B.

v.

WHO

129th Session **Judgment No. 4237**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. B. against the World Health Organization (WHO) on 24 November 2017 and corrected on 29 January 2018, WHO's reply of 7 May, the complainant's rejoinder of 27 August, corrected on 7 September, and WHO's surrejoinder of 6 December 2018;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision – taken after his resignation – to find him guilty of serious misconduct, and the decision to withhold from his separation entitlements an amount corresponding to financial losses allegedly incurred by WHO as a result of his misconduct.

The complainant joined WHO in November 2005. At the material time, he held a continuing appointment as Head of the Procurement and Supply Services Unit (PSS) of the Regional Office for Africa (AFRO) in Brazzaville, Republic of the Congo.

Following a compliance review, which identified irregularities in the procurement and supply processes in PSS, the Regional Director for Africa requested the Office of Internal Oversight Services (IOS) to carry out an investigation into the alleged irregularities. IOS commenced the investigation in April 2013 and the complainant was relevantly notified on 30 April, while he was on sick leave.

On 21 June 2013 the complainant was informed that the Regional Director had decided to reassign him with immediate effect for an initial period of three months pending investigation, to enable IOS to complete the investigation in optimal conditions. On 3 December 2013 he was informed that the Regional Director had decided to suspend him from his functions with pay for 30 days pursuant to Staff Rule 1120 and to block his access to his WHO email account, as well as the WHO/AFRO premises, but to allow him access to the medical services.

IOS undertook two missions to AFRO for the purposes of the investigation. The first mission took place in May and the second in December 2013. The complainant was interviewed by IOS during the second mission, on 11 December 2013. An additional interview that was scheduled for 13 December never took place, because on 12 December 2013 the complainant went on certified sick leave. In a medical certificate of the same date, his treating physician diagnosed him with acute stress related to his workplace and signed him off work for eight days.

On 14 December 2013 the complainant submitted his resignation, referring to the effects of the investigation on his health. He asked that the statutory three-month notice period be waived so that his resignation could take effect on 20 December 2013. In a medical certificate of 19 December, his treating physician signed him off work for an initial period of 30 days. By a letter of 30 December 2013, the Regional Director accepted the complainant's resignation effective 31 December 2013 and informed him that he was still subject to an investigation for serious misconduct, that the payment of his separation entitlements would be withheld pending the outcome of the IOS investigation, and that his access to his WHO email account and the WHO/AFRO premises remained suspended.

IOS submitted its investigation report on 3 October 2014. It concluded that the complainant had failed to disclose a conflict of interest with two companies in breach of Staff Rule 110.7.1; he had failed to cooperate with IOS during the investigation in breach of paragraph 25 of the WHO Fraud and Prevention Policy; he had violated several Principles of WHO procurement and procurement processes contained in the WHO eManual; he had signed a contract amendment increasing the price of the purchase of services without the required authority; and he had used his official position to secure a personal advantage in breach of Staff Rule 110.8.3 and paragraph 19 of the Ethical principles and conduct of staff. IOS recommended that the Administration determine whether the complainant's actions amounted to misconduct warranting the imposition of disciplinary or other measures, taking into account that the complainant had in the meantime resigned, and that it take the necessary measures to recover the amounts corresponding to the estimated financial loss incurred by WHO as a result of the complainant's actions.

By a letter of 18 December 2014 to which a copy of the IOS report was attached, the complainant was notified of the findings of the IOS investigation and was invited to provide his comments. In a letter of 21 February 2015, the complainant refuted the charges raised against him and asserted that the investigation had been carried out in a disrespectful and intimidating manner and was tainted with irregularities, breach of due process, lack of transparency, prejudice and lack of respect for his dignity. He asked to be paid separation emoluments without delay. By a letter of 18 June 2015, he was informed of the Regional Director's decision to endorse the findings of the IOS report and to confirm that he had engaged in serious misconduct, for which he would have been subjected to summary dismissal had he still been a WHO staff member. By the same letter, the complainant was also informed that the total amount of 48,768 United States dollars, which corresponded to the financial loss incurred by WHO by reason of his misconduct, would be recovered from his separation emoluments.

