S.

v.

WHO

130th Session **Judgment No. 4308**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. S. against the World Health Organization (WHO) on 13 July 2018 and corrected on 12 September, WHO's reply of 16 November 2018, the complainant's rejoinder of 28 February 2019 and WHO's surrejoinder of 5 June 2019;

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 decision to dismiss him for misconduct.

The complainant joined WHO in February 1986. At the material time, he was an Administrative Associate in the WHO Country Office in Nepal (WCO/Nepal), which is part of WHO's Regional Office for South-East Asia (SEARO).

In January 2016 the WHO Representative to Nepal reported to SEARO that following the 2015 earthquake, a donation of 40,000 United States dollars had been made by a pharmaceutical company to the WHO staff association of Nepal for the purpose of providing relief to patients suffering from lymphatic filariasis.

This sum had been deposited in a sub-account of the WHO staff association of Nepal in June 2015.

In response to allegations of inappropriate conduct by the complainant in connection with that donation, the Senior Adviser to the Regional Director of SEARO carried out a fact-finding mission and submitted, under cover of a memorandum of 6 September 2016, a report with his findings to the Director of the Office of Internal Oversight Services (IOS). The Director of IOS provided the Regional Director with a summary of the Senior Adviser's findings in a memorandum of 27 October 2016 (investigation memorandum), recommending that the Regional Director review the findings with a view to considering potential disciplinary or other measures against the complainant.

By a memorandum dated 15 November 2016, the complainant was informed of the charges raised against him, namely (a) breach of WHO Staff Rules and eManual provisions: (i) eManual Section IV.1.1 outlining the policies and procedures for mobilizing resources; (ii) eManual Section IV.1.2 for the absence of an established and formalised donation agreement; (iii) eManual Section XVIII.5.3 for the failure to seek clearance from the WCO/Nepal management for dealings with the private sector; and (b) misleading WHO by modifying the contents of an email from the representative of the pharmaceutical company making the donation, which was tantamount to an act constituting fraud pursuant to eManual Section XII.14.1. The complainant was further informed that, if the charges were established, his actions would amount to misconduct pursuant to Staff Rule 110.8 and he was asked to respond to the charges, which he did on 2 December 2016.

By a letter of 6 February 2017, the complainant was notified of the Director-General's decision to impose on him the disciplinary measure of dismissal with one month's notice, pursuant to Staff Rules 1110.1.6 and 1075.1, and to place him on special leave with full pay during his last month of service, pursuant to Staff Rule 650.

The complainant submitted a request for administrative review on 23 March 2017. Further to the rejection of this request on 12 May 2017, he lodged an appeal with the Global Board of Appeal (GBA) on 7 August 2017. In its report of 12 February 2018, the GBA recommended that the appeal be rejected. By a letter of 13 April 2018,

the Director-General notified the complainant of his decision to accept the GBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to reinstate him in his former position or in another suitable position with retroactive effect. Alternatively, he asks the Tribunal to order WHO to compensate him for the loss of salary and pension benefits for a period of at least five years. He also asks the Tribunal to order WHO to adopt a less severe measure in the event that he is found guilty of some form of misconduct. He claims 30,000 euros in moral damages and 5,000 euros in costs.

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

CONSIDERATIONS

1. The complainant was a staff member of WHO. He commenced employment with the Organization in 1986 and, at the time of the events central to this complaint, was an Administrative Associate in the WCO/Nepal in SEARO. The following is a broad outline of those events and some additional matters of detail will be referred to when dealing with the arguments of the parties. There is no real dispute between the parties about what occurred though there is an issue as to how certain events should be understood.

2. In March 2015 two representatives of a pharmaceutical company, Ms D. and Ms I., visited Nepal (a visit coordinated by WHO) to meet Nepalese suffering from lymphatic filariasis. The complainant acted as their interpreter. In April 2015, a severe earthquake struck Nepal causing significant damage. Shortly thereafter, Ms D. was in email contact with the complainant effectively expressing her sympathies about what had occurred. A little over a week later the complainant sent an email to Ms D. soliciting a donation "to support those [lymphatic filariasis] patients to rebuild their houses". In due course, an amount of 40,000 United States dollars was sent by the company in response to this request and, specifically, a request for this amount made by the complainant in an email of 11 May 2015. At about this time, the WHO South-East Asia Region Staff Association (the staff association) was conducting an appeal for funds to deal with

the aftermath of the earthquake and in due course the pharmaceutical company's donation was, with the knowledge and consent of Ms I., deposited in a sub-account of what appears to have been the Nepalese branch of the staff association. The precise status of the Nepalese branch is unclear from the material before the Tribunal.

