A.

v.

WHO

124th Session **Judgment No. 3869**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. A. against the World Health Organization (WHO) on 23 September 2014 and corrected on 3 October 2014, WHO's reply of 16 January 2015, the complainant's rejoinder of 7 April and WHO's surrejoinder of 25 June 2015;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the application for hearings submitted by the complainant;

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

The complainant, a former WHO staff member, challenges the decision to abolish his post.

The complainant, who held a continuing appointment at grade P.5, received on 21 January 2011 a letter dated 17 January notifying him that, "due to the financial situation and a programmatic shift in priorities", his post was abolished. He was informed that efforts would be made to reassign him through a formal process conducted by the Reassignment Committee.

On 18 March 2011 he filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) and in May lodged a statement of appeal challenging the decision to abolish his post. On 23 August 2011 he was informed that the reassignment process had proved

unsuccessful and that his appointment was terminated with three months' notice. He separated from service on 30 November 2011.

In its report of 14 April 2014 the HBA noted that the complainant's appeal was against the decision to abolish his post and that he had not contested the decision of 23 August 2011 to terminate his appointment. Hence the HBA did not review the termination decision. The HBA concluded that the decision to abolish the complainant's post complied with applicable procedural requirements and that it was based on objective grounds (namely financial and programmatic reasons). It also found that the complainant's claims that the decision was tainted with prejudice, discrimination and unequal treatment were not supported by the available evidence. It therefore recommended that the appeal be dismissed.

By letter dated 8 May 2014 the complainant was informed that the Director-General endorsed the conclusions and recommendation of the HBA to dismiss his appeal. That is the decision he impugns before the Tribunal.

The complainant asks the Tribunal to order his reinstatement, or, in the alternative, to award him compensation. He considers that an award of 391,356.20 United States dollars representing two years' salary less his earnings during that time would be an appropriate amount.

WHO asks the Tribunal to determine whether the complaint was filed in a timely manner. It also asks it to find the complaint irreceivable to the extent that it concerns the decision to terminate the complainant's appointment and to dismiss the complaint in its entirety as devoid of merit.

CONSIDERATIONS

1. On 30 November 2011, the complainant separated from service with WHO. He had commenced working for WHO in October 2001 and secured a continuing appointment on 1 July 2007. On 16 February 2009, he was appointed to the post of Health Economist at grade P.5. In January 2011, the complainant was informed that this post was to be abolished and attempts would be made to reassign him. The decision to abolish the position was made on 17 January 2011. These attempts to reassign

the complainant were unsuccessful and, in the result, he was informed, on 23 August 2011, that a decision had been made to terminate his employment, effective 30 November 2011.

2. On 18 March 2011, the complainant submitted a notice of intention to appeal to the HBA and lodged a statement of appeal on 31 May 2011. The HBA met on three occasions in late 2013 and early 2014. It issued its report on 14 April 2014. The report appears to have involved a comprehensive and detailed consideration of the facts and circumstances that had led to the abolition of the complainant's post. The HBA reached four conclusions. The first addressed the receivability of the internal appeal and had two elements. The first element was that the appeal, insofar as it challenged the 17 January 2011 decision to abolish the complainant's post, was receivable. The second element was that the appeal, insofar as it challenged the decision in August 2011 to terminate his employment, was not receivable.

3. The second and third conclusions of the HBA were that the abolition of the complainant's post complied with the applicable procedural legal requirements and had been based on objective grounds, namely financial and programmatic reasons. The fourth was that the complainant's claims that the abolition of his post was the result of prejudice, discrimination and unequal treatment were not supported by the available evidence. In the result, the HBA recommended that the appeal be dismissed in its entirety as well as the request for redress. By letter dated 8 May 2014, the Director-General set out her decision in relation to the appeal. She expressly agreed with the four conclusions of the HBA and its recommendation to dismiss the appeal in its entirety. This is the impugned decision. The Director-General concluded by saying that she hoped the complainant would accept her decision as final but advised him that any appeal to this Tribunal "would have to be filed within ninety (90) days of [his] receipt of this letter".