On 24 August 2015 the complainant submitted a notice of intention to appeal against the 18 June 2015 decision and asked that it be merged with an earlier notice of intention to appeal lodged by him on 25 May 2015 against the Administration's failure to pay him his separation emoluments. On 9 October 2015 he submitted his full statement of appeal to the Regional Board of Appeal (RBA). The RBA issued its report on 1 September 2016 recommending that WHO "not pay the entitlements to the [complainant]", that it "pay [him] moral damages", and that it "drop the recovery of the loss of [48,768 United States dollars]". In his decision of 9 November 2016, the Regional Director rejected the appeal.

On 5 December 2016 the complainant lodged an appeal with the Global Board of Appeal (GBA), challenging the Regional Director's decision. In its report of 7 July 2017, the GBA recommended that the appeal be dismissed. By a letter of 5 September 2017, the Director-General informed the complainant that he had decided to accept the GBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, as well as "the decision of 18 June 2015 to retroactively summarily dismiss him", and to order WHO to remove from his personnel file all documentation referring to the investigation and the disciplinary measure, and to pay him the remaining 48,768 United States dollars owed to him in terminal emoluments. He also asks the Tribunal to order his retroactive reinstatement with payment of all salary, benefits, step increases, pension contributions, entitlements and other emoluments that he would have received from the date of separation from service through the date of reinstatement. In the event that the Tribunal decides not to reinstate him, in addition to the foregoing compensation, he seeks payment of all salary, benefits, step increases, pension contributions, entitlements, and other emoluments from the date of the judgment through the date of the statutory expiration of his continuing contract. He claims moral and exemplary damages, payment of all costs incurred in bringing this complaint and the internal appeal, interest on all sums awarded by the Tribunal, and any other award the Tribunal deems just, necessary and fair.

WHO asks the Tribunal to dismiss the complaint in its entirety as devoid of merit.

CONSIDERATIONS

1. The complainant impugns the Director-General's 5 September 2017 decision accepting the GBA's recommendation to dismiss his appeal of 5 December 2016. The Director-General endorsed the GBA's findings and conclusions, as contained in its report of 7 July 2017. The GBA concluded that the complainant's separation from service was "a consequence of his voluntary resignation submitted in December 2013"; that the IOS investigation into the complainant's violation of the rules of conduct and the procurement rules and procedures was "procedurally correct and in conformity with due process"; that withholding and deducting the amount of 48,768 United States dollars from the complainant's separation entitlements was "a justified measure permitted under the Staff Rules"; and that considering the complexity of the case "the delay in carrying out the IOS investigation was not excessive".

2. The complainant bases his complaint on the following grounds:

(a) the proceedings before the RBA and the GBA were flawed;

(b) he was unlawfully summarily dismissed with retroactive effect;

(c) WHO breached its duty of care, violated his right to due process, and breached the principles of equal treatment and confidentiality;

(d) the IOS investigation was flawed and showed bias against him;

(e) WHO unlawfully transferred him and suspended him with pay;

(f) the deduction of 48,768 United States dollars from his separation entitlements was unjustified; and

(g) the length of the procedures was marked by an excessive delay.