3. A small proportion of the funds donated by the pharmaceutical company had, by December 2015, been expended for the purpose of rebuilding housing or providing alternative housing for two patients suffering from lymphatic filariasis. In that month, the staff association decided to close the bank sub-account into which the pharmaceutical company's donation had been deposited. In late December 2015 there were email exchanges, including between the complainant and Ms D., about how the significant residue of the donation should be dealt with given that the sub-account would be closed. What occurred at this time was of some importance to the disciplinary proceedings brought against the complainant and which led to his dismissal.

4. The complainant's conduct in relation to the pharmaceutical company's donation was initially the subject of a fact-finding mission in August 2016 undertaken by the Senior Adviser to the Regional Director of SEARO. This and subsequent administrative action led to the complainant being charged under WHO Staff Rule 1130. This, in turn, led to a decision of 6 February 2017 by the Director-General to impose the disciplinary measure of dismissal. A request for administrative review was unsuccessful and in August 2017 the complainant appealed to the GBA. In its report of 12 February 2018, the GBA recommended that the appeal be dismissed. The Director-General accepted this recommendation and by a decision dated 13 April 2018 rejected the appeal. This is the decision impugned in these proceedings.

5. In his complaint, the complainant advances four arguments challenging the impugned decision. The first argument is that some facts were overlooked or were not adequately evaluated. This argument has three elements. The first is that the complainant did not attempt to transfer the funds (the residue of the company's donation) and acted with full transparency. The second is that the actual nature of the company's donation was misinterpreted. The third is that the responsibilities of other concerned actors were ignored. The second

argument is that there were irregularities in the investigation process. The third argument is that there was no fraudulent purpose. The fourth and final argument is that the principle of proportionality was not respected.

6. The first element of the first argument that some facts were overlooked or were not adequately evaluated was that the complainant did not attempt to transfer the funds (the residue of the company's donation) to his private bank account and acted with full transparency. On 21 December 2015 the complainant sent an email to Ms D. (copied to Dr Y., a WHO National Professional Officer based in Nepal) informing her that the staff association's sub-account containing the funds would be closed and proposing that the funds be transferred for "further disbursement" to either the account of Dr Y. or his account. He said that "they" (by inference, staff association officials) wanted an email "with no objection from your side to transfer into [Dr Y.'s or his] account". The complainant then said: "We shall appreciate your consideration with positive reply."

7. Ms D. responded with an email dated 22 December 2015 addressed to the complainant. The email read:

> "We trust you to proceed with the best option to ensure the funds [the pharmaceutical company] provided are used to re-build [lymphatic filariasis] patient homes as soon as possible.
>
> Pease [sic] follow WHO requests locally."

Six days later, on 28 December 2015, the complainant forwarded this email of Ms D. to the staff association coordinator (for the Nepal Country Chapter), Ms S., under cover of an email (copied to Dr Y.) that said:

> "As discussed please find below an email from [the pharmaceutical company] with no objection and request you to release the amount at the earliest for payment to victims.
>
> Thank you for all your support and looking forward more cooperation from the WHO [staff association Nepal]."

However in the copy of the forwarded email from Ms D., the last paragraph had been altered to read "Pease [sic] implement at the earliest". Thus the exhortation to "follow WHO requests locally" from Ms D. in her original email had been replaced by a request to act expeditiously. This alteration would have involved two steps. The first

would have been the deletion of the text in the original email and the second step would have been the replacement of the deleted text with new text. The fact that the misspelt "Pease" is repeated in the altered text strongly suggests that the text following that word had been deleted and different text substituted for it almost certainly deliberately. It is completely implausible that these steps could have been taken accidentally or inadvertently.

8. The complainant has advanced several explanations as to how the alteration came about. In his response of 2 December 2016 to the notification of charges under Staff Rule 1130 he provided one explanation. The relevant charge was:

> "Misleading the Organization by modifying the contents of the original email (that Ms [D.] had previously sent to you on 28 December 2015) regarding the intention of [the pharmaceutical company], which [is] tantamount to an act constituting fraud as defined in eManual Section XII.14.1, paragraph 80."

The complainant's response was:

> "[In all the circumstances] I was distracted and mistakenly unintentionally I replied in the wrong email 'please implement at the earliest' by which I meant to reply to the concerned government officials to follow up their activities in clearing the encumbrances. Later on, I noticed this only when I received mail on 28 December from Ms [D.] about the alternation [sic] in the email. Therefore, I did not intend to alter the content of the email but this happened unknowingly in a stressful environment."

