G.

v.

WHO

127th Session **Judgment No. 4094**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. A. G. against the World Health Organization (WHO) on 7 December 2016 and corrected on 11 January 2017, WHO's reply of 13 April, the complainant's rejoinder of 9 June and WHO's surrejoinder of 12 September 2017;

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

Having examined the written submissions and decided not to order 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 to abolish her post and to terminate her fixed-term contract.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO. She joined UNAIDS in February 2008 as a National Country Officer, at grade NO-C, in the Country Office in Port-of-Spain. Her initial two-year fixed-term appointment was renewed in February 2010 and again in February 2012 and was due to expire on 31 January 2014.

On 9 January 2013 the complainant was informed that the Executive Director had decided to abolish her position. By a letter of 18 February 2013, she was advised that this decision had been taken "in connection with the re-profiling of the office to which [she] was

assigned" and that reasonable efforts would be made to reassign her to a vacant post in her duty station (Port-of-Spain) during a period of six months from the date of receipt of the letter. She was also invited to apply for vacant posts in the context of the 2013 Mobility Exercise, which coincided with her reassignment period, and was told that her status as a staff member participating in a reassignment process would be taken into account by the Mobility Review Committee in the formulation of its recommendations to the Executive Director. In the context of the Mobility Exercise, she was offered in May 2013 the post of Investment and Efficiency Adviser, at grade P.4, in the UNAIDS Country Office in Malawi, which she declined for personal reasons.

By a letter of 31 July 2013, the Director of Human Resources Management informed the complainant that no suitable placement had been identified for her in her duty station during the reassignment period, which was due to expire on 4 September 2013, and that consequently her fixed-term appointment would be terminated effective 4 December 2013. He added that the letter served to provide her with the three months' notice required under the applicable rules and that she would receive an indemnity based on her years of service and increased by 50 per cent.

On 23 September 2013 the complainant filed a notice of intention to appeal the decision of 31 July 2013 and on 20 December 2013 she filed her statement of appeal. She challenged not only the termination of her appointment, but also the fact that her termination indemnities had been calculated at the NO-C level rather than the NO-D level. In this regard, she contended that there had been inordinate delay in the processing of the request for reclassification of her post, and that the reclassification at the NO-D level, which had ultimately been accepted, ought to have been made retroactive by at least three years. She claimed reinstatement, moral damages and costs.

In its report of 8 July 2016, the Headquarters Board of Appeal (HBA) concluded that UNAIDS had made efforts to reassign the complainant and that her separation was authorised by the relevant rules. Regarding the reclassification of her post, the HBA noted that the complainant's salary and termination indemnities had been adjusted retroactively to reflect the reclassification of her post and that she had received full

payment of the amounts due in April 2014. However, it considered that the delay in executing the reclassification decision and the wrong calculation of her separation indemnities entitled her to damages and costs. The HBA recommended that WHO pay her 10,000 Swiss francs in moral damages and 5,000 francs in legal costs upon the presentation of receipts.

By a letter of 6 September 2016, the Executive Director informed the complainant that he had decided to accept the HBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to award her compensation in an amount equal to two years' salary at the level of NO-D, step 6, including all pension benefits. She claims 15,000 Swiss francs in moral damages and 20,000 francs in legal costs.

WHO asks the Tribunal to dismiss the complaint.

CONSIDERATIONS

1. Against the preceding background, it is necessary to consider the pleas of the parties.

2. On 9 January 2013 the complainant was informed orally that the post she then occupied was to be abolished. Thereafter steps were taken to try and reassign her to another post within UNAIDS. That did not occur and her contract expired on 4 December 2013 as a result of her post having been abolished. The Tribunal notes that the complainant was then on a two-year fixed-term contract which was scheduled to conclude on 31 January 2014 had her position not been abolished.

3. The central issue in these proceedings is whether UNAIDS took adequate steps to try and reassign the complainant. A material portion of WHO's pleas is directed to establishing that the complainant was afforded such opportunities for reassignment as arose under WHO Staff Rule 1050 "Abolition of post" and Information Note UNAIDS – HRM/IN 2012-2 "Reassignment Process for Abolition of Position and Staff Deemed in Need of Placement" (the Information Note). While the

question of whether there has been compliance with provisions of this type can be a relevant consideration in a case such as the present, such provisions do not mark out the boundaries of an organization's obligations towards a staff member whose position is abolished.

4. The Tribunal recently addressed this question in Judgment 4036, considerations 7 and 8, citing Judgment 3908. Several propositions emerge from Judgment 4036 which are consistent with earlier case law. The first is that normative legal documents promulgated within an organization cannot alone circumscribe the obligation of the organization to explore other employment options within the organization for staff whose positions have been abolished. The second is that an organization has a duty to apply processes biased in favour of the staff member whose position has been abolished and which are likely to promote appointment to another position. The third and related proposition is that an organization has an obligation to deal fairly with staff who occupy an abolished position which ordinarily extends to finding, if they exist, other positions within the organization for which those staff have the experience and qualifications. This last proposition is qualified by matters referred to in consideration 16 of Judgment 3908. The fourth proposition is that it is not the Tribunal's role to actually assess whether a staff member whose position has been abolished was suitable for another position to which they might have been reassigned. Rather, it is to ascertain whether any or adequate consideration was given to the fact that the complainant was then a member of staff whose post had been abolished and was facing the termination of her or his employment.