3. The complainant's plea that he was summarily dismissed with retroactive effect is unfounded. The complainant was interviewed by IOS on 11 December 2013 and an appointment was made for a second interview to be held on 13 December 2013. However, a second interview

never took place because after the first interview the complainant was seen by his treating physician who prescribed him eight days of rest due to his acute state of stress. The complainant submitted his resignation by a letter of 14 December 2013, requesting a waiver of the mandatory notice period and an effective separation on 20 December 2013. As the reason for his resignation, he cited his fear that his health condition would worsen if he were to continue working for WHO. On 19 December 2013 the complainant again saw his treating physician who prescribed 30 days of rest for his continued state of stress. A psychiatrist appointed by WHO was sent to the complainant's home on 20 December 2013 to assess the complainant's state of health. The Regional Director accepted the complainant's resignation with effect from 31 December 2013 and relevantly informed the complainant by a letter of 30 December 2013. In that letter the Regional Director also confirmed that the investigation into the complainant's alleged misconduct would continue and that the complainant would be provided with the findings of the investigation, and be given an opportunity to respond. In a letter of 6 January 2014, the complainant acknowledged receipt of the Regional Director's 30 December 2013 decision. It follows that the complainant was not summarily dismissed but that he voluntarily resigned, of his own accord, for health reasons.

4. The complainant's plea that he was forced to resign and that WHO should have refused his resignation, in view of its duty of care and having regard to his ill health at the time, is unfounded. The complainant has not presented any evidence that he was mentally incapacitated at the time of his resignation and was thus unable to take such a decision. The medical certificates provided by his treating physician and the psychiatrist appointed by WHO to verify his health status, all confirmed that the complainant was suffering from work-related stress and anxiety due, in large part, to the ongoing investigation. None of the certificates noted mental incapacity or inability to take reasoned decisions. In a letter of 6 January 2014 to the Regional Director, the complainant expressed his anger and disappointment at how he had been treated by the Administration during the investigation, particularly at the first interview, and at the fact that the Administration had accepted his resignation while he was

on certified sick leave. The complainant did not request that the Administration revoke its acceptance of his resignation in that letter, and the letter itself does not demonstrate any apparent mental incapacity or lack of lucidity on the part of the complainant.

5. The WHO Staff Regulations and Staff Rules do not prevent staff members from resigning due to health reasons, nor do they forbid the Organization from accepting such resignations. The complainant asserts that WHO violated the Staff Regulations and Staff Rules by not requiring him to undergo a medical examination prior to his separation. Staff Rule 1085, entitled "Medical Examination on Separation", provides as follows:

> "Prior to separation, a staff member **may** be required to undergo a medical examination by the Staff Physician or by a physician designated by the Organization. If a staff member fails to undergo this medical examination within a reasonable time limit fixed by the Organization, then claims against the Organization arising out of illness or injury which allegedly occurred before the effective date of separation shall not be entertained; furthermore, the effective date of separation shall not be affected." (Emphasis added.)

It is clear from the wording of Staff Rule 1085 that a medical examination on separation is not mandatory. The Tribunal notes that the AFRO Medical Officer nevertheless contacted the complainant in an email dated 31 December 2013 asking whether the complainant wished to have a new medical examination or whether he wished to use his most recent examination results instead. The complainant responded that he did not object to his previous examination results being used. As noted in the GBA report, "in line with Staff Rule 1085, the [complainant] had a medical examination at separation and as evidenced from the case documents he allowed the use of his medical records by WHO doctors and actively collaborated in the process, signed the corresponding forms and was found fit for separation purposes". The GBA concluded that "the [complainant's] resignation was voluntary and of his free will". The Tribunal sees no error in that determination. The complainant's argument that the medical examinations and the certificates of 12, 19 and 20 December 2013 were sufficient to prove that he was not fit for resignation is not persuasive or sufficient to replace the medical evaluation, made by the AFRO Health and Medical Services on 22 January 2014,

that the complainant was "medically fit for termination", especially given that the complainant has not provided any proof that the 22 January 2014 medical evaluation showed a material mistake or inconsistency, that it overlooked some essential fact, or that it plainly misread the evidence (see Judgments 1284, under 4, and 3994, under 5).