In his brief in these proceedings, the complainant says that "the slight modification of the email was simply an inadvertent mistake". In the rejoinder he says:

> "[T]he words were simply replaced by mistake, as he believed he was writing into the text of an email of which he was the author, while hastily sending it out to numerous addressees in the course of his end-of-the-year work."

These explanations are entirely implausible and both the GBA and the Director-General were entitled to reject the complainant's explanation that the alterations had been an inadvertent mistake. Having rejected the complainant's explanation, it was open to them to conclude the alteration was deliberate and to do so at the standard of beyond reasonable doubt.

9. It is convenient to deal with the remainder of this first element of the first argument with the complainant's third argument, namely that there had been no fraudulent purpose.

10. However, before doing so, it should be noted that after the complainant forwarded Ms S. the altered email of Ms D. on 28 December 2015, Ms S. sent Ms D. the same day an email explaining what would happen to the company's donation and, in so doing, sent (effectively as part of an email chain) the email from the complainant together with the altered version of Ms D.'s email, as discussed in preceding considerations. Thus, by this mechanism, Ms D. became aware that her earlier email had been altered. When she became aware of the alteration, she emailed Ms S., the complainant and the WHO Representative to Nepal, Dr V. In sum, these emails from Ms D. indicated that the company's donation had been intended to be managed by WHO, that what was being proposed about transferring the funds into a personal account was inconsistent with what had been intended and contrary to the company's policies, and that she was troubled by the alteration to her email discussed earlier. Ultimately the funds were returned to the company. It can be inferred (and it is apparent from documents in evidence) that as a result of Dr V. being made aware of these events and, in particular, the alteration of the email, an investigation was subsequently undertaken into the events which is discussed in more detail shortly.

11. The complainant argues that his entire approach to the management of the company's donation, and in particular where the funds might go when the staff association's sub-account was closed, was open and transparent. It is true that in his communications the complainant was open about the possibility of the funds being deposited into his personal account and being managed by him. But that argument misses the point. Once it is accepted that he deliberately altered Ms D.'s email, it is necessary to search for a reason. The complainant offers no reason or explanation, given that his position was that the alteration was inadvertent. One obvious reason, which can be inferred from established facts and a finding that the alteration was deliberate, was to remove from the transaction to which the staff association would be a party (transferring the funds from its sub-account) the expression of the requirement or request of the pharmaceutical company to the effect that the funds needed to be managed by WHO locally. That is, the staff association would be unaware of this expressed requirement or request and could well have transferred the funds without qualification. The complainant has, of course, said nothing

about what he anticipated might occur after the funds had been transferred in the circumstances just discussed. But given that the alteration to the email was deliberate, it can reasonably be inferred that the complainant believed he would thereafter be able to deal with the funds unconstrained by any supervision or oversight by the WHO local administration. At the very least, this would create an opportunity for the complainant to use some, or even all, of the funds for his own personal benefit either directly or indirectly. It was open to the GBA and the Director-General to view this as fraudulent conduct. Accordingly these arguments of the complainant should be rejected.

12. The second element of the first argument is that the actual nature of the pharmaceutical company's donation was misinterpreted. The gist of this argument is that the complainant's involvement in the request to the company for a donation, the making of the donation and the management of the funds was in a personal capacity, and not as a representative of WHO. One consequence of this argument, so the complainant contends, is that WHO regulatory requirements governing donations to the Organization by external parties were not enlivened. Non-observance of these requirements founded one of the charges leading to the disciplinary measure of dismissal. As WHO points out, the complainant's successful request for the 40,000 United States dollars donation was in an email in which the signature block identified the complainant as a staff member of WHO and his position in the Organization. It is true that in that email the complainant indicated he would not be able to provide, as requested, bank details "in WHO letterhead" and that "we mobilise our support through WHO Staff Association", but he nonetheless referred to support from WHO Country Offices and the activities of "our WHO staff team". As events transpired, it became apparent that Ms D. and Ms I. believed the donation was being managed by WHO.

