Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D.

v.

WHO

121st Session **Judgment No. 3582**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. C. M. D. against the World Health Organization (WHO) on 27 November 2013, WHO's reply of 29 April 2014, the complainant's rejoinder of 18 August and WHO's surrejoinder of 22 October 2014;

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 challenges the decision not to extend her fixed-term appointment following the abolition of her position.

The complainant, who held temporary contracts from 2001 to 2007, was thereafter offered a fixed-term appointment which took effect on 1 August 2007 and was extended twice. It was due to end on 31 January 2011. Between May and November 2010 numerous e-mails were exchanged between the complainant, her supervisor and the Administration with regard to a possible extension of her contract beyond its expiry date.

The complainant was informed by a letter dated 19 November 2010 that, for purely programmatic and financial reasons, her position would

be abolished as from 28 February 2011 and that, consequently, her appointment would not be extended beyond that date.

On 18 January 2011 the complainant sent the Headquarters Board of Appeal (HBA) a statement of intention to appeal, then on 21 February she took sick leave; the date of her separation from service was therefore deferred until 30 June 2011. In the brief which she filed with the HBA on 25 March the complainant requested the setting aside of the decision of 19 November 2010, her immediate reinstatement in her unit or in an equivalent post in another department for an appointment of at least one year, compensation for moral and professional injury and, lastly, reimbursement of her procedural costs.

The HBA, which did not hear the parties, submitted its report to the Director-General on 18 July 2013. It considered that there had not been any personal prejudice against the complainant, nor incomplete consideration of the facts by the Administration in its decision of 19 November 2010, and that the provisions of the WHO Staff Regulations and Staff Rules and the terms of the complainant's contract had been observed. However, in view of some of the material in the file – namely the e-mails exchanged between the Administration, the complainant and her supervisor which had encouraged her to expect that her appointment would be extended, the tone of an e-mail which was regarded as inappropriate, the circulation on 30 November 2011 outside the unit of an e-mail referring to the abolition of the complainant's post and mentioning her name, as well as the excessive length of the internal appeal proceedings – it recommended an award of compensation in an amount "equivalent to 2 months' net base salary plus post adjustment", reimbursement of the complainant's procedural costs in an amount not exceeding 3,000 United States dollars, subject to the presentation of documentary evidence, and the dismissal of the other claims.

By a letter of 20 August 2013, which constitutes the impugned decision, the Director-General, who endorsed most of the findings of the HBA, decided to award the complainant 6,000 dollars for moral injury, 2,000 dollars for the excessive length of the internal appeal

proceedings and a maximum of 3,000 dollars in respect of the procedural costs she had incurred.

On 27 November 2013 the complainant filed a complaint with the Tribunal in which she seeks the setting aside of the impugned decision and that of 19 November 2010, "appropriate compensation" for the excessive length of the internal appeal proceedings, compensation for moral and professional injury, immediate reinstatement in her unit or in an equivalent post in another department "under an equivalent contract and with all her rights" or, failing that, compensation for loss of employment, and the reimbursement of her procedural costs. In addition she seeks an order for the production of various documents.

WHO asks the Tribunal to dismiss the complaint in its entirety. If, however, the Tribunal were to allow the complainant's claim for compensation for loss of employment, WHO considers that the Tribunal should take account of any amounts earned by the complainant for any professional activity and/or any indemnity received since the date of her separation from the Organization.

CONSIDERATIONS

1. Thirty months elapsed between the date on which the complainant filed her statement of intention to appeal against the decision of 19 November 2010 and the date on which the HBA submitted its report to the Director-General, i.e. 18 July 2013. The HBA itself recognised that that excessively long period warranted an award of moral damages to the complainant. In her decision of 20 August 2013 the Director-General said that she "endorse[d] [that] finding" since "the time taken to conclude the appeal proceedings [did] not appear justified by the circumstances of the case", even though it appeared to "be the result of [the HBA's] workload and not of ill will". She awarded the complainant compensation under that head in the amount of 2,000 United States dollars.

The complainant submits that this compensation is insufficient to redress the moral injury caused by this undisputed delay and she asks

the Tribunal to set an "appropriate" amount for the compensation due to her.

2. It must first be noted that, contrary to the complainant's submissions, the amount which the HBA recommended should be awarded under that head was not higher than the amount ultimately set by the Director-General. The "compensation […] in an amount equivalent to 2 months' net base salary plus post adjustment" recommended by the HBA was intended to compensate not only the moral injury stemming from the excessive length of the proceedings, but all the moral injury suffered by the complainant.

3. That said, it is obvious from the circumstances of the case that the length of the internal appeal proceedings was unreasonable in light of the Tribunal's consistent case law, since there is no indication that its protracted nature was due to wrongful procedural conduct on the part of the complainant, and the appeal body's workload on which WHO relies certainly does not justify keeping a staff member in a state of uncertainty for almost three years as to the outcome of an appeal filed with the competent body and in accordance with the applicable rules. The complainant is therefore entitled to moral damages for the defendant organisation's breach of its duties of due diligence and care (see, in particular, Judgments 2522, under 7, 3160, under 16, and 3188, under 25).