6. The complainant's claims of bias, procedural irregularities and flaws in the IOS investigation and the IOS report, and in the proceedings and reports of the RBA and the GBA are unfounded. The complainant asserts that the IOS investigation was flawed as he was not present, nor was he given the opportunity to be represented, during the search of his office and the seizure of his office computer and other items from his office. He also asserts that during the investigation he was not treated equally to other staff members under investigation. On the latter point, the Tribunal notes that the complainant was the Head of PSS at the material time and was therefore not in the same position, in fact and in law, as his colleagues in PSS. WHO eManual, section XIV.1.1, relevantly provides:

> "**Access in the context of an investigation of possible misconduct**
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> 300 WHO may access the relevant information and communication systems when there are grounds to believe that a breach of WHO's regulations, rules or policies may have taken place and access to such systems may reveal information relevant to an investigation of possible misconduct.
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> 310 Process: WHO access in the context of an investigation of possible misconduct will require the approval of Director, IOS (or a duly designated IOS staff member). Such access will be conducted by IOS with any required technical assistance. To the extent appropriate, the user concerned will be informed of the access and invited to be present when the access is performed. If the user concerned is not present, or in case of refusal to accept or to participate in the access, IOS, through the responsible system administrator, will log all instances of access performed."

WHO eManual, section XIV.1.2, entitled "E-mail Usage Policy", provides, in relevant parts:

> "70 The Organization reserves the right to review, intercept, access, and disclose E-mails sent or received through the WHO E-mail systems. [...]
>
> [...]

> 260 All WHO electronic messages, including the contents of all files stored on WHO systems, are the property of WHO. WHO reserves the right to access all such information. [...]"

7. The above cited provisions specify that "[t]o the extent appropriate, the user concerned will be informed of the access and invited to be present when the access is performed". This means that there will be situations in which it is not possible or not appropriate to have the staff member concerned present during the seizure of her or his office computer. In the present case, it was not possible for the complainant to be present when the IOS investigators came to his office, as he was away on sick leave. However, IOS did contact him by phone to notify him that the investigators were copying the contents of the hard drive of his office computer, as well as the hard drives of the computers used by his co-workers in PSS. The complainant has not provided any evidence that the IOS investigators violated the proper investigative procedures, cited above, nor that they confiscated any personal items, files, or documents.

8. The complainant submits that he was suspended from his functions with pay for 30 days without being informed of any allegations of misconduct against him. He states that, as he was not supervising PSS at that time, his suspension was invalid and the decision to suspend him was arbitrary and unfounded. The memorandum, dated 3 December 2013, notifying him of his suspension, specified that the suspension was pending investigation. As the GBA noted in its report, the suspension was justified and taken in accordance with Staff Rule 1120 and, as the complainant did not immediately challenge the suspension decision through the proper internal means of redress, he cannot do so now. As the Tribunal explained in Judgment 3971, under 8, "[a]ll claims regarding the complainant's suspension, house ban [...] are irreceivable for failure to exhaust the internal means of redress. The complainant did not file an internal appeal challenging those decisions separately [...] and cannot do so now in the present complaint. The house-ban decision as well as the suspension decision have, by themselves, an immediate, material, legal, and adverse effect on the person concerned, and are not subsumed

under the final decision taken at the conclusion of any disciplinary proceedings. Consequently, they cannot be considered as mere steps leading to the final decision taken at the conclusion of the proceedings and, according to the Tribunal's case law, must be challenged by themselves, and not as a part of the final decision (see Judgments 1927, under 5, 2365, under 4, and 3035, under 10)."

9. The complainant's arguments that WHO breached its duty of care, violated his right to due process, and breached the principles of equal treatment and confidentiality are unfounded. As noted in the considerations above, WHO did not violate its duty of care by accepting the complainant's resignation. With regard to the claim of breach of confidentiality, the complainant was notified by a memorandum, dated 21 June 2013, that he had been temporarily reassigned to another post in order to allow IOS to conduct its investigation in PSS, the unit which he supervised, under the best conditions. The complainant asserts that WHO breached confidentiality when an email with that memorandum was copied to colleagues and further re-transmitted to other staff members in his department, and in the department to which he was transferred, thus notifying them of his transfer to allow for the investigation to proceed. He argues that this communication grossly breached his right to confidentiality during an investigation and constituted disrespect for his dignity. The Tribunal finds that notifying the staff members in his department and in the department to which he was transferring, that he would be transferred was necessary for the proper functioning of those departments. Noting that PSS, the complainant's unit, was under investigation did not reveal any confidential information, neither of the investigation as a whole, nor with regard to the complainant specifically.

