J.

v.

WHO

130th Session **Judgment No. 4305**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. J. against the World Health Organization (WHO) on 6 November 2018 and corrected on 10 December 2018, WHO's reply of 17 April 2019, the complainant's rejoinder of 19 July and WHO's surrejoinder of 18 October 2019;

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

Having examined the written submissions;

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

The complainant challenges the decision to terminate his appointment due to the abolition of his post and the failure to reassign him to another suitable vacant position.

The complainant joined the United Nations Joint Programme on HIV/AIDS (UNAIDS), a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO, in December 2007 under a two-year fixed-term contract. At the material time, he held the position of Strategic Information Advisor in the UNAIDS Country Office in Port-au-Prince, Haiti, at grade P.4.

In 2016 UNAIDS announced a restructuring exercise, which was referred to as the "2016 Repositioning Process". An Information Note on the "Process for the Placement of Staff in 2016 Repositioning" was issued on 20 September (HRM/IN 2016-8), which explained how the

process was to be implemented for the various categories of staff affected.

By a letter of 2 November 2016 the complainant was informed that his position was to be abolished in the context of the Repositioning Process. As a staff member eligible for reassignment, all reasonable efforts would be made to reassign him to a vacant position during the six-month reassignment period, in accordance with Staff Rule 1050.2 and the Information Note on the Reassignment Process for Qualifying Staff Members (HRM/IN 2013-10). As indicated in HRM/IN 2016-8, a compendium of vacant international professional positions was to be published. He was encouraged to apply and his status as a staff member participating in the reassignment process would be taken into consideration by the Mobility and Reassignment Committee (MRC). Paragraph 11 of HRM/IN 2013-10 relevantly provided that "[t]he paramount consideration for reassignment shall be the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned". Paragraph 12 stated that, in this context, staff members eligible to participate in the reassignment process "are considered and given due preference for vacant positions during the reassignment period".

Also on 2 November, the UNAIDS Executive Director issued an Executive Directive entitled "2016 Repositioning Exercise: Mobility and Reassignment" announcing his decision to extend the reassignment process to certain categories of staff who had previously been ineligible to participate, namely those with less than five years' service, those on temporary appointments, and locally-recruited staff, as well as staff due for mobility. A revised Information Note detailing those changes, entitled "2016 Revised Repositioning – Update", was issued on the same day (HRM/IN 2016-9 bis).

The complainant applied for 19 vacant international professional positions in November. By a letter of 22 December 2016 he was informed that the MRC, which had met on 9 and 10 December 2016, had not found a suitable placement for him. The letter stated that reasonable efforts would continue to be made to reassign him to a vacant position within UNAIDS for the remaining duration of his reassignment period.

The complainant continued to apply for positions within UNAIDS. In a report of 25 May 2017, the MRC recommended that the complainant's fixed-term appointment be terminated on the ground that he did not meet the essential requirements in terms of education and experience for any of the five positions for which he had applied.

By a letter of 8 June 2017 the complainant was informed that no suitable position for his reassignment had been identified and that his reassignment period had expired on 2 May 2017. The letter referred to the MRC report of December 2016, which had been shared with the complainant in February 2017, and which had recommended other candidates, including candidates who were exceptionally eligible to apply and candidates participating in mobility, for the 19 positions in the compendium for which the complainant had applied. The MRC report concluded that the complainant's qualifications and performance "d[id] not exceed those of other candidates recommended for positions to which [he] applied and positions at grade and one grade below". The letter further stated that the complainant did not meet the minimum requirements for the five vacant positions for which he had applied in 2017, as outlined in a table attached to the letter. Consequently, his fixed-term appointment was terminated with effect from 12 September 2017. In the event, the complainant was separated from UNAIDS on 7 March 2018, his contract having been extended to cover his sick leave.

Meanwhile, on 3 July 2017, the complainant challenged the decision of 8 June 2017, alleging unequal and preferential treatment and breach of the Staff Rules. He requested that the decision to terminate his appointment be set aside and that he be reassigned to one of the vacant positions. His request for review was rejected on 1 September, on the ground that the concept of "due preference" within the meaning of the applicable rules did not grant priority to staff members participating in a reassignment process over those participating in mobility or staff exceptionally invited to apply in the context of the Repositioning. Within UNAIDS due preference was interpreted to mean "otherwise equal".

