O.

v.

WHO

121st Session **Judgment No. 3586**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. W. J. O. against the World Health Organization (WHO) on 13 March 2013 and corrected on 5 July, WHO's reply of 8 October 2013, the complainant's rejoinder of 9 January 2014 and WHO's surrejoinder of 11 April 2014;

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 contests the decision not to extend his fixed-term appointment.

He joined WHO in April 2008 as Coordinator of the Surveillance, Monitoring and Evaluation (SME) Unit within the Global Malaria Program (GMP) under a one-year fixed-term appointment, which was later extended up to 29 April 2011.

On 26 August 2010 the complainant's first-level supervisor, the Director of the GMP, informed him verbally that his appointment would not be extended upon expiry for financial reasons. He added that, from now on, he would act as Senior Advisor.

By a letter of 7 September 2010 he was formally notified of the decision not to extend his "temporary appointment" beyond its expiry date. Another letter was issued on 18 November superseding and cancelling that of 7 September as it mistakenly referred to a temporary appointment instead of a fixed-term appointment. The letter was otherwise identically worded and contained no reason as to the decision not to extend the appointment.

At the end of September the Director of the GMP wrote to the Director-General proposing a reorganization of the GMP, including the dissolution of the existing units. He added that the primary consideration had been to protect staff in view of the financial constraints faced by the GMP, while planning for future staffing as additional resources became available. By an information note of 14 October all staff were members informed that the GMP had undergone reorganization, with effect from that date. The note listed the names of the coordinator of the new units of the GMP; the name of the complainant did not appear on the note. Dr C., who had unsuccessfully applied for the position of Coordinator of the SME Unit two years earlier, was appointed ad interim Coordinator of the Strategy, Economics and Elimination (SEE) Unit that replaced the SME Unit.

On 30 September 2010 the complainant filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) contesting the decision of 7 September not to extend his appointment. He then contacted the Administration, asking for an administrative review of the process that led to the appeal. The appeal proceedings were suspended while the administrative review was undertaken in an attempt to find an informal settlement. As no mutually-agreed solution had been found during the discussions he had with the Administration in January 2011 the complainant asked the Administration to send him the findings of the administrative review in writing within one week. Having not received the outcome of the administrative review, in February he wrote to the HBA asking for the internal appeal proceedings to resume and, on 25 March 2011, he submitted his statement of appeal.

Mid-November 2012 the HBA issued its report. The HBA noted that the complainant was informed orally of the reasons for not extending his

appointment. It requested documents from the Administration to examine the financial status of the GMP between 2009 and 2011 in order to determine whether the non-extension decision was justified and why the decision was not reversed when the GMP secured additional funding in 2011. It found no breach of applicable rules with respect to the non-extension decision and the restructuring of the GMP, and no evidence of manipulation of the re-profiling exercise. In its view, there was no error on the part of the Director of the GMP in appointing Dr C. It therefore recommended rejecting the appeal. It made two more general recommendations. First, the use of the informal administrative review should remain an issue to be decided between the Administration and the staff member concerned directly, without including the HBA in their discussions. Second, a separation letter should always contain the reason for the decision, even if the staff member concerned has been informed verbally.

By a letter of 17 December 2012, which is the impugned decision, the Director-General informed the complainant that she had decided to dismiss his appeal as she agreed with the HBA's conclusions and recommendations. She added that some of the issues raised by the complainant with respect to the restructuring/re-profiling fell outside the scope of the appeal given that the restructuring took place after the contested decision. The arguments raised with respect to the administrative review also fell outside of the internal appeal proceedings as the review took place after the filing of the internal appeal.

The complainant asks the Tribunal to quash the decision not to extend his appointment, or in the alternative, to order WHO to pay him an amount equivalent to the salary, benefits and allowances (including "refunding of US taxes") he would have received had his contract been extended from 30 April 2011 until 30 September 2013, the date of his mandatory retirement age, less the termination indemnities he received from WHO in relation to his separation and any other salaries paid to him during that period. He also claims 250,000 United States dollars in compensation for "professional, personal and moral damage" together with costs. He further claims interest on all amounts awarded by the Tribunal. He asks WHO to

provide a copy of the draft administrative review report and some financial documents concerning the funding of the GMP. In his rejoinder, he adds a claim for reimbursement of 30,000 dollars that he had lost through "rapid and forced selling" of household furnishings, a recently-purchased vehicle, and penalties related to the recent signing of a mandatory three-year apartment lease.

WHO asks the Tribunal to dismiss the complaint as devoid of merit. It submits that the claim made with respect to the administrative review is irreceivable, as is the claim to be provided with a copy of the draft administrative review report. With respect to the request to be provided with some financial documents, WHO indicates that it would provide these to the Tribunal if it wishes to assess their relevance but stresses that WHO is not obliged to provide a copy to the complainant as they contain confidential information. It adds that the complainant did not request these documents during the internal appeal proceedings and the information he requests concerns events that took place after the decision not to extend his appointment was taken.

CONSIDERATIONS

1. WHO raises receivability as a threshold issue. It argues that the matters in the complaint that relate to the internal administrative review process are irreceivable because they are outside the scope of the internal appeals process. WHO further contends that matters that relate to the re-profiling process are irreceivable because that exercise came after the internal appeal was filed in September 2010.

2. The Tribunal observes that the internal appeals proceedings were suspended while the parties sought resolution by way of the administrative review process. The complainant's statement of appeal was filed on 25 March 2011. This was after the re-profiling exercise at the GMP had been undertaken. It is noteworthy that the complainant's request for relief in the Tribunal, aside from his financial claims, is stated as follows:

"The Complainant respectfully requests:

> – that the decision of non-extension of [his] appointment be quashed, as irregular, based on error of law, incomplete consideration of facts and personal prejudice;
>
> – In consequence, that the Organization should pay the following […]."

3. In effect, the complaint is against the decision not to extend the complainant`s contract of employment with WHO. His stated grounds are that the decision should be quashed because of irregularity, error of law, incomplete consideration of facts and personal prejudice. Additionally, he alleges that WHO did not fulfill its duty of care towards him. These are the grounds to support his claim to have the non-extension decision quashed. The claim by which the complainant seeks to obtain damages on the basis of flaws in the HBA's internal appeal process is admissible; it is an ancillary claim that arises out of the HBA proceedings and is admissible in the Tribunal as the HBA could not have heard it. So is his claim for damages. This is a natural consequence of the claim and implicit in it.

4. In his rejoinder before the Tribunal the complainant added the claim that the decision not to extend his contract was made in breach of WHO's duty to respect the principle of good faith and to show respect for his dignity, warranting the award of professional, personal and moral damages. This claim is irreceivable for failure to exhaust internal remedies as it was not raised in the internal appeal.

5. WHO further contends that any document or information that came from the administrative review process should be disregarded by the Tribunal. This, according to WHO, is because the review was an informal process to help the parties to arrive at an amicable solution and is not a pre-cursor to filing an internal appeal as the Staff Rules and Regulations of some international organizations require. WHO also submits that, additionally, the complainant has not sought the consent of the parties and cannot rely on evidence or documents from that process. It is noted that WHO provided materials to the HBA from that process, except the draft report, but they were not given to the complainant. The Tribunal accepts that the confidentiality

of that informal process should be maintained and, accordingly, documents from it were not to be brought into the appeals proceedings. The HBA should have disregarded documents or information from the administrative review process.

Informal processes such as mediation and conciliation are, certainly in modern times, an important part of dispute resolution. They can often provide a speedier and less expensive mechanism for dispute resolution than more formal processes. However such informal processes are more likely to result in the resolution of the dispute if the parties can speak candidly without concerns that what they say will be used later in more formal processes such as internal appeals or litigation in the Tribunal. It is for that reason that records concerning informal processes, such as the administrative review process in the present case, should remain confidential to the parties and should not be disclosed in the more formal processes.

6. It bears recalling at this juncture that the Tribunal's scope of review in a case such as this is limited. Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization's freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6). These grounds of review are applicable notwithstanding that the Tribunal has consistently stated, in Judgment 3444, under 3, for example, that an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract

when it expires and the complainant's terms of appointment contained a similar provision.

7. The complainant submits that the decision not to extend his contract was made in breach of applicable rules. Staff Rule 1040, paragraph 1, relevantly states as follows:

> "In the absence of any offer and acceptance of extension, fixed-term and temporary appointments shall expire automatically on the completion of the agreed period of service. Where it has been decided not to offer an extension of appointment to a staff member holding a fixed-term appointment, the staff member shall be notified thereof no less than three months before the expiry of the appointment."

8. Paragraph III.10.10 of the e-Manual provides that, in accordance with Staff Rule 1040, notice is to be given in writing by the Organization if extension is not contemplated and that the notice is fixed by Staff Rule 1040 at no less than three months before the expiry of the appointment. This is the minimum notice and the Rule does not set a maximum notice period. Paragraph III.5.12 of the e-Manual provides that one of the conditions to which an extension of a fixed-term appointment is subject is that the funds necessary for the position are available or are "expected to be assured".

9. The complainant submits that WHO breached its rules because it gave no reason for not extending his contract in the letter of 7 September 2010, or in the letter of 18 November 2010, which superseded it. However, he acknowledges that he was verbally informed by the Director of the GMP that his contract would not have been extended because of financial constraints and that upon his departure the Unit would have been reorganized. The reason was not repeated in writing. The Tribunal considers that in addition to verbally informing the complainant, the reason should have been repeated in the written notice particularly because of the serious implications that it held for the complainant and his seniority. He joined WHO in 2008 as Co-coordinator of the SME Unit of the GMP. Had he received contract extensions his mandatory date of retirement would have been 30 September 2013.

10. It is firm principle that the reason not to extend a fixed-term contract must be a valid one and not one that was given to conveniently get rid of a staff member (see, for example, Judgment 1154, under 4). The complainant submits that financial constraints, which was the reason given for not extending his contract, was not a valid reason. He submits that deliberate steps were taken to delay the receipt of funds from one of the external donors in order to terminate his employment. He insists that the Director of the GMP knew before 18 November 2010, when he issued the second letter, but certainly by January 2011 or even later in April 2011, before his contract expired, that funds would have been available or were "expected to be assured", which could have funded the extension of his contract. He further submits that, accordingly, the decision not to extend his contract should have been reversed at that time when the funds became available.

11. On the other hand, WHO states that the decision not to extend the complainant`s contract was made in August/September 2010. The consequences of this, according to WHO, is that even if it later emerged that funds would become available, that would have been irrelevant to the decision not to extend the complainant`s contract because the lawfulness of a measure must be appraised at the date on which the measure or decision was adopted and that would have been from August/September 2010. WHO cited the following statement of the Tribunal in Judgment 3037, under 11, as authority for this submission:

> "The Tribunal recalls the principle that the lawfulness of a measure must be appraised as at the date of its adoption. In consequence thereof all subsequent facts are irrelevant (see Judgment 2365, under 4(c))."

12. The Tribunal considers this principle inapplicable to the present case. Judgment 3037 concerned an interim measure, namely, a suspension. The decision not to extend the complainant`s contract in the present case was taken a considerable time (some eight months) before it expired on the ground of financial constraints or the unavailability of funds. Good faith and WHO's duty of care to the complainant would have required that decision to have been reconsidered if funds became available prior to the expiry of the contract on 29 April 2011. WHO's statement that it did

not have to revisit the decision if funds were known to have been available before the contract expired is in error.

13. Whether funds were known to have been available to fund the extension of the complainant's contract when the decision was taken or before his contract expired is a question of fact, which the HBA had to determine. Those facts were within the knowledge of WHO and could, in particular, have been found from the relevant documents, particularly from the relevant financial agreements and related records. The HBA could not have properly determined the issue unless WHO placed all of the relevant information before it and provided it to the complainant as well. The HBA could not have simply relied on WHO's assertion that grants were received for specified purposes that did not include funding for the complainant`s post. These considerations mirror the complainant`s application for the disclosure of documents.

14. The complainant submits that by not providing the relevant documents to him, even as some of them were disclosed to the HBA, violated the principle of "equal arms". According to him, he was, and still is, at a disadvantage in relation to WHO's assertion that some specific grants could not be used to fund his post. He was also at a disadvantage, in relation to the Global Fund grants, by not knowing that an additional 5 million United States dollars was coming in 2011 to the GMP for National Program reviews. He also refers to other grant fund agreements from which funds were expected. He refers to an amount of some 80 million United States dollars that was expected in January 2011 or by April 2011 under one grant. He also refers to grants that were either received or expected by the GMP from the United Kingdom's Department for International Development (DFID), the United States Agency for International Development (USAID) and the Canadian International Development Agency (CIDA). He states that the HBA was not in a position to properly determine whether funds would have been available to fund his contract extension because it did not have all of the information that was necessary to have made that decision.

15. The Tribunal considers that WHO should have disclosed all of the information, including copies of the fund agreements and related documents or records, that it had that related to line items, position descriptions and allocation of funds associated with each grant, to the HBA and to the complainant. This disclosure would have assisted the HBA to determine the central issue of whether GMP knew before the complainant's contract expired that funds would have become available to fund his extension.

16. The Tribunal has consistently stated, in Judgment 2700, under 6, and Judgment 3295, under 13, for example, that a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. According to this principle, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers. The Tribunal sees nothing in the circumstances of this matter that establishes a special case which justified withholding the document that WHO provided to the HBA from the complainant.

17. The Tribunal has consistently stated that the principle of equality of arms must be observed by ensuring that all parties in a case are provided with all of the materials an adjudicating body such as the HBA uses in an internal appeal, and that the failure to do so constitutes a breach of due process. WHO breached due process by not having provided the relevant documents to the complainant. It also breached due process by not disclosing all of the agreements and related information, which could have assisted the HBA to have made a properly informed determination whether financial constraint was a valid reason for not extending the complainant's contract.

18. It is noted that WHO disclosed to the HBA two agreements which it requested during its proceedings, but did not provide them to

the complainant. WHO has indicated that it would disclose other agreements to the Tribunal at its request.

19. The Tribunal holds that all relevant documents should have been disclosed to the HBA, without its request, to enable it to thoroughly investigate the central question: whether funds were or would have been available or were "expected to be assured" at the material time to fund the extension. It is observed that having received such records as were disclosed to the HBA, the Board did not make a positive finding when it found as follows:

> "The Board Members determined that they could not find any elements to show that there were any breaches of WHO SRR [Staff Regulations and Staff Rules] and applicable procedures or that the reason given to the [complainant] for the non-renewal of his contract was incorrect."

20. The Tribunal considers that because WHO did not disclose all of the relevant materials to the HBA, its investigation was incomplete. The failure to disclose all of the relevant materials prevented the HBA from properly considering the facts. Accordingly, the decision not to extend the complainant's contract not only violated due process but also WHO's duty of care and the impugned decision should be set aside. The complainant is entitled to moral damages. The decision also caused the complainant the loss of the opportunity to have his contract renewed and the loss of career opportunity entitling him to material damages.

21. It is also found that WHO breached its duty of care towards the complainant as is evidenced in the manner in which the complainant was treated. The evidence shows that, between November 2009 and April 2011, the Director of the GMP removed some tasks from him and gave them to Dr C. Dr C. was an unsuccessful candidate for the post of Coordinator of the SME Unit when the complainant was appointed to it. The Director appointed the complainant to the post of Senior Advisor in August 2010 and named Dr C. as acting Coordinator of the SEE Unit in October 2010 while he (the complainant) was still attached to the GMP without any re-profiling or advertisement of

these posts. There is no indication that the complainant was given any meaningful duties or responsibilities in the post of Senior Advisor. In fact, it is obvious that the Director did not have any of the meaningful verbal professional contact that was necessary at their levels with the complainant to enable the complainant to maintain his dignity in the office. This, according to the complainant, was so particularly for a period of about seven weeks between July and August 2010.

22. The complainant states that the Director of the GMP had removed him from all technical and policy responsibilities in May 2010, some three months prior to the decision not to extend his contract. WHO's response is that the Staff Rules give a Director unlimited discretionary power to remove any or all duties at any time, and further, that the Director had previously raised concerns with the complainant in 2009 regarding the progress on the World Malaria Report because he was not satisfied with the complainant's progress on it. WHO states that the Director was therefore free to assign it to another person in the interest of WHO. The evidence shows, however, that some of the reassignments and the manner in which they were done lacked sensitivity.

23. The complainant further alleges that in April 2010 the Director yelled at him and used "[h]arsh words" to him in an open public space and in the presence of other persons. WHO indicates that the Director stated that he may have spoken sternly to the complainant because he had attempted to do something which he thought was "ill-chosen". This act, done as it was in the presence of another person, did not accord with the duty of care to the complainant.

24. The complainant further alleges that there was a pattern of repeated and unusual moves by the Director of the GMP against him which is evidence of personal prejudice. The complainant insists that this is a form of abuse of authority warranting the setting aside of the non-extension decision and the awarding of damages. The complainant has the burden to prove that the alleged incidents show a pattern of personal prejudice in all of the circumstances or that improper

motive or bias was the underlying cause for the incidents. The Tribunal has consistently stated, in Judgment 1775, under 7, reiterated in Judgments 3192, under 13, and 3314, under 9 for example:

> "Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where [...] the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification."

25. It is apparent that there was tension between the complainant and the Director of the GMP who was appointed to head the SME Unit in 2009. The complainant states that for 18 months the Director of the GMP had shown animosity towards him. However, the evidence that the complainant has provided is insufficient to satisfy his burden to prove that he sustained personal prejudice in the sense that the alleged incidents demonstrate a pattern of conduct on the part of the Director that shows that the underlying cause for the conduct was improper motive or bias in all of the circumstances. This ground of the complaint is therefore unfounded.

26. The complainant challenges the internal process as it relates to his case. He relevantly raises delay in the process. It is observed that it was some four months before the complainant reactivated the internal appeal proceedings. There is nothing that points to unreasonable delay, and, accordingly, this claim is unfounded.

27. Based on the finding in consideration 20 above that the complainant is entitled to material damages, he is awarded 80,000 United States dollars. Additionally, the complainant is awarded 30,000 United States dollars in moral damages for WHO's violation of due process and its duty of care towards the complainant, held in considerations 17, 20 and 21 of this Judgment. These sums should be paid within 30 days of the date of delivery of this judgment, failing which they shall bear interest at the rate of 5 per cent per annum from that date until the date

of payment. He is also awarded costs in the amount of 6,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. WHO shall pay the complainant material damages in the amount of 80,000 United States dollars.
3. WHO shall also pay the complainant moral damages in the amount of 30,000 United States dollars.
4. WHO shall pay interest on the sums referred to in points 2 and 3 at the rate of 5 per cent per annum from the date of public delivery of this judgment until the date of payment, unless these sums are paid within 30 days of the date of public delivery of this judgment.
5. WHO shall also pay to the complainant costs in the amount of 6,000 United States dollars.
6. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