10. The complainant alleges a breach of due process, as he was interviewed by IOS without first being allowed to review all the relevant materials and the complete list of allegations. He also submits that the RBA did not listen to the recordings of the IOS interview, thereby causing him to miss an opportunity to support his allegations that the investigators were biased against him (as allegedly evidenced by their tone of voice); that his request for a five-member GBA panel

was not granted, nor was his request to have a staff member from headquarters on the panel. According to the Tribunal's case law,

> "'[A]n investigation [shall] be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made' (see Judgments 2475, under 7, 2771, under 15, 3200, under 10, 3315, under 6, 3682, under 13, 3872, under 6, and 3875, under 3) [...]."

(See also Judgment 4106, under 9.)

There is no obligation to inform a staff member that an investigation into certain allegations will be undertaken (see Judgment 2605, under 11). Moreover, there is no principle in the Tribunal's case law which requires that an official should receive detailed information about the allegations prior to the investigation interview (see Judgment 4106, under 9).

With regard to the complainant's claims regarding the composition of the GBA, the Tribunal notes that the complainant himself quoted in his submissions the text of the applicable rules, which state in relevant part that "an appeal shall **normally** be heard by a Panel of three members of the Board" (Staff Rule 1230.3), that "**[i]n exceptional circumstances as determined by the chair and deputy chair, an appeal may be heard by a Panel of five members of the Board [...]**" (Staff Rule 1230.3.4), and that "[i]f the appellant was assigned to a region at the time of the appealed decision, **there shall be at least one member assigned to that region on the Panel**. If the appellant was assigned to headquarters, including offices administered by headquarters, at the time of the appealed decision, there shall be at least one member assigned to headquarters on the Panel" (Staff Rule 1230.3.5) (complainant's emphases). According to the GBA, "[t]he Chair determined that there were no 'exceptional circumstances' as required by Staff Rule 1230.3.4 that would warrant the establishment of a five-member panel". Moreover, it noted that "[t]he [complainant] requested that the Panel member appointed by the Director-General be changed 'for the sake of a more balanced Panel' further clarifying at the Panel Chair's request 'with one Member from the Regions and one from Headquarters, instead of both Members being from the Regions'. Pursuant to Rule 510 of the GBA Rules of Procedure, the Panel Chair rejected the objection explaining that all Panel members

whether appointed by the Director-General or elected by the staff and regardless of their duty station are required to be independent and impartial in exercising their functions." The Tribunal finds that the GBA considered the request in light of the applicable rules and properly found that the complainant's requests regarding the composition of the GBA were unjustified.

11. The complainant challenged, before the GBA and in the present complaint, the "unlawful" withholding of 48,768 United States dollars from his separation entitlements on the basis that any loss suffered by WHO did not derive from his own actions or from his violation of procurement rules and policies. According to the GBA's conclusions, endorsed by the Director-General in the impugned decision, the amount withheld from the complainant's separation entitlements corresponded to two instances of financial loss suffered by WHO because of the complainant's improper conduct. The first loss amounting to 47,793 United States dollars derived from the complainant's approval of an amendment (in January 2011) to a contract concluded in 2009 with a company providing copying and printing services, without the proper delegation of authority. The second loss amounting to 975 United States dollars derived from the complainant's improper purchasing of two iPods for personal use. In its report the GBA cited Staff Rule 380.5, which relevantly provided:

> "Deductions, from salaries, wages and other emoluments, including terminal entitlements, may be made only in the following cases:
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> [...]
>
> 380.5.2 for indebtedness to the Organization;
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> [...]"

The GBA also cited Staff Rule 1112, entitled "Misconduct resulting in financial loss" and effective as of 1 February 2015, which stated:

> "A staff member whose misconduct results in a financial loss suffered by the Organization may be required to partially or fully compensate the Organization."

The GBA noted that the deduction of 48,768 United States dollars from the complainant's separation entitlements "did not constitute a punishment or a disciplinary measure, but a recovery of losses that [were] easily quantifiable and identifiable, namely the losses deriving from the [complainant] signing an amendment to a contract without the proper delegated authority and purchasing two iPods for personal use". The complainant defends himself by stating that he did not buy, and does not possess, any iPods and that his supervisors had approved the amended contract. The Tribunal finds that these assertions do not properly refute the evidence presented by WHO in its submissions and in the IOS report; in particular, the submission of documented approval to purchase the iPods and the complainant's written request to the supplier that the iPods be delivered to his desk, thus circumventing WHO's standard operating procedures for the receipt of goods; and the complainant's approval of the amendment to a supplier contract which resulted in a higher cost for WHO. The complainant's assertion that his supervisors share in the blame for not having checked his work is unconvincing. The Tribunal notes that the GBA found that "[the] IOS findings were precise, carefully substantiated and appropriately supported by evidence. The [complainant] could not effectively rebut the IOS allegations or prove the existence of a manifest investigation error, omission or unfairness." The GBA concluded that "the [complainant's] actions amounted to misconduct and that such misconduct was established beyond reasonable doubt in the IOS Report". The Tribunal finds no flaw in the GBA's findings and conclusions.

12. According to the Tribunal's case law (see, for example, Judgments 3757, under 6, 4024, under 6, 4026, under 5, and 4091, under 17), "where an internal appeal body has heard evidence and made findings of fact, the Tribunal will only interfere if there is manifest error (see Judgment 3439, consideration 7)". Moreover, where there is an investigation by an investigative body in disciplinary proceedings, "it is not the Tribunal's role to reweigh the evidence collected by an investigative body the members of which, having directly met and heard the persons concerned or implicated, were able immediately to assess the reliability of their testimony. For that reason, reserve must be

exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgments 3682, under 8, and 3593, under 12)" (see Judgment 3757, under 6). In the present case, the IOS report analytically, reasonably, and convincingly rebutted the arguments raised by the complainant regarding the approval of the contract amendment (paragraphs 96-105 of the report) and the improper purchasing of the two iPods (paragraphs 120-126 of the report). In conclusion, WHO considered that the complainant's arguments regarding these two instances of financial loss were either implicitly or expressly rebutted.

13. The complainant's claim that the length of the procedures constituted an excessive delay is unfounded. As noted by the GBA in its report, "the [GBA] recognised the complexity of the investigation, involving the whole PSS unit and the level of proof required for establishing misconduct; the investigation team collected and analyzed thousands of emails with the aid of outside consultants and conducted a series of interviews and investigations across two continents". The GBA concluded that "the amount of time taken [by the IOS investigation team] was warranted and such thoroughness was in the interests of both the Organization and the [complainant]". The Tribunal finds that there was no delay in the proceedings before the RBA, which included two appeals that were filed separately and later joined, and which lasted approximately twelve months. As to the proceedings before the GBA, the complainant filed his full statement of appeal before the GBA on 5 December 2016, the parties' submissions were completed by April 2017, and the GBA report was submitted on 7 July 2017. The Tribunal finds no delay in these proceedings. Taking into account all of the circumstances, including the factual and legal complexity of the proceedings, the number of steps in the process (the IOS investigation, the two appeals before the RBA and the appeal before the GBA), the total length of the procedure was not unreasonable. The claim for moral damages for excessive delay is rejected.

14. In light of the above considerations, the Tribunal finds that the complaint is unfounded and must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

YVES KREINS

DRAŽEN PETROVIĆ