13. The Tribunal accepts that, narrowly construed, the provisions in the eManual concerning "Mobilizing Resources from Donors" (Section IV.1), on which the first charge against the complainant was based, address circumstances not on all fours with the circumstances arising in this case. Notwithstanding, this section of the eManual is expressed to set out "general policies and procedures for mobilizing resources", though this does not include emergencies for which,

seemingly, separate policies apply. It can be assumed that the complainant was aware of these provisions, as consistent case law has it that a staff member is presumed to be aware of the organization's rules and regulations to which she or he is subject (see, for example, Judgments 4247, consideration 6, and 2962, consideration 13). These provisions point to the need for staff to be punctilious in their dealings with outside institutions funding WHO projects or activities and, in particular, in accepting contributions from pharmaceutical companies. This is required for an obvious reason, namely to ensure that funds from external sources are accepted for a clear and defined purpose, managed appropriately and, additionally, the activities of the Organization are not inappropriately influenced by the external provision of, amongst other things, financial donations. At the very least, these provisions inform the obligations of staff arising under the general obligation, created by Article 1.1 of the Staff Regulations, "to regulate their conduct with the interests of the World Health Organization only in view". Even if the GBA and the Director-General were in error in treating the provisions of the eManual, Section IV.1, as directly applicable to the donation of the pharmaceutical company in the present case, that error is not a material one, given that the complainant's conduct in soliciting and dealing with the donation fell far short of what was required by Article 1.1.

14. The third element of the first argument is that the responsibilities of other concerned actors were ignored. The complainant's pleas on this question conclude with the observation that "the responsibilities of all concerned parties were ignored, and the complainant was used as a scapegoat for all". The first and obvious observation to make is that the complainant's dismissal was based on his conduct, and his conduct alone. His conduct came under scrutiny because of the revelation of his deliberate alteration, in a material way, of the email of Ms D. when forwarded to Ms S. and for which he has never provided a satisfactory explanation. It is simply untenable to suggest that he has been made a scapegoat and this argument should be rejected.

15. The complainant's second argument is that there were irregularities in the investigation process. The difficulty with the complainant's pleas in this respect is that they constitute a series of assertions about what should have happened by way of investigative

steps, what analysis should have been undertaken and criticism of the conclusions reached at various stages in the process. However, no reference is made in support of those assertions to any normative legal document or the Tribunal's case law that establishes that such steps should have been taken, the analysis undertaken as suggested or any particular conclusion reached.

16. However, one possible argument of substance is that the complainant was not afforded due process. The sequence of events which ultimately led to the charges were, firstly, that a fact-finding mission was, as noted earlier, undertaken by the Senior Adviser to the Regional Director of SEARO resulting in a report dated 6 September 2016 and, secondly, that an investigation memorandum dated 27 October 2016 was sent by the Director of IOS to the Regional Director of SEARO. The latter memorandum included, as an exhibit, the former report. It is clear from the 6 September 2016 report that the Senior Adviser interviewed five individuals including the complainant. In a final section of the report entitled "Overall conclusion", the Senior Adviser observed that his conclusion was based on, inter alia, the "interviews". In his pleas the complainant argues that "[he] should have been informed of the contents of the interviews that were held and should have been given an opportunity to comment and provide relevant documents".

17. The investigation memorandum raised the possibility of the complainant being charged with misconduct. Indeed the tenor of the document was that he should be. Had the investigation of the facts been undertaken by IOS itself, it would have been governed by a document entitled "The Investigation Process" promulgated by the Director-General's Office. Paragraph 11 of that document provides that investigators should document interviews and ask the person interviewed to review the record of the interview for accuracy and sign it. No such provision, at least expressly, governed the fact-finding process undertaken by the Senior Adviser. However, if, as was the case, his report was effectively adopted by IOS, then implicitly his investigation should have been undertaken subject to the same constraints. That is, the interviews relied on by the Senior Adviser should have been documented and, consistent with the Tribunal's case law, the complainant should have been provided with copies of

the transcript or summaries of the interviews (see, for example, Judgments 3927, consideration 11, 3732, consideration 6, and 3682, consideration 16). However, the case against the complainant was almost exclusively founded on documents or on facts which he did not dispute. The central factual issue concerned the alteration of Ms D.'s email, a matter peculiarly within the knowledge of the complainant. Accordingly, in the particular circumstances of the case, this failure does not vitiate the finding of misconduct nor the disciplinary measure imposed. As the GBA noted, "the [complainant] had an effective opportunity to test the evidence put against him and to defend himself against the allegations of misconduct". There is no warrant for awarding damages as the complainant seeks.

18. This leads to a consideration of the fourth and final argument that the principle of proportionality was not respected. The gravamen of the argument is that even if the findings made about the complainant's conduct were correct, his dismissal was a disproportionate disciplinary measure. As the Tribunal said in Judgment 3640, consideration 29, "[t]he disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area." The disciplinary measure of dismissal was not disproportionate, particularly having regard to the complainant's alteration of the email of Ms D. This was a manifestation of dishonesty and fraud and it was open to WHO, as the disciplinary authority with a power to decide the disciplinary measure, to view the totality of the complainant's conduct as misconduct warranting dismissal.

19. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