The complainant appealed against that decision in November 2017 before the WHO Global Board of Appeal (GBA), which recommended in its report of 11 June 2018 that his appeal be dismissed in its entirety. By a letter of 10 August 2018, the Executive Director decided to

follow the GBA's recommendation and dismissed his appeal. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement as from 8 March 2018 to a suitable position within UNAIDS. He seeks payment of all salary and benefits he would have received from the date of his separation to the date of his reinstatement. In the event that he is not reinstated, he claims material damages equivalent to three years' gross salary with all benefits. He claims moral damages in an amount not less than 150,000 Swiss francs, as well as costs, with interest on all sums awarded.

WHO submits that the complaint is partly irreceivable for failure to exhaust internal remedies with respect to his allegations concerning selection procedures, and otherwise entirely unfounded.

CONSIDERATIONS

1. Before the Tribunal, UNAIDS derives its legal status from WHO as the administering organization and UNAIDS staff are subject to the WHO Staff Regulations and Staff Rules, adjusted as necessary to take into account the special needs of UNAIDS (see Judgment 4135, consideration 6). The complainant joined UNAIDS in December 2007 and worked under a succession of two-year fixed-term contracts until his separation over ten years later in March 2018. The separation occurred in circumstances where firstly the complainant's position was abolished in a restructuring exercise announced by UNAIDS in 2016 entitled the "2016 Repositioning Process" and secondly, he was not reassigned to another position. Generally, reassignment of staff in WHO whose position has been abolished and, incidentally, staff working for UNAIDS in the same circumstance, is governed by WHO's Staff Rule 1050. However, in relation to the 2016 Repositioning Process, the Executive Director of UNAIDS issued an Executive Directive on 2 November 2016 entitled "2016 Repositioning Exercise: Mobility and Reassignment" which had a bearing on the operation of Staff Rule 1050.

2. The complainant requests an oral hearing. However, the Tribunal considers that it is sufficiently well informed about the case by the evidence in the file and does not therefore deem it necessary to hold such a hearing.

3. A central and decisive issue in these proceedings concerns the legal status and effect of the Executive Directive issued on 2 November 2016 having regard to the provisions of Staff Rule 1050.

4. Staff Rule 1050 relevantly provides that:

"1050.1 Subject to Staff Rules 1050.2 and 1050.3, the fixed-term or continuing appointment of a staff member may be terminated if the post that he occupies is abolished.

1050.2 In accordance with conditions and procedures established by the Director-General, reasonable efforts shall be made to reassign staff members whose posts have been abolished or have come to an end, as follows:

1050.2.1 Staff members with a continuing appointment.

1050.2.2 Staff members holding a fixed-term appointment on 1 February 2013 who have completed at least five years of continuous and uninterrupted fixed-term service with the Organization, provided that this period of continuous and uninterrupted fixed-term certified satisfactory service began before 1 February 2013.

1050.2.3 Staff members not holding a fixed-term appointment on 1 February 2013 who have completed at least ten years of continuous and uninterrupted certified satisfactory fixed-term service with the Organization.

[...]

1050.4 The paramount consideration for reassignment shall be the necessity of securing the highest standards of efficiency, competence and integrity with due regard given to the performance, qualifications and experience of the staff member concerned. The Director-General may establish priorities for reassigning staff members.

1050.5 The reassignment process shall be coordinated by a Reassignment Committee established by the Director-General as follows:

1050.5.1 the process will extend to all offices if the abolished post is in the professional category or above; if the abolished post is subject to local recruitment, the reassignment process shall be limited to the locality of the abolished post;

1050.5.2 staff members shall be given due preference for vacancies during the reassignment period, within the context of Staff Rule 1050.4;

1050.5.3 staff members may be reassigned to vacant posts at the same grade as the post to be abolished, or one grade lower.

1050.6 The reassignment period will end within six months from its commencement.

1050.7 During the reassignment period, the staff member may be provided with training to enhance specific existing qualifications.

1050.8 The staff member's continuing or fixed-term appointment shall be terminated, or not extended, if the staff member is not reassigned during the reassignment period or if the staff member refuses a reassignment pursuant to Staff Rule 1050.5.3.

[...]"

5. As is apparent from Staff Rule 1050, it is intended to create a regime for the abolition of posts and the placement of staff elsewhere in the Organization who occupy positions which have been abolished. The staff who gain the benefit of participating in the reassignment process under the Rule is not unlimited. Staff Rule 1050.1 authorises the termination of employment of a staff member if they are either in a position of continuing appointment or on a fixed-term contract. Any person in the first mentioned class is eligible to participate in the reassignment process. However, in relation to the second mentioned class, it is only those staff on a fixed-term appointment who have completed at least five years of continuous and uninterrupted service who are eligible to participate. It can be seen that there are other qualifications concerning eligibility to participate but they are not presently relevant. The policy rationale for the rule cast in these terms is comparatively clear. It is to afford a benefit (the opportunity for reassignment under the Rule) to members of staff who have a substantial connection with the organization, either because they are in a position of continuing appointment or because they have been working for the organization for some years. The observations of the Tribunal in Judgment 3908, consideration 15, are apt to apply to the two classes referred to in this consideration:

"[...] in the context of the abolition of a position, the organisation's duty to explore reassignment transcends simply providing a procedural advantage and requires the application of process biased in favour of the staff member

> whose position has been abolished and which is likely to promote appointment to another position. The rationale is obvious. A person who has secured appointment or reappointment to a position within an international organisation can ordinarily expect to maintain the position on the agreed terms of the appointment or reappointment putting aside, for example, illness or incapacity, non-performance or misconduct. In practical terms, staff may make adjustments to their circumstances including financial and family arrangements based on the assumption that they will maintain the position on the agreed terms."

It would, of course, be possible to recast Staff Rule 1050 to confer the benefit it affords on a wider class or classes of staff who do not have the same substantial connection with the organization discussed earlier. But that would flow from an amendment to the Staff Rules following a formal prescribed procedure for their amendment.

6. The Executive Directive had the effect of expanding the classes of staff who could be assigned to other positions within UNAIDS as a result of the 2016 Repositioning Exercise. Those expanded classes included some other specified groups whose posts were abolished and other groups whose appointments would conclude but not by virtue of the abolition of a post. Thus the number of staff potentially competing for positions within UNAIDS arising from the 2016 Repositioning Exercise was, by operation of the Executive Directive, expanded. For staff in abolished positions to whom Staff Rule 1050 applied in terms, they potentially would have to compete for positions, at least in the sense of being considered for appointment in the reassignment process, with a wider class of members of staff than those identified in the Staff Rule itself. The Organization does not appear to dispute it had this effect. However, it rejects the argument of the complainant that the Executive Directive unlawfully altered the operation of Staff Rule 1050.

7. The question of the lawfulness of the Executive Directive insofar as it widened the classes is raised by the complainant in his pleas and reference is made to Judgment 3322. In that matter, an Article in the ILO's Staff Regulations authorised promotion of staff but, relevantly, in relation to staff in the Professional category, normally not staff who had not completed at least one posting outside Geneva, to paraphrase the provision. One of the staff actually promoted, whose promotion was challenged in the proceedings, did not satisfy

this criterion. The Article went on to say this was "subject to exceptions which may be decided by the Director-General after consulting the Joint Negotiating Committee".

8. Part of the ILO's case in those proceedings, was that the operation of the Article had been suspended by a Circular issued by the Director of the Human Resources Development Department. The Tribunal observed in consideration 6 that "[b]arring the application of a provision of the Staff Regulations by means of a mere circular constitutes a gross breach of the hierarchy of rules governing the officials of the Organization, and the Director of the Human Resources Development Department clearly had no authority to adopt a measure with such a purpose", and the Tribunal did not accept the ILO's argument that its case law established "that a circular may lawfully disregard a provision of the Staff Regulations, let alone amend it, or suspend its application". The Tribunal went on to consider whether what occurred was authorised by the provision in the Article concerning exceptions. For essentially factual reasons that need not be repeated, the Tribunal concluded what occurred was not authorised.

9. The gravamen of the complainant's argument on this point is that the Executive Directive altered, unlawfully, the operation of Staff Rule 1050. The response of WHO has two main elements. One was that the Executive Directive itself provided that "due preference will be given to those staff participating in a reassignment process over equally qualified candidates participating in mobility and those exceptionally authorized to apply to positions in the compendium". Even assuming that this meant a person seeking reassignment under Staff Rule 1050 would actually be appointed to a position notwithstanding that another person might be appointed to the position (but to whom Staff Rule 1050 did not apply) who was equally qualified, it does not deny the fact that that other person was able to compete for the position in circumstances where the evaluation of "equal qualification" would involve elements of subjective assessment.

10. Another response of WHO was that Staff Rule 1050 does not specifically prohibit exceptions and the Executive Director had merely introduced an exception by the promulgation of the Executive Directive and a related Information Note, namely HRM/IN 2016-9 bis.

In this regard WHO referred to passages in Judgment 3322. But this argument is misconceived. As earlier discussed, the Article under consideration in that matter contained, itself, a provision for the creation of exceptions even though there was a debate in the proceedings about the scope and effect of that provision. No such provision is found in Staff Rule 1050.

11. The Tribunal is satisfied that the promulgation and implementation of the Executive Directive altered, unlawfully, Staff Rule 1050 and led to an unlawful diminution of the right of the complainant to engage in the reassignment process conferred by this Staff Rule. This conclusion is not inconsistent with cases in which the Tribunal has recognised the obligation of an organization to explore other employment options with staff whose positions have been abolished but who are not covered by rules of the same character as Staff Rule 1050 (see, for example, Judgments 2902, consideration 14, and 3159, consideration 19). This type of case just referred to does not involve formal and widely cast processes and procedures for reassignment.

12. It is necessary to address the consequences of this conclusion. The complainant applied for a number of positions as part of the reassignment process. He was unsuccessful in relation to all of them. It is unnecessary to descend into detail about why he was unsuccessful in relation to each of them. It suffices to note that in relation to two of the positions (both P4 positions), of Strategic Information Adviser (one in Guatemala and the other in Swaziland), they were filled by either a staff member "exceptionally eligible to apply" or a staff member "due for mobility". That is to say, staff participating by virtue of the Executive Directive and not under Staff Rule 1050. Indeed the MRC said of the complainant in its report, in explaining why no favourable recommendation had been made, that no suitable placement had been identified because the "[q]ualifications and performance of [the complainant] do not exceed those of other candidates recommended for positions to which the [complainant] applied and positions at grade and one grade below". Why this incorrect test was applied is unclear and it certainly does not align with the declaration in the Executive Directive (assuming, for the moment, it was lawful and effective) that a person in the position of the complainant would be given

"due preference [...] over equally qualified candidates participating in mobility and those exceptionally authorized to apply [...]".

13. WHO challenges the receivability of the complainant's allegations concerning some of his applications made both during and after the expiry of the reassignment period, on the ground that the selection processes for those positions are not relevant to the impugned decision. However, the complainant is able to challenge his non-appointment as part of a challenge to the termination of his employment arising from his non-redeployment (see Judgment 4036, consideration 10).

14. There was a flaw in the reassignment process and the complainant lost a valuable opportunity to secure another position within UNAIDS and thus lost the opportunity of maintaining continuing employment (see, for example, Judgement 3754, consideration 21). It is inappropriate, in the circumstances, to make an order reinstating the complainant. The complainant seeks, by way of monetary relief, lost salary and moral damages. He is entitled to material damages for the lost opportunity just referred to, which the Tribunal assesses in the sum of 60,000 Swiss francs. He seeks moral damages for the injury he suffered from the flawed reassignment process and resulting separation from service. The Tribunal is satisfied that, in the circumstances of this case, the complainant is entitled to moral damages assessed in the amount of 10,000 Swiss francs. He is also entitled to costs assessed in the sum of 8,000 francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant 60,000 Swiss francs by way of material damages.
2. WHO shall pay the complainant 10,000 Swiss francs in moral damages.
3. WHO shall pay the complainant 8,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 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