4. According to the Tribunal's case law, the amount of damages awarded for the injury caused by an unreasonable delay in processing an internal appeal depends on the length of the delay and its consequences (see Judgment 3530, under 5).

Whatever the extent of the delay, its consequences naturally vary depending on the subject matter of the dispute. A delay in resolving a matter of limited seriousness in its impact on the appellant will ordinarily be less injurious than a delay in resolving a matter which has a severe impact (see Judgment 3160, under 17).

It was particularly important that the appeal against the decision not to extend the appointment of the complainant, who was then approaching 40 years of age and who had been in the service of WHO for almost nine years, should be processed quickly, so that she might know at the earliest possible opportunity what her chances were of remaining in the Organization's service. This was essential for the next stage in her career. Without dwelling on the question of whether, as she alleges, the appeal proceedings hampered her search for a new job, the Tribunal considers that, having regard to all the circumstances of the case, the compensation of 2,000 dollars awarded under the impugned decision is not sufficient to redress the injury caused by the unusually long internal appeal proceedings. The amount of that compensation should, in fairness, be increased to 4,000 dollars. This amount compensates the complainant for all the injury resulting from the excessive length of the proceedings and from the fact that the impugned decision did not award her sufficient redress under that head.

The complaint will therefore be allowed in this respect.

5. WHO contends that the non-extension of the complainant's fixed-term appointment was based on objective, programmatic and financial reasons necessitating the abolition of her post and the redistribution of her duties to other members of the unit.

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

a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17).

7. The detailed explanations supplied by WHO in its reply and the supporting documentary evidence convince the Tribunal that the restructuring of the complainant's unit, the staff complement of which was reduced by two thirds between 2010 and 2014, had nothing to do with the complainant's personality and was prompted solely by objective considerations related to the policy on budgetary savings and rationalisation which the Organization had been forced to adopt, since maintaining the complainant's post no longer appeared to be essential for the proper functioning of the unit. The question of whether this restructuring was apposite, in other words, of whether the aim in question could not have been achieved by reducing the number of staff of another cluster, or by abolishing another post in that unit, is a matter of policy and lies outside the Tribunal's jurisdiction for the above-mentioned reasons.

The complainant, who alleges that she suffered personal prejudice and discrimination, provides no conclusive evidence to substantiate her allegations in this respect. The fact that the contested measure was taken shortly before a general restructuring exercise cannot be viewed as evidencing prejudice or discriminatory treatment. The complainant's assertion that it would have been easier for her to keep her job in the Organization in the context of that general restructuring exercise is belied by the fact that her job applications filed between March 2012 and April 2013, i.e. after the exercise began, were unsuccessful.

8. The complainant contends that WHO breached the procedure applicable to the termination of fixed-term contracts. First, she submits that insufficient reasons were given for the decision of 19 November 2010. Secondly, she submits that that decision did not comply with the requirements of the Staff Rules on the period of notice, since she was notified of it only two months before her appointment expired.

9. The first criticism is devoid of merit.

The refusal to extend a fixed-term appointment may not be arbitrary or irrational (see Judgment 1128, under 2), even though such a decision lies at the discretion of the competent authority and the holder of a contract of that kind does not, in principle, have a right to have it extended upon its expiry (see Judgment 3448, under 7). The person concerned is therefore entitled to know the reasons for this decision, which adversely affects her or him, in order to be able to make an informed decision as to whether an appeal against it is likely to succeed.

In the instant case, the letter of 19 November 2010 referred to the complainant's earlier discussions with various senior officials regarding the financial and programmatic situation which had led WHO to abolish her post and, for that reason, not to extend her appointment. Though succinct, this indication of the reasons for the decision was sufficient to enable the complainant to challenge the decision in full knowledge of the facts (see Judgment 3290, under 15).

10. The complainant's second criticism must be examined in light of Staff Rule 1050.3 which, at the material time, made the termination of fixed-term appointments subject to at least three months' notice. The complainant ought to have been notified of the decision not to extend her appointment with the defendant organisation no later then three months before it expired on 31 January 2011. This was not the case, since the complainant was notified of the decision of 19 November 2010 only two months before the expiry of her appointment. The complainant infers from this that her appointment was tacitly renewed for a further term, since it was not terminated within the time limit established by the Staff Rules.

11. The three-month period of notice prescribed by Staff Rule 1050.3 is consistent with the Tribunal's case law, which requires international organisations to give reasonable notice of the non-renewal of a fixed-term appointment (see Judgments 2104, under 6, and 3448, under 8). This case law takes account of international organisations' specific needs and of the legitimate interests of the staff member concerned who, even if she or he in principle has no right to the renewal

of her or his appointment, must be apprised of the employer's intentions early enough to be able to start looking for other employment in a timely manner (see Judgment 1617, under 2).

