigation did not establish beyond a reasonable doubt that the complainant had signed the order or that it was he who had handed it over to the third party claiming payment. In its view, the only proven allegation was his negligence in handling LPO No. 1439, in that he had not secured the LPO booklet and had not cancelled LPO No. 1439, if he had written it, in accordance with the correct procedure. The Board considered that there were more proportionate disciplinary measures available under Staff Rule 1110.1. It therefore recommended that WHO should set aside the decision to dismiss the complainant and that it should either reinstate him with retroactive effect from 10 November 2007 or pay his salary and emoluments from the date of dismissal until the expiry date of his contract. It also recommended awarding him moral damages in the amount of

10,000 United States dollars and reimbursing his legal costs up to a maximum of 10,000 dollars on presentation of receipts.

By a letter of 6 January 2010 the Director-General informed the complainant that she took the view that his actions with respect to the lost air conditioning units did constitute misconduct and that, so far as concerned the purchase order, he had been negligent and had demonstrated "extremely poor performance and judgment". However, she agreed with the Headquarters Board of Appeal that the sanction of dismissal was unwarranted and she therefore decided not to renew his appointment instead. The complainant would receive a payment corresponding to three months' salary in lieu of notice, with interest. The Director-General also awarded him 3,000 dollars in moral damages and the same amount in costs. That is the impugned decision.

B. The complainant contends that the disciplinary proceedings and the resultant decision to dismiss him are seriously flawed, because of the Organization's failure to afford him due process. He asserts in particular that he was denied the right to cross-examine the individuals whose statements were used as evidence against him, as well as the right to be present during such interviews. He therefore considers that he was not in a position to rebut the evidence adduced against him and to prove that the allegations of misconduct were unfounded.

The complainant also contends that the Organization presumed his guilt solely on the basis of the OIOS report. In so doing, it violated his right to be presumed innocent by shifting onto him the burden of proving that he had not committed misconduct. In his view, the Organization failed to prove beyond a reasonable doubt that he had engaged in the alleged behaviour, as the statements made by him during the OIOS investigation and reproduced in the report were qualified and should not have been treated by WHO as an admission of guilt.

The sanction of dismissal for misconduct was also, in the complainant's view, disproportionate. Never before had he incurred a penalty or warning. In fact, he had been a model employee, as illustrated by his latest appraisal report. Referring to the Tribunal's

case law, he argues that the Organization committed an error of law in imposing a disciplinary sanction that was out of all proportion to the "objective and subjective circumstances" in which the alleged misbehaviour was committed.

The complainant asks the Tribunal to set aside the impugned decision and to order that he be retroactively reinstated in his position and paid the resulting arrears of salary and benefits. Alternatively, he claims payment of his salary and emoluments from the date of his dismissal until the expiry of his contract which, according to him, had been renewed for a further two years. In this regard, the complainant provides a document signed by his first-level supervisor in Liberia, as evidence that his contract had in fact been renewed until 31 July 2009. He also seeks moral damages in the amount of 15,000 dollars and costs in the amount of 20,000 dollars.

C. In its reply WHO denies the complainant's contention that his contract had been renewed for a further two years. It affirms that no such offer of employment was ever made to the complainant, and that no contract was signed for that period. At the material time, his fixed-term appointment was scheduled to expire on 31 July 2007. His contract was extended for three months and then for a further nine days pending the decision concerning the allegations of misconduct on the part of the complainant. In the Organization's view, his claim for reinstatement is therefore wholly without merit.

With respect to the complainant's argument that the disciplinary process was flawed, the Organization stresses that its rules and procedures on misconduct do not require it to establish a formal disciplinary hearing. It asserts that the requirements of due process were observed in this case, as the complainant had ample opportunity to explain the circumstances surrounding the missing air conditioning units and the issuance of LPO No. 1439. The Organization enabled him to travel to Swaziland to ensure his full participation in the investigation. The material facts and the substance of the charges were

clearly stated to him in the memorandum of 21 August 2007 and he was given the opportunity to answer the charges levelled at him, which he did in his letter dated 29 August 2007.

More specifically, WHO asserts that neither its rules and procedures on the investigation process, nor the Tribunal's case law, require that the subject of an investigation be present when witnesses are interviewed, or that he or she receive transcripts of such interviews. It submits that the complainant was provided with the fullest opportunity to explain himself, and to test the evidence against him. His right to be heard was not denied or in any way compromised. On the contrary, he had three separate meetings with the OIOS investigator, who shared with him documentary evidence and information compiled from interviews with witnesses, which the complainant was therefore able to challenge.

The defendant points out that the complainant erroneously continues to allege that he has been dismissed. The impugned decision, as notified to the complainant on 6 January 2010, was that he would not be offered a further appointment as a result of his misconduct and negligence. The Organization argues that the requisite standard of proof in order to support a charge of misconduct is that there be a "set of precise and concurring presumptions" that the complainant's conduct amounted to wrongdoings. As regards the charge of mismanagement of WHO assets, it considers that it has satisfied this standard of proof. So far as concerns the charge in connection with the issuance of the fake LPO, the Director-General has acknowledged that the Administration had not proved beyond reasonable doubt that the complainant signed the LPO and that he was responsible for providing it to the company concerned. Rather, his actions were negligent in relation to the performance of his official duties.

WHO considers that the decision not to offer the complainant a new contract was proportionate to his actions. It emphasises that his position as Administrative Officer meant that he was responsible for financial and personnel matters, as well as procurement and the

management of WHO assets, which required that the Organization fully trust him. The Director-General felt that by his actions, the complainant had breached that trust.

Lastly, the defendant argues that the complainant's claims for moral damages and costs are without merit, given that it complied with its internal rules and procedures, that it reviewed its earlier decision to dismiss him and that it has already awarded him 43,222 dollars including in respect of moral damages and costs.

D. In his rejoinder the complainant presses his pleas. He contends that the Director-General committed an irregularity by ignoring the factual findings of the Headquarters Board of Appeal. In his view, WHO is now attempting to use the same flawed evidence to justify the non-renewal of his appointment *ex post facto*. Moreover, as his contract renewal had gone through most of WHO's internal processes, a contract was formed as soon as he accepted the offer of extension. Referring to the Director-General's statement that his contract would not have been renewed because of his alleged misconduct, he points out that it may be inferred from this statement that, but for the alleged misconduct, his contract would have been renewed.

E. In its surrejoinder WHO maintains its position in full.

CONSIDERATIONS

1. The complainant is a former staff member of WHO. Until October 2006, he was an Administrative Officer based in Swaziland with responsibility for managing the Organization's assets as well as for certain of its procurements. In October 2006 he was reassigned to Liberia. On 24 October 2007 he was informed that he was dismissed for misconduct associated with his responsibilities in Swaziland. His dismissal was said to be with effect from 1 November 2007 and he would be paid one month's salary in lieu of notice. An appeal against that decision was dismissed in accordance with the recommendation

of the Regional Board of Appeal. The complainant thereafter appealed to the Headquarters Board of Appeal.

2. The misconduct of which the complainant was accused concerned two matters. The first involved the storage of certain air conditioning units, the value of which is estimated at approximately 8,000 United States dollars. They were stored in private premises following a WHO office move in January 2006. It is not in dispute that there was no room for the units in the new premises and that the old premises had to be vacated quickly for use by another body. The premises in which the units were stored were subsequently sold and the units were reported missing in December 2006. The second matter concerned an order form – LPO No. 1439 – which purported to be an order for medical equipment worth approximately 185,000 dollars from a named company. The form was a fake. Lawyers acting for that company made a claim for payment of the amount in question, but subsequently withdrew the claim.