5. In the present case, in addition to the application of Staff Rule 1050 and the Information Note, another process was in play that might be viewed as a further step undertaken by the Organization to satisfy its obligation, as discussed in the case law, to attempt to reassign the complainant in the face of the abolition of her post. It involved the participation of the complainant in the 2013 Mobility Exercise. As noted earlier, the complainant was informed on 9 January 2013 that her position was to be abolished. On 18 February 2013 she was invited to participate in the 2013 Mobility Exercise. The complainant's participation

enabled her to seek appointment to positions which otherwise may not have been available to her having regard to her status as a locally recruited National Country Officer. In the material before the Tribunal, four "key guiding principles" are identified as governing the 2013 Mobility Exercise. The fourth was: "giving priority consideration to fixed term staff who are due for mobility and fixed term staff with five or more years of continuous and uninterrupted service whose positions are planned to be abolished in 2013".

Thus, if this principle was applied in the consideration of, relevantly, the positions for which the complainant applied through her participation in the mobility exercise, it would have constituted a significant step towards the satisfaction of the obligation of the Organization to endeavour to reassign the complainant in the face of the abolition of her position.

6. In its reply WHO identified the six positions the complainant applied for in the context of the Mobility Exercise. It also identified one position that the complainant was actually offered (though this position was not one of the six she had applied for) as part of that exercise, namely the position of Investment and Efficiency Adviser, at grade P.4, in the UNAIDS Country Office in Malawi. For personal reasons which are not questioned by WHO in any substantial way in the pleas, the complainant declined this offer. However, the offer is significant in two related respects. Firstly, it involved an offer of a post which was a Professional category post, that is a post subject to international recruitment, and, secondly, the post was at a P.4 grade which would have involved, had it been accepted, a promotion for the complainant. Thus, there was no fundamental barrier to offering the complainant a Professional category post involving a promotion. Three of the six positions for which the complainant applied were, as explained by WHO in its reply, "filled through lateral reassignment in the context of the 2013 Mobility Exercise, i.e. serving internationally recruited fixed-term professional staff who were due for mobility in 2013 and already held the respective grades (P.4 and P.5)". No suggestion is made in the reply that the complainant was unqualified to fill these positions nor that any consideration was given in evaluating her suitability with due regard to the fact that her position had been abolished, notwithstanding

the identification of that criterion as one of the four "key guiding principles" in placing staff in the context of the 2013 Mobility Exercise.

7. In addition to the six positions identified by the complainant at the time she engaged in the Mobility Exercise, she identifies in her pleas several other positions to which she, in her view, could have been appointed rather than being separated following the abolition of her position. WHO identifies, in its pleas, how several of these positions were filled and there is a repeated reference to the staff member appointed as being "an internationally recruited professional staff, who already held the [P.4 or P.5] grade, was due for mobility in 2013 and met all the requirements of the position". Moreover, WHO argues in the reply that the reassignment had to be to a vacant post at the same grade as the post abolished or one grade lower within the country of nationality of the complainant. These factors, it points out, rendered the identified positions "not available for reassignment of the complainant in the context of the reassignment process under WHO Staff Rule 1050 and [the Information Note]".

8. In her rejoinder, the complainant argues she was entitled to be treated with priority having regard to the "key guiding principles" for the 2013 Mobility Exercise, especially considering that her position was to be abolished (and, in addition, that it was necessary to be attentive to the applications of women). The answer of WHO to this proposition in its surrejoinder is to refer to Judgment 3103, consideration 10, which, by analogy, establishes that these guiding principles would only be engaged when choosing between equally qualified candidates. However, what WHO does not argue, nor is it established from the documents in evidence, is that the complainant's status as a staff member whose position had been abolished, was taken into account as a factor of significance in evaluating her suitability for appointment when compared to the suitability of others appointed in the 2013 Mobility Exercise. As is evident from Judgment 4036, referred to earlier, it should have been. Moreover, the provisions in Staff Rule 1050.5.1 and Staff Rule 1050.5.3 that limited reassignment to a post at the same grade as the post abolished, or one grade lower, within the locality of the abolished post, did not exhaustively

identify the Organization's obligations concerning the reassignment of the complainant, particularly given UNAIDS preparedness to appoint the complainant, in the context of the Mobility Exercise, to a professional post in another country which involved promotion (see Judgment 3916, consideration 11).

9. The complainant is entitled to moral damages for the unfair treatment that she suffered, as well as material damages for the lost opportunity to remain employed and secure further employment with UNAIDS. The Tribunal assesses those damages in the sums of 10,000 and 20,000 Swiss francs respectively. She is also entitled to costs, assessed in the sum of 7,000 Swiss francs.

10. It is unnecessary to deal with other issues, including procedural issues, raised by the complainant.

DECISION

For the above reasons,

1. WHO shall pay the complainant 10,000 Swiss francs in moral damages.
2. WHO shall pay the complainant 20,000 Swiss francs in material damages.
3. WHO shall pay the complainant 7,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2018, Ms Dolores M. Hansen, Judge presiding the meeting, 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 6 February 2019.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