4. A threshold issue is raised in these proceedings by WHO. It argues that the complainant failed to comply with the time limit prescribed in Article VII, paragraph 2, of the Tribunal's Statute, namely that the

complaint must be filed "within ninety days after the complainant was notified of the decision impugned". The complaint was, in fact, filed on 23 September 2014. The combined legal and factual issue is when was the complainant "notified of the decision" for the purposes of Article VII, paragraph 2.

5. This issue was addressed by the complainant in his brief, though not in detail. It is noted in the brief that the letter of 8 May 2014 containing the impugned decision was handed to the complainant on or about 12 July 2014 by his neighbour of 10 years who collected the complainant's mail when he was absent from his home. This is plainly a reference to the hard copy of the letter. The neighbour had collected the hard copy of the letter on or about 4 July 2014 and retained it until the complainant returned on or about 12 July 2014 when the neighbour handed over the mail. If the date of notification was 12 July 2014 then the complaint was filed within the prescribed time limit.

6. In its reply, WHO does not dispute these facts. Rather it argues that the date of notification was on or about 8 May 2014. In support of this argument, WHO relies on an email chain of early May 2014. The first email, dated 6 May 2014, was from an assistant of the Executive Director, Office of the Director-General, to the complainant which was sent to four different email addresses, each seemingly an address of the complainant incorporating variations of his name. The assistant told the complainant in the email that a decision of the Director-General in his appeal would be sent to him shortly and she sought to confirm whether the address she had on file, a Swiss address, was his correct mailing address. By email response on the same day from one of the email addresses to which the initial email had been sent, the complainant indicated that his current address was another address. It was an address in Nigeria.

7. On 8 May 2014 the assistant sent to the complainant at the same email address as the one he used to reply to the email of 6 May a scanned copy of the HBA report and the Director-General's letter of 8 May 2014. Those documents were described by the assistant in the

email as "an advance copy" of the letter and the report and she noted that the originals had been transmitted by registered mail to the Nigerian address the complainant had furnished two days earlier. After referring to the Tribunal's case law concerning proof of receipt of a document, WHO says "it is reasonable to assume that the complainant received and opened the email of 8 May 2014 on or around the date that it bore".

8. In his rejoinder, the complainant recounts WHO's arguments set out in the preceding consideration to the effect that the "decision should be deemed receivable on or about [8 May 2014] rather than on the date on which the decision letter was received". The complainant then refers to Judgment 595, consideration 6, which is a decision of the Tribunal decided in 1983 and which might be viewed as establishing that the relevant date, for calculating time limits, was the date of receipt of a hard copy of a letter containing the impugned decision. What is important is that the complainant does not contest WHO's contention that he received and opened the email of 8 May 2014 on or about the date it bore. An inference might be drawn that the complainant was comparatively assiduous in opening and reading emails having regard to his prompt response on 6 May 2014 to the request of the same date for his current address and this inference can be drawn, at least in relation to the email of 8 May 2014, having regard to his failure to contest the fact asserted by WHO, namely that he opened that last mentioned email on or about 8 May 2014.

9. Whatever may have been the state of the Tribunal's case law in 1983, it is now settled that a decision may validly be notified by email and the time runs from the date on which the complainant learns of the decision (see, for example, Judgment 2966, consideration 8). It is true that circumstances can arise where the email communication together with a scanned copy of a hardcopy document accompanying the email misleads a complainant about when a time limit has commenced to run. An example of this is found in a recent judgment: Judgment 3704, consideration 8. However, in the present case, the complainant does not say that, as a matter of fact, the combined effect of the language used in the email of 8 May 2014 and the concluding observations of the

Director-General in the letter of the same date, led him to believe that the 90-day time limit in the Tribunal's Statute would begin to run when he received a hard copy of the letter of 8 May 2014. Had such a statement been advanced by the complainant, it would have been necessary for the Tribunal to assess the veracity of the statement having regard to all the circumstances. Judgment 3704, just referred to, contains at consideration 3 an often repeated statement of the general principles of the Tribunal concerning the need to ensure strict compliance with time limits. Fundamentally they are intended to provide a reasonable opportunity to challenge final administrative decisions but also to create legal certainty and stability between organisations and their staff.

10. In the present case, the complaint was not filed within the time limit specified in Article VII, paragraph 2, of the Tribunal's Statute and, accordingly, is not receivable. It thus should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