12. On the other hand, the protection of the legitimate interests of the staff member concerned does not mean that failure to comply with the prescribed period of notice entails the employer's loss of its right to alter a legal relationship by ending an appointment on its expiry and the tacit renewal of the appointment for a further fixed term. The aim of the aforementioned case law is achieved when the appointment is extended by the length of time needed to give the official a full period of notice (see, in particular, Judgments 2162, under 2, and 3444, under 3). Non-compliance with the notice period established by the Staff Rules will result in a tacit extension of the appointment for a further fixed term only if the Staff Rules or the contract expressly provide for this contingency or if the official concerned has received assurances to that effect from the employer in circumstances where the principle of good faith requires that they be honoured.

As none of these exceptional situations had arisen in the instant case, the one-month extension decided on 19 November 2010 is consistent with the above-mentioned case law and the plea entered in this respect must be dismissed.

13. Between 13 November 2001, when the complainant joined WHO, and 8 October 2005, she held several temporary contracts interspersed with a few breaks. From 25 November 2005 until 31 January 2011, the date on which her last appointment expired, she was granted a series of contracts, the first of which were temporary in nature, followed by fixed-term appointments as from 1 August 2007. Thus, apart from a few very short breaks between her successive contracts, she had accumulated more than five years of continuous uninterrupted service in the Organization. The question is whether, when her employment ended owing to the abolition of her post, she fell into the category of staff members covered by the provisions on reassignment set forth in Staff Rule 1050.2.

At the material time that provision read *in parte qua*:

> "When a post held by a staff member with a continuing appointment, or by a staff member who has served on a fixed-term appointment for a continuous and uninterrupted period of five years or more, is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member occupying that post, in accordance with procedures established by the Director-General and based upon the following principles:
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> […]
>
> 1050.2.2 the paramount consideration shall be 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;
>
> […]
>
> 1050.2.7 staff members shall be given due preference for vacancies during the reassignment period, within the context of Rule 1050.2.2;
>
> […]."

The French version differs somewhat from the English text in that, instead of the phrase "served on a fixed-term appointment for a continuous and uninterrupted period of five years or more", it reads "*engagé pour une durée déterminée et qui compte au moins cinq années de service continu et ininterrompu"*. The English version of the text, on which Judgment 3159 rests, therefore appears to be more rigorous than the French version, which indicates that a staff member may benefit from the reassignment procedure after the expiry of her or his appointment or the abolition of her or his post, provided that she or he was employed under a continuing or fixed-term appointment at the material time and had then been in the Organization's service continuously and uninterruptedly for at least five years.

The Tribunal has consistently held that any ambiguity in the regulations or rules established by an international organisation should, in principle, be construed in favour of the staff and not of the organisation (see Judgment 3369, under 12). Hence the complainant, who at the material time met both of the conditions which had to be satisfied under the French version of Staff Rule 1050.2, belonged to the category of staff members covered by the provisions on reassignment.

14. The complainant submits that WHO did not make all the efforts required by Staff Rule 1050.2 and that, by failing to reassign her to another post, it not only breached its duty of protection and care but also disregarded the legitimate expectation created by her service.

It is, however, clear from the defendant organisation's cogent explanations and the documents in the file that, even though WHO wrongly denied the complainant's right to benefit from the provisions of the aforementioned Staff Rule 1050.2 and did not abide by them, it undertook the necessary searches for another post in its service which it could propose to the complainant. The purpose of these provisions, which is to enable the staff member's reassignment whenever possible, was therefore served.

In these circumstances, the Tribunal will not set aside the impugned decision, but it will award the complainant damages in the amount of 2,000 dollars for the procedural irregularity noted above.

In addition, the documents, mainly e-mails, on which the complainant relies in order to claim a legitimate expectation, cannot be regarded as containing assurances that her appointment would be extended again when it expired, or that she would be assigned to another post.

This plea is therefore groundless.

15. For the remainder, WHO has honestly admitted that the dispute with the complainant should have been better managed. The Tribunal considers that the compensation which the Organization agreed to pay to the complainant is not based on an arbitrary assessment of the moral injury which she suffered under this head.

16. The complaint must be allowed in part for the reasons given in considerations 4 and 14, above. All the complainant's other claims must be dismissed, without there being any need to allow the complainant's request for the production of additional documents.

17. There are no grounds for granting the complainant damages other than those awarded under 4 and 14, above.

18. The complainant, who succeeds in part, is entitled to costs, which will be set at 1,500 United States dollars.

DECISION

For the above reasons,

1. WHO shall pay the complainant 4,000 United States dollars in addition to the compensation already awarded in the decision of 20 August 2013.
2. It shall also pay her 1,500 dollars in costs for the proceedings before the Tribunal.
3. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