3. The Office of Internal Oversight Services (OIOS) conducted an investigation into the missing air conditioning units and the fake order form in June 2007. The complainant was interviewed as part of the investigation, as were various other persons. The complainant was not present during those other interviews. In the course of his interview with respect to the air conditioning units, he stated that he had reported where the units were at a staff meeting on the Monday following the weekend during which they were moved and that, later, he went with an Information Technology officer to the private premises and they saw that the units were there. So far as concerns the fake order form, he stated that the handwriting looked like his, but denied that the signature was his. Upon further questioning, he agreed that he might have made a mistake when preparing the form and forgotten to cancel it. In a further interview, he admitted that he made a mistake, but the context does not indicate that he made a mistake in preparing the form. Later, when responding to a notification of charges, he admitted that he had been negligent with respect to

the form but, again, the context does not indicate the nature of that negligence. His dismissal followed his response to the charges, it being said in the notice of dismissal that his explanations with respect to the fake order form were "neither convincing nor credible". With respect to the air conditioning units, it was said, amongst other things, that there was no evidence of their storage in the premises identified by him.

4. The Headquarters Board of Appeal concluded that there was insufficient evidence to establish misconduct on the part of the complainant. So far as concerns the air conditioning units, it said that it "felt that others in the Country Office were [also] involved [in] the[ir] removal […] and […] storage off site". It also noted that it had been denied information with respect to aspects of the OIOS investigation and its conclusions and that the complainant had not been present during the questioning of two persons who could have corroborated or contradicted his version of events. So far as concerns the fake order form, it concluded that the OIOS investigation did not establish beyond reasonable doubt that the complainant had signed it, had handed it to the company to which it was addressed or that he was implicated in any way in its use. It found that "the only proven allegation against [him] was his negligence in how he handled LPO 1439 in not securing the LPO booklet and not cancelling LPO 1439, if he had written it, as per procedure". The Board recommended that the complainant's dismissal should be set aside and that he should be reinstated with effect from 10 November 2007. Alternatively, it recommended that he should be paid the salary and other benefits he would have received from the date of his dismissal until his contract would otherwise have expired. It also recommended the payment of moral damages in the sum of 10,000 United States dollars and legal fees up to 10,000 dollars on presentation of receipts.

5. The Director-General agreed with the conclusion of the Headquarters Board of Appeal that the complainant's conduct did not warrant dismissal. However, she was of the view that his actions with

respect to the air conditioning units "were improper and constitute[d] misconduct" and those with respect to the order form "were negligent and demonstrated extremely poor judgment and performance". She further expressed the view that, if he had not been dismissed, his actions would have resulted in his contract not being extended. In this regard, it is said that the complainant's contract was extended until 9 November 2007 to enable the finalisation of the charges against him. In the result, it was decided that he would be paid the equivalent of three months' salary in lieu of the notice he would have received on the same date, plus moral damages in the amount of 3,000 dollars and costs in the same amount on proof of payment. That is the decision impugned before the Tribunal, in accordance with which an amount of 43,222 dollars has been paid to the complainant.

6. It is not in dispute that the complainant did not have an opportunity to test the evidence provided by the other persons interviewed by the OIOS in the course of its investigation. WHO seeks to excuse that course by referring to the fact that the complainant did not seek an oral hearing either before the Regional Board of Appeal or the Headquarters Board of Appeal. It cannot do so. A staff member is entitled to due process before a disciplinary sanction is imposed. In this regard, he or she must be given, at the very least, an opportunity to test the evidence on which the charges are based, to give his own account of the facts, to put an argument that the conduct in question does not amount to misconduct and that, even if it does, it should not attract the proposed sanction (see Judgments 2254, consideration 6, and 2475, consideration 22). The complainant was given an opportunity to reply to the OIOS report but, beyond that, it is not clear that the requirements of due process were observed. However, it is clear that he had no opportunity to test the evidence of others interviewed by the OIOS or any other evidence that was used against him. This was a serious breach of due process upon which the complainant was entitled to rely in his internal appeals, without seeking a hearing in which to give evidence or to test the evidence of others. Further, it was for the Organization to

establish misconduct beyond reasonable doubt and, this being a dismissal case, the complainant was entitled to the benefit of the doubt (see Judgment 2786, consideration 9). However, the burden of proof was effectively reversed when he was dismissed. In this regard and as already noted, it was then said that the complainant's explanations with respect to the fake order form were "neither convincing nor credible" and that there was no "evidence of the [...] storage [of the air conditioning units] in the premises" identified by him. Seemingly, the last statement was wrong as an administrative assistant apparently went to the premises in question looking for the units and, as the Headquarters Board of Appeal pointed out, it is improbable that she would have done so unless she knew that they had been there.

7. In the light of the defects attending the original decision to dismiss the complainant, it was not open to the Director-General to come to the conclusion on the basis of the same material that he was guilty of misconduct in relation to the air conditioning units. In concluding that he was, she stated, amongst other things, that although he had said that "the then acting [WHO Representative] was aware of the offsite storage [...] he has firmly denied that [the complainant] or anyone else brought th[e] matter to his attention". She added "there [was] no indication in the minutes of the Country Office staff meeting of 16 January 2006 that th[e] issue was ever discussed". The complainant was never given an opportunity to test the evidence of the former WHO Representative and he was not given a copy of the minutes of the staff meeting. Further, the memorandum of the then WHO Representative in December 2006 – after the complainant had left for Liberia and before the OIOS commenced its investigation in June 2007 – indicates that at least someone in the Swaziland Office knew what had been done with the air conditioning units. In these circumstances, the Director-General's finding of misconduct cannot stand. Her finding of negligence with respect to the fake order form also involves a misstatement as to the finding of the Headquarters Board of Appeal. As already indicated, the Board's finding was not unequivocal as to negligence in relation to the cancellation of the

form. It left open the question whether he had written out the form and its finding of negligence in relation to its cancellation was conditional on his having done so. Nevertheless, the Director-General stated that the Board had found that he was negligent in failing to cancel the form as well as in failing to secure the LPO booklet.

8. The wrongful finding of misconduct in relation to the air conditioning units and the misstatement as to the finding of negligence by the Headquarters Board of Appeal dictate that the Director-General's decision be set aside. This notwithstanding, the time that has now elapsed makes it impractical to order the complainant's reinstatement. However, he is entitled to material damages that take account of what would have happened had he not been dismissed. In this regard, the complainant contends that his contract was extended for a further period of two years on 31 July 2007. Although there was a recommendation to that effect, the evidence indicates, as claimed by WHO, that it was only renewed until 9 November 2007. Had the matter been properly considered at that time, it may well have resulted in a finding of negligence, but not of misconduct. In these circumstances, it is likely that his contract would only have been extended until 31 July 2008 but with a prospect of further extension if his performance proved satisfactory in that period. Given that his previous performance had been rated highly, there was a good chance that it would be satisfactory and his contract then renewed. That being so, the complainant lost not only the salary and benefits he would have received until 31 July 2008, but also a valuable chance that his contract would then have been further extended. In the circumstances he is entitled to material damages equivalent to one year's salary and other benefits he would have received from 10 November 2007 to 9 November 2008 had his contract not been terminated. He is also entitled to moral damages which, in view of the seriousness of the breach of the requirements of due process, the Tribunal fixes at 15,000 dollars and costs in the amount of 10,000 dollars. WHO is entitled to deduct the amount of 43,222 dollars already paid.

DECISION

For the above reasons,

1. The Director-General's decision of 6 January 2010 is set aside.
2. WHO shall pay the complainant material damages in an amount equivalent to the salary and other benefits that he would have received from 10 November 2007 to 9 November 2008 had his contract not been terminated.
3. It shall also pay him moral damages in the amount of 15,000 United States dollars and costs in the amount of 10,000 dollars.
4. The Organization is entitled to deduct the amount of 43,222 dollars already paid to the complainant.
5. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet