

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**WHO**

**122nd Session**

**Judgment No. 3686**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. M. against the World Health Organization (WHO) on 26 September 2013 and corrected on 14 January 2014, WHO's reply of 23 April, the complainant's rejoinder of 25 July and WHO's surrejoinder of 31 October 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 challenges the Director-General's final decision on her internal appeal in relation to the issuance of new terms of reference altering the functions of her post, arguing that the compensation she was offered was inadequate.

The complainant joined WHO in 1994 and was appointed Deputy Regional Director of WHO's European Regional Office (EURO), at grade D-2, in March 2006. In September 2009 an election took place to fill the position of Regional Director of EURO. Five candidates were initially nominated, including the complainant, but three withdrew, leaving only the complainant and one other person (Ms J.) in the running.

The complainant was unsuccessful and Ms J. took up her functions as Regional Director in February 2010.

The new Regional Director wished to create a new organisational structure for the EURO office without the complainant's role. In anticipation of the formal approval of the new structure, which did not occur until later that year, she began to discuss the implications of this with the complainant in February 2010. Efforts were made to find an alternative assignment for the complainant. Two assignments were proposed (Kazakhstan or Greece), but the complainant considered that they were not commensurate with her skills and experience.

In April 2010 the Regional Director decided to change the complainant's terms of reference by taking back all managerial functions which her predecessor had delegated to the complainant and by assigning the complainant temporary duties related to the proposed reassignment to Greece. In June 2010 the complainant lodged an appeal against that decision with the Regional Board of Appeal (RBA), but she requested permission to proceed directly to the Headquarters Board of Appeal (HBA), because the RBA's recommendation on the case would be addressed to the Regional Director, who had a conflict of interest. This procedural request was rejected by the Regional Director, as was the appeal in due course. The case then came before the HBA, which considered that the complainant's claims concerning the reassignment proposals and the modification of her terms of reference should be rejected, but that she should be awarded up to 10,000 Swiss francs for the procedural violation committed by the Regional Director in failing to refer the complainant's request for waiver of the RBA proceedings to the Director-General.

Meanwhile, in July 2010 the complainant was appointed to the position of Head of the India Country Office/WHO Representative, a grade D-1 position in which she was permitted to retain her personal D-2 status.

In the impugned decision of 3 July 2013, the Director-General partly agreed with the HBA concerning the procedural violation in the RBA proceedings. She also considered that one of the Regional Director's communications addressed to the complainant had been unnecessarily

abrupt. On that basis, she decided to award the complainant 10,000 Swiss francs in moral damages and 2,500 Swiss francs in costs whilst rejecting the complainant's other claims. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her material damages in the amount of 50,000 Swiss francs, moral damages in the amount of 65,000 Swiss francs and reasonable legal fees and costs.

WHO asks the Tribunal to dismiss the complaint in its entirety and to deny all requests for relief.

### CONSIDERATIONS

1. The complainant joined WHO in 1994 as a Technical Officer at the P-4 level. At the material time she was the Deputy Regional Director, WHO/EURO, a D-2 post. In September 2009, she and four other WHO staff members, although three subsequently withdrew, were nominated for election to the post of Regional Director, WHO/EURO. On 15 September 2009, Ms J. was elected as the new Regional Director and she took up her duties on 1 February 2010.

2. At a 3 February 2010 general meeting, the Regional Director presented her vision for the future of the EURO office and presented a new organizational structure for EURO to the staff members. At a subsequent 4 March staff meeting, the Regional Director presented a modified version of the preliminary organigram that had been given to the staff members. The modified organigram had a new D-2 post of Director of Programme Management (DPM) and five D-1 Director posts. However, the complainant's post of Deputy Regional Director did not appear in the organizational structure.

3. On 17 February, prior to this latter general meeting, the complainant, the Regional Director and the Manager of Human Resources (HRM) met. At the meeting, the Regional Director explained the rationale for the restructuring of EURO. The complainant was informed that the restructuring included a reduction in the number of D-2 positions

to include only one D-2 post for the DPM. The complainant was further notified that the DPM post would be focused on development, synergy, and consistency of technical programs, and would require a candidate with an extensive medical background. It was noted that the complainant did not possess the requisite medical background for the position. The Regional Director then made two offers of reassignment to the complainant concerning posts within EURO – one of long-term nature as Head of Country Office/WHO Representative for Kazakhstan, Moldova and Tajikistan, and another of a temporary nature establishing the Non-Communicable Diseases Centre (NCD Centre) in Athens, Greece. Finally, the Regional Director noted that a review of the complainant's Terms of Reference (TORs) as Deputy Regional Director would be needed in order to clarify her role and responsibilities pending any reassignment.

4. According to the minutes of the meeting, in response to the information conveyed by the Regional Director, the complainant stated that an assignment as Head of Country Office/WHO Representative Kazakhstan, Moldova and Tajikistan represented a significant demotion for her and that she was not comfortable with the offer. As to the interim reassignment to Greece, the complainant stated that it was a more feasible option but she would need to explore the implications of the temporary assignment in terms of her continued work after completing the task. She added that it would be possible to handle such a temporary assignment in her current position. Finally, in view of the economic and political climate in Greece at the time, the complainant expressed scepticism about the feasibility of the reassignment option.

5. At the same meeting, the Regional Director advised that the Head of Country Office option was not a demotion and that the complainant's TORs could be expanded and that she could keep her current personal grade of D-2. Regarding the interim reassignment to Greece, the Regional Director stated that the Director of Administration and Finance had confirmed the Greek commitment, that the necessary funds had been transferred by the Government of Greece and that the agreement had been ratified by Parliament, but undertook to verify these matters.

6. On 19 February 2010, the Regional Director followed up on the meeting of 17 February and confirmed the offer made with respect to the post of Head of Country Office/WHO Representative, Kazakhstan, Moldova and Tajikistan. She reiterated her willingness to expand the responsibilities of the post to cover neighbouring countries to best utilize the complainant's skills and experience. The Regional Director also confirmed her intention to seek the Director-General's approval to upgrade the post to the P.06/D.01 level and to allow the complainant to maintain her D-2 grade on a personal basis.

7. The complainant rejected the Head of Country Office/WHO Representative Kazakhstan, Moldova and Tajikistan offer on 9 March. She outlined her concerns regarding the offer, which she did not consider to be commensurate with her qualifications, experience and current position and duties within WHO. She further stated that she viewed the offer as a demotion, which she believed would negatively affect her future career development. In an email exchange with the Regional Director on 25 March concerning the post of Head of Country Office/WHO Representative, Kazakhstan, Moldova and Tajikistan, the complainant confirmed her rejection of the offer on the basis that the position was not commensurate with her current level of expertise, experience, capacity and level of responsibilities within the Organization.

8. By letter of 25 March 2010, the Regional Director advised the complainant that she would be taking back the areas of authority previously delegated to the complainant as Deputy Regional Director by the previous Regional Director. The complainant was also provided with revised TORs, which set out the complainant's duties with respect to the NCD Centre in Athens and were said to be effective for a period of six months, commencing immediately. After the six month period, the TORs were to be evaluated and updated in the best interests of the Organization.

9. The complainant responded the following day stating that she had been taken aback by the decision to change her TORs with immediate effect, especially considering that the new organigram was not to apply

until June 2010. The complainant also expressed her surprise that the decision to change her TORs was taken without consulting her. In light of her concerns, she expressed her desire to comment on the new TORs prior to their becoming effective, following her return from sick leave. On the same day, the Regional Director agreed to postpone the implementation of the new TORs until the complainant had recovered from her illness, so that she could provide her response.

10. In a 7 April email to the complainant, the Regional Director noted that she was still waiting on the complainant's input regarding her revised TORs and invited the complainant to meet, if required. The complainant responded the same day with her comments on the proposed changes to her TORs. Specifically, the complainant raised concerns related to the ratification of the host agreement by the Greek Parliament and the financial viability of the NCD Centre given the economic crisis in Greece. In addition, she echoed her concerns that the interim reassignment to Greece did not correspond to her D-2 post and that it was not a fair representation of her experience, qualifications and competencies. The complainant then proposed that she be assigned to a role as acting Director for one of the Divisions. The complainant noted that there were certain horizontal EURO and WHO-wide functions that she was involved in, and she requested confirmation of her continued involvement in them. The complainant further noted that, prior to agreeing to go ahead with the changes in her current TORs and work regarding the NCD Centre in Athens, she would need to know more about her future at WHO as she could not accept to be seen as a kind of "floater" in the system without long-term vision and objectives, as well as clarity regarding her future professional career development.

11. The Regional Director responded on 9 April and acknowledged the complainant's comments regarding the TORs and her concerns. The Regional Director stated that she hoped the NCD Centre in Athens would be going ahead and that the complainant would work on it for six months reporting directly to her. The Regional Director rejected the complainant's proposal to be assigned acting Director for one of the Divisions. The Regional Director advised the complainant that she

would remain assigned to her present post during the temporary assignment; however, her title was to be revised to Regional Director's Special Representative. The complainant was further informed that her involvement in certain horizontal EURO and WHO-wide functions would be suspended until further notice, as well as her supervisory role over a number of offices and programmes, as well as Divisional Directors. The complainant was also advised that she would not be perceived as a "floater" in the office but that, at the current stage, the Regional Director could not commit to any long-term positions for her. Finally, it was noted that, as of 12 April 2010, the Regional Director would take over all managerial functions previously delegated to the complainant and that she would draft and share with the complainant before publication an announcement regarding the complainant's new role and TORs.

12. In the meantime, on 22 March, the Regional Director wrote to the Minister of Health and Social Solidarity in Greece and informed her that she believed the NCD Centre should be operational as soon as possible. She proposed that the Centre be officially inaugurated in May of 2010.

13. On 12 April, the complainant emailed the Director of Administration and Finance to follow up on the proposed inauguration of the NCD Centre. The complainant sought clarification on: the status of the ratification of the agreement by the Greek Parliament; the transfer of funds by the Government of Greece to WHO; and the availability of funds through the internal mechanism of advancing the funds from headquarters. The Director of Finance and Administration responded the same day. She advised that the agreement was still awaiting ratification at the Greek Parliament level and that WHO had not received any payments from the Government of Greece. The Director added that "given the financial crisis in Greece recently and the perceived high risk associated with ratification under these new circumstances, we have decided with the Regional Director to suspend usage of this advance, until further notice". Ultimately, in September 2012, Greece advised that it had withdrawn its offer to host the NCD Centre.

14. On 21 April, the Executive Director of the Director-General's Office contacted the complainant on behalf of the Director-General to ascertain her interest in an upcoming vacancy for WHO Representative in Angola. The complainant advised that she did not wish to be considered for the post as she could not speak Portuguese.

15. On 7 July, the Director-General announced the complainant's appointment to the D-1 post of Head of Office/WHO Representative to India. The complainant maintained her personal grade of D-2.

16. The complainant lodged her appeal against the Regional Director's 9 April decision on 8 June. In the Notice of Intention she requested that her appeal be transferred to the HBA on the basis of the Regional Director's personal involvement in the matter. Having been informed by the Chair of the RBA of the complainant's request and the resulting requirement to forward the transfer request to the Director-General, the Regional Director stated that she had determined the RBA was the competent body to consider the appeal, pursuant to Staff Rule 1230.2. Subsequently, the RBA recommended that the appeal should be dismissed as irreceivable. On 18 March 2011, the Regional Director informed the complainant of her decision to dismiss the appeal in its entirety. The Regional Director also confirmed the complainant's decision not to pursue the claims of harassment raised in her appeal.

17. The complainant lodged an appeal against the Regional Director's decision with the HBA. On 15 February 2013, the HBA submitted its report to the Director-General. Ultimately, the HBA found the appeal to be receivable. In regard to the handling of the complainant's request for waiver of the RBA proceedings, the HBA concluded that it was a procedural error on the part of the Regional Director not to forward the waiver request to the Director-General, which constituted a lack of due process. As a result, the HBA recommended that the complainant be awarded moral damages up to 10,000 Swiss francs for breach of procedure and undue delay. The HBA also recommended an award of legal costs for the appeals brought before the RBA and HBA. With respect to the complainant's change of title, the HBA noted that,



while a new title was proposed, it never came into effect. Finally, the HBA did not find anything to indicate the decision to change the complainant's TORs was unlawful or in breach of the Staff Rules and Regulations.

18. On 3 July 2013, the Director-General awarded the complainant moral damages of 10,000 Swiss francs for: failure on the part of the Regional Director to forward the waiver request to the Director-General; proposing two reassignments that were not commensurate with the complainant's position as Deputy Regional Director; and for the issuance of the letter dated 25 March 2010, which the Director-General found to be unnecessarily abrupt. In addition, the Director-General awarded the complainant up to 2,500 Swiss francs in legal costs. Concerning the offers of reassignment made to the complainant, the Director-General found no evidence of bad faith and was satisfied that the reassignments were proposed in the larger context of wide-ranging and diligent efforts to find a suitable position for the complainant. The Director-General further observed that a suitable reassignment was found for the complainant within a reasonable period of time – namely, the WHO Representative India post.

19. The complainant submits that the Regional Director's 9 April decisions were *ultra vires*. At the material time, the Regional Director's new organizational structure had not been approved and it was not approved until September 2010. Consequently, in the interim period, the complainant should have retained her functions. As well, the Regional Director did not have the Director-General's approval to issue new TORs for the complainant's post or change her title. Moreover, the complainant submits that the Regional Director's decisions and actions in connection with the restructuring of the EURO office were improperly influenced by Member States and were, therefore, unlawful.

20. WHO submits the new claims in the rejoinder that the Regional Director's decisions were *ultra vires* are irreceivable as they introduce a new cause of action for which the internal means of redress have not been exhausted. On the merits, WHO submits the Regional Director had

the requisite authority to reorganize the EURO office, and conducted the necessary consultations with the Director-General concerning the new structure, to the extent that it impacted on the D-2 post in the office. Furthermore, the Organization maintains that the Director-General approved the modifications proposed by the Regional Director to the complainant's TORs.

21. Regarding the complainant's submission that it was improper for the Regional Director to initiate discussions with her about the proposed reorganization of the EURO office before the reorganization plan was duly authorized, WHO maintains that the provision of advance information to the complainant about the restructuring of the EURO office, including the facilitation of her participation in discussions about her TORs and potential new assignments, was done in order to fulfill its duty of care to the complainant and to respect her dignity. In its pleadings, WHO notes in relation to the complainant's *ultra vires* arguments that she may have misunderstood its submissions in Reply. WHO stresses the reorganization decision was not tainted by interference from Member States nor was it necessary for the Regional Director to obtain the approval of the Regional Committee to carry out the reorganization. Lastly, there were no breaches of the Staff Rules or the e-Manual in connection with the changes to the complainant's TORs and title.

22. Turning to the receivability question, the case law is clear that a complainant's claims must not exceed in scope the claims submitted during the internal appeal process. However, a complainant is not precluded from advancing new pleas before the Tribunal even if those pleas were not placed before the relevant internal appeal body (see Judgment 2571, consideration 5). In the present case, the complainant's submission that the actions taken by the Regional Director were unlawful for having occurred prior to the Regional Director's authorization of the restructuring plan is receivable as a plea that fits within the ambit of her challenge to the lawfulness of the decisions taken against her in the letter of 9 April 2010. Similarly, the complainant's allegation concerning the Regional Director's failure to

obtain the requisite approval of the Director-General before issuing her revised TORs and changing her title of Deputy Regional Director is a new plea contesting the lawfulness of the decision made by the Regional Director in the letter of 9 April 2010 and, therefore, is receivable. Additionally, the complainant's allegation that the Regional Director's decisions in the letter of 9 April 2010 were unlawful for having been improperly influenced by Member States will be considered.

23. However, the complainant's submission that the Regional Director's decisions concerning the internal restructuring of the EURO office are unlawful due to the improper influence of Member States falls outside the scope of the complaint and, therefore, is irreceivable for having failed to exhaust the internal means of redress. Similarly, the complainant's claim with respect to the alleged unlawfulness of the Regional Director's decision to appoint Mr M.-M. to the DPM position is irreceivable on the basis that it represents a new claim which falls outside the scope of the complaint.

24. On the merits, WHO does not dispute that at the material time, that is from 1 February when the Regional Director took up her duties to 9 April the date of the Regional Director's decisions, the proposed restructuring of the EURO office had not been approved and, in fact, was not approved until much later that year. It is also clear that at the material time the Regional Director's proposed new structure for the office did not include the post of Deputy Regional Director. It was to be replaced by a new D-2 post, Director of Programme Management. It is in this context that the actions and decisions taken by the Regional Director must be examined.

25. It is also not disputed that the two offers of reassignment made to the complainant were not commensurate with her qualifications and experience, which was acknowledged by the Director-General in her final decision, as was the Regional Director's failure to forward the complainant's waiver request to the Director-General. However, for the reasons set out below, WHO's assertion that the discussions with the complainant about the restructuring, her new TORs and potential new

assignments were done to fulfill its duty of care and to respect her dignity are untenable.

26. As regards the reassignment offer as Head of Country Office/WHO Representative for Kazakhstan, Moldova and Tajikistan, in addition to not being commensurate with the complainant's qualifications and experience, as later revealed, the post still had to be reclassified to a P.06/D.01 and the Director-General's approval had to be sought for the complainant to retain her personal grade of D-2. Assuming that the Director-General would not withhold her approval, the reclassification of a post is a lengthy complex process. Given these contingencies, it cannot be said that it was an offer capable of acceptance at the time.

27. The reassignment in relation to the NCD Centre is even more problematic. In response to the complainant's inquiry regarding the status of the NCD Centre, on Monday 12 April the Director of Finance and Administration advised, as noted above, that "given the financial crisis in Greece recently and the perceived high risk associated with ratification under these new circumstances, we have decided with [the Regional Director] to suspend usage of this advance, until further notice". It is evident from this communication that on the preceding Friday 9 April when the Regional Director informed the complainant of this reassignment, the Regional Director must have known that the NCD Centre would not be going ahead at that time and it was no longer a viable option. This was not communicated to the complainant.

28. As set out above, the Regional Director also took decisions affecting the status of the complainant's D-2 post. As noted by WHO, subject to the limited and shared authority mentioned in Article 53 of the WHO Constitution, the WHO Constitution does not assign any administrative authority to Regional Directors. Rather, their administrative authority must derive from the Director-General by a delegation of authority. According to the delegation of authority document dated 28 April 2008, the Director-General delegated to the Regional Director comprehensive authority over decisions affecting staff up to the D-1 level.

However, the Director-General retained responsibility for all D-2 level posts within WHO. Accordingly, the Regional Director did not have the authority to alter the complainant's TORs without the authorization of the Director-General. While WHO maintains that the Regional Director consulted with the Director-General and obtained the Director-General's approval in relation to the proposed modification of the complainant's TORs, WHO does not provide documentary evidence to corroborate these assertions. Consequently, WHO has failed to establish the lawfulness of the Regional Director's decision to alter the complainant's TORs.

29. As to the functions withdrawn from the complainant's D-2 post, it appears that certain functions had been delegated to the Deputy Regional Director post by the previous Regional Director at the time of the creation of the post in 2006. In her letters of 25 March 2010 and 9 April 2010, the Regional Director purported to take back these same functions from the complainant. However, WHO does not provide any documentation to show that the functions withdrawn from the complainant's D-2 post were the same functions that had been delegated to her post by the previous Regional Director. Instead, WHO merely provides a delegation of authority document signed by the previous Regional Director that does not identify the delegated functions or responsibilities. In the absence of such information, it cannot be assumed that the Regional Director took back the same previously delegated functions and responsibilities as opposed to functions and responsibilities assigned by the Director-General. In these circumstances, WHO has failed to establish that the withdrawal of the functions and responsibilities was lawful.

30. At this juncture, it must be observed that the change to the complainant's title coupled with the removal of all her managerial responsibilities and functions are actions that can only be described as demeaning and humiliating.

31. Turning to the internal appeal before the RBA, although the Regional Director's failure to forward the complainant's waiver request has been recognized, the Regional Director took a decision in a situation

where she clearly had a conflict of interest. This coupled with the failure to forward the waiver request, reflects a flagrant disregard of the complainant's rights.

32. Lastly, as concerns the complainant's allegation that the 9 April decisions were influenced by Member States, this has not been substantiated and no further consideration is required.

33. The next question that arises is whether WHO can rely on facts subsequent to 9 April 2010 for the purpose of rebutting the complainant's allegations of bad faith and breach of the duty of care. The complainant takes issue with WHO's reliance on the WHO Representative/Angola and the WHO Representative/India reassignment offers as evidence of the Regional Director's good faith efforts to find the complainant a suitable reassignment. The complainant submits that these offers occurred after the 9 April 2010 decision and, therefore, these facts are irrelevant to the appeal and must be disregarded by the Tribunal.

34. WHO submits that the good faith actions taken to find the complainant a suitable reassignment subsequent to 9 April 2010 are relevant to the current appeal and should not be disregarded by the Tribunal. WHO maintains that in order to assess the complainant's claims of bad faith and breach of the duty of care the Tribunal must examine the surrounding circumstances, including actions taken after the 9 April decisions. WHO maintains that its subsequent conduct is relevant circumstantial evidence from which an inference of good faith can be drawn.

35. In Judgment 2364, consideration 2, the Tribunal considered grounds of complaint based on facts arising subsequent to the impugned decision. In holding that the claims were not receivable the Tribunal stated:

“Even though it is only the ‘decision’ of 10 March 2002 which he wishes to have set aside, the complainant refers to facts which arose after that date and adds in his rejoinder that, since the final decision was dated 23 July 2002, ‘all grievances raised until that date can validly be taken into account’ as part of his complaint. In addition, before the Tribunal he also

submits a claim for the repeal of the internal audit charter – a claim that was not put forward in his internal appeal.

With regard to the claims based on facts subsequent to 10 March 2002 and presented as grounds for appeal, since internal remedies were not exhausted (Article VII(1) of the Statute of the Tribunal), they must be deemed irreceivable. The same goes for the claims that were not put forward in the internal appeal proceedings.

Furthermore, the validity of a decision or measure cannot be judged on the basis of facts occurring subsequently to that decision or measure.

In the case in hand, therefore, all facts subsequent to the ‘decision’ of 10 March 2002 must be disregarded and the situation must be considered as it stood at that date.” (Emphasis added.)

36. For the same reasons, WHO may not rely on the WHO Representative/Angola and WHO Representative/India reassignment offers – which occurred after the 9 April decisions – to rebut the complainant’s allegations of bad faith and breach of the duty of care. Instead, the situation must be considered by the Tribunal as it stood on 9 April 2010.

37. In summary, in its dealings with the complainant, WHO breached its duty of care, did not act in good faith in making its reassignment offers, and did not treat her with dignity and respect. The amount already awarded for moral damages is inadequate in light of the repeated and egregious disregard of the complainant’s rights and her dignity. WHO will be ordered to pay the complainant moral damages in the amount of 65,000 Swiss francs in addition to the amount already awarded by the Director-General. She is also entitled to additional costs in the amount of 5,000 Swiss francs.

## DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the amount of 65,000 Swiss francs.

2. WHO shall pay the complainant costs in the amount of 5,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER