

110th Session

Judgment No. 2973

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs B. K.-M. against the World Health Organization (WHO) on 9 January 2009 and corrected on 29 April, WHO's reply of 10 August, the complainant's rejoinder of 16 October and the Organization's surrejoinder of 4 December 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who has dual Lebanese and American nationality, was born in 1964. She joined the programme known as UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS, administered by WHO – as Manager, Best Practice, in the Information Centre at grade P.4, under a short-term contract for the period from 16 September 2003 to 13 August 2004. Her contract was renewed with the same title and grade for the period from 13 September 2004 to 12 August 2005. At her request, it was later amended to expire on 15 July 2005. She subsequently accepted a third short-term contract, again with the same title and grade, with effect

from 12 September 2005 and she separated from service upon its expiry on 30 November 2005.

In September 2004 the complainant asked Mr B., her first-level supervisor, to complete the performance evaluation report for the period covered by her first contract, which was overdue. That same month, Ms M., who was Director of the Social Mobilization and Information Department and the complainant's second-level supervisor, informed Mr B. that she intended to move the complainant's functions to another unit. By an e-mail of 2 October 2004 to Ms M. the complainant reported what she considered to be a pattern of harassing behaviour on the part of Mr B. Some time later, the complainant's desk – which had been located adjacent to Mr B.'s office – was relocated three floors away. With effect from 15 March 2005 the complainant's functions were formally transferred to the Office of the Director of the Social Mobilization and Information Department and Mr B. ceased to have supervisory authority over her. Between 15 March and 15 July the complainant was under the direct supervision of Ms M. Following a restructuring, with effect from 15 August 2005, the Social Mobilization and Information Department was renamed Policy, Evidence and Partnerships and the functions of Manager, Best Practice, were moved to the Human Rights, Gender and Best Practice Unit of that department. From 12 September until her separation from service, the complainant's first-level supervisor was Ms H., the Associate Director of that unit.

In March 2005 the complainant had a meeting with the Chief of Human Resources Management, Ms G., to whom she reported harassment on the part of Mr B. and asked for help in ensuring that the proper procedure was followed in the evaluation of her work performance. She wrote to Ms M. and Ms G. on 10 June 2005, requesting their guidance as to how to manage an upcoming meeting with Mr B. which had been scheduled in order to address the issue of her overdue performance evaluation reports. She stated that they were both aware that her relationship with Mr B. had been strained since September 2004 and she alleged that he had engaged in "extensive character assassination" since that time. The complainant met with

Ms M. and Mr B. on 16 June 2005. By an e-mail of 17 June to them as well as to Ms G., she expressed inter alia her dissatisfaction with the delay in finalising her performance evaluation reports and with the Administration's approach to the evaluation process. The report covering her first contract was completed on 24 June 2005. Her evaluation reports for the period from 16 September 2004 to 17 March 2005 and for the period from 17 March 2005 to 15 July 2005 were finalised on 22 June and 14 July 2005 respectively.

In the meantime, on 7 July 2005 a vacancy notice was advertised for a fixed-term post for the position of Manager, Best Practice, in what was then the Social Mobilization and Information Department / Information Centre. The complainant applied for this post on 8 July. Between 5 October and 5 November she was absent on sick leave. On 7 November she was interviewed for the post. In a letter of 23 November to the Director of the Programme Support Department the complainant stated that she had been ostracised by members of UNAIDS' management as a consequence of her having reported Mr B.'s behaviour and she expressed concern that she would suffer discrimination during the selection process for the aforementioned post. As it happened, she was not selected for the post and she separated from service on 30 November 2005.

On 16 February 2006 the complainant lodged a formal complaint with the WHO Headquarters Grievance Panel, alleging that Mr B. had subjected her to sexual and psychological harassment for a period of more than two years. By a letter of 24 February she was informed that the Grievance Panel considered her complaint receivable. In the first half of 2007 the complainant made numerous enquiries regarding the status of her complaint. By a letter of 27 June 2007 she was informed that Mr B. had challenged the receivability of the complaint and that the Grievance Panel would consider that issue at its first meeting. Between September 2007 and February 2008 a series of exchanges ensued between the complainant and the Administration regarding the appointment of an external expert to assist the Grievance Panel with its investigation and the delay in the proceedings. By a letter of 28 February 2008 the complainant was informed that the Grievance Panel had met and once again determined that her complaint was

receivable. She was also informed that a full investigation would commence.

By an e-mail of 29 May 2008 to the complainant's counsel, Human Resources Management enquired about the possibility of reaching a settlement in the case. Having heard nothing further, on 2 October the complainant wrote to the Chair of the Headquarters Grievance Panel requesting an update on the status of her complaint. By a letter of 10 October 2008 the Director-General of WHO informed the complainant that Mr B.'s ongoing medical condition had prevented his full participation in the investigation and the Grievance Panel proceedings. As a result the Grievance Panel had been unable to provide her with a complete report and it was therefore not possible for her to take a decision on the merits of the complaint. Acknowledging the unsatisfactory nature of this outcome for all of the parties concerned and noting the delay in the proceedings, she awarded the complainant 10,000 Swiss francs. That is the impugned decision.

B. The complainant contends that WHO and UNAIDS violated the duty of care owed to her by failing to provide a work environment free from harassment. She points out that she sought the advice of the Ombudsman who subsequently intervened with the Office of the Executive Director of UNAIDS. On 1 April 2005 the Executive Director issued a memorandum regarding the work environment at UNAIDS and appended an Information Note from Human Resources Management dated 1 March 2005 regarding harassment. Despite these publications and the numerous reports of harassment she made to senior management, no action was taken by the Administration to address the tension in the workplace or to protect her from Mr B.'s behaviour. Instead, she was marginalised and victimised, which caused injury to her health, and subsequently separated from service.

She also contends that Mr B. repeatedly refused to complete her performance evaluation reports, despite many reminders from both herself and Human Resources Management. On numerous occasions she requested the assistance of Ms M. and Ms G. but it was not until June 2005 that Mr B. fulfilled his obligation in this respect.

Referring to the Tribunal's case law, the complainant argues that the Organization failed to carry out a timely and thorough investigation into her allegations and consequently breached both the duty of care owed to her and its duty of good governance, thereby depriving her of her right to be given an opportunity to prove her allegations. She points to the fact that numerous staff members who were witnesses to the harassment have since separated from service. In addition, without a report from the Headquarters Grievance Panel, the Headquarters Board of Appeal was unable, at the time it considered an appeal she had lodged regarding her non-selection for the post of Manager, Best Practice, to make a recommendation on her claim for moral damages.

The complainant challenges the Organization's assertion that Mr B.'s medical condition prevented a full investigation of her allegations. She notes that he was able to submit written arguments to the Grievance Panel regarding the receivability of her formal complaint and that of another staff member who had made similar allegations against him. She contends that the delays in the Grievance Panel proceedings were a violation of procedure, as was its second examination of the receivability of her complaint.

She finds the reasons for the decision to award her 10,000 francs in compensation unclear and she questions why the Organization made awards in the same amount to Mr B. and to another staff member whose similar allegations of harassment against Mr B. were not investigated due to the latter's medical condition.

The complainant seeks material damages in an amount equivalent to two years' salary at grade P.4, step 3. She also seeks moral damages and compensation for injury to her health and for the failure by UNAIDS to provide a work environment free from harassment. She claims costs.

C. In its reply WHO submits that numerous reasonable measures were taken by Ms M. in response to the complainant's allegations. Ms M. discussed the matter with Mr B. and advised him to maintain a professional management relationship with all of the Information

Centre's staff members. In early 2005 she arranged for him to meet regularly with an external consultant in order to improve his management skills. In addition, the complainant's desk was relocated, her functions were reassigned and Mr B. no longer acted as her first-level supervisor.

The Organization denies that the delay in finalising the complainant's performance evaluation reports stemmed from a refusal by Mr B. to fulfil his obligation in that respect. It explains that he was absent on sick leave during the first half of 2004 and that changes in the first-level supervision of the complainant required assessments from more than one supervisor in order to bring the evaluations up to date. It adds that Mr B.'s appraisals of the complainant's performance were positive.

WHO submits that Mr. B.'s health condition made it impossible for the Grievance Panel to conduct a timely and thorough investigation of the complaint because it was not possible, for medical reasons, to interview him. It rejects the allegations made by the complainant in this respect. His condition was monitored by the Director of Health and Medical Services during and after his service with UNAIDS; he was separated from service for health reasons and he is in receipt of a disability benefit from the United Nations Joint Staff Pension Fund. Furthermore, the gravity of his condition was confirmed by medical information that was requested by and provided to the Director-General before she made the impugned decision.

The Organization states that the Headquarters Board of Appeal did make a recommendation on the complainant's claim for moral damages and that this recommendation was provided to the Executive Director on 21 November 2008 who accepted it and advised the complainant of his decision by a letter dated 8 January 2009.

It asserts that the Director-General's letter of 10 October 2008 was not an offer of compensation to the complainant. The letter conveyed the Director-General's final decision on the complainant's harassment complaint.

D. In her rejoinder the complainant elaborates on her pleas. She points out that the relocation of her desk and the transfer of her functions occurred at her own request. Furthermore, she suffered retribution from Mr B. because of her allegations, and the stress of the situation led to her prescribed sick leave. She also points out that, despite his medical condition, Mr B. was well enough to initiate an appeal against a decision to remove him from his function, request a two-year contract extension and pursue a complaint before the Tribunal, which resulted in a judgment.

The complainant asks the Tribunal to award her “substantial compensation” for the mental, physical and material damages which were the result of Mr B.’s harassment and the Organization’s failure to observe the Staff Rules and Staff Regulations. She also asks the Tribunal to set aside the decision regarding her non-selection for the post of Manager, Best Practice.

E. In its surrejoinder the Organization maintains its position. It argues that after her performance evaluation reports were finalised the complainant made no further allegations until after she had been informed of her non-selection for the post of Manager, Best Practice, and it was therefore reasonable for Ms M. to consider that the complainant’s concerns had been resolved. It objects to the complainant’s claims regarding her non-selection for the post in question on the basis that these claims are the subject of another complaint before the Tribunal. WHO also denies that her sick leave was attributable to the actions of Mr B. or the Administration.

CONSIDERATIONS

1. The complainant joined UNAIDS in September 2003 as Manager, Best Practice, at grade P.4, in the Information Centre of the Social Mobilization and Information Department. She worked on short-term contracts until November 2005 when she left UNAIDS. In December 2003 her first-level supervisor, Mr B., went on extended sick leave until June 2004. In his absence she was asked to take

over his duties as Chief of the Information Centre. Upon Mr B.'s return to work in June 2004, the complainant, who states that there were interpersonal problems within the unit, noted that he was becoming antagonistic and aggressive and that he had numerous conflicts with staff.

2. The complainant alleges that for a period of more than two years she was subjected to sexual and psychological harassment by Mr B. She states that she reported the harassment repeatedly to the Director of the Social Mobilization and Information Department, Ms M., the Chief of Human Resources Management, Ms G., and the Ombudsman.

3. In early December 2005 another staff member filed a formal complaint of harassment against Mr B. with the Headquarters Grievance Panel. A few days later, Mr B. suffered a heart attack and never returned to work. In mid-February 2006 the complainant filed a formal complaint of harassment with the Grievance Panel. However, an investigation into that complaint was never completed on the grounds that Mr B. was too ill to be interviewed or to defend properly the allegations against him.

4. By a letter of 10 October 2008, which is the impugned decision, the Director-General informed the complainant that she was unable to take a decision on the complaint as a result of the Grievance Panel's inability to conduct an investigation. She acknowledged that this was an unsatisfactory result and awarded the complainant 10,000 Swiss francs in compensation.

5. The complainant contends that WHO and UNAIDS breached their duty of care by failing to take action to address the workplace tensions, to protect her from harassment and to investigate her complaint promptly and in accordance with the procedures established by the Organization.

6. WHO submits that the actions taken in response to the complainant's concerns were sufficient and reasonable in the circumstances; that the time taken to convene the Grievance Panel was due to a backlog of cases and the medical condition of Mr B.; and that the Panel was not able to complete its investigation by reason of Mr B.'s medical condition which was duly substantiated. Furthermore, WHO contends that no further damages should be awarded as the complainant has been adequately compensated for the unsatisfactory result of her harassment complaint.

7. Turning first to the period of time prior to the filing of the formal complaint of harassment, the Organization maintains that Ms M. responded promptly to the complainant's informal complaints. It asserts that the actions taken by her and the Associate Director of the Human Rights, Gender and Best Practice Unit, were reasonable and sufficient in the circumstances and in line with their respective roles and responsibilities. The Tribunal finds that this assertion is not supported by the evidence. Although there is evidence that the Organization tried to take steps to improve Mr B.'s management skills, this action was directed at helping Mr B. and not at protecting the complainant. As to the steps taken to distance the complainant from Mr B., including the transfer of her functions to a different unit, these steps were initiated by the complainant and not by the Administration.

8. In further support of its assertion that the actions of the Administration were responsive to the complainant's concerns, WHO points out that the Executive Director of UNAIDS initiated a fact-finding inquiry, separate and apart from the investigation of the Grievance Panel, with a view to addressing the allegations quickly, determining whether misconduct had occurred, and whether disciplinary action might be warranted. The Tribunal notes that, at the time the Executive Director initiated the inquiry, the complainant had not filed a formal complaint with the Grievance Panel. It is plain from the Organization's submissions that this action was taken by the

Executive Director in relation to a complaint filed with the Grievance Panel by another staff member and not by the complainant. In these circumstances, it is unacceptable to claim that the Organization was responsive to the complainant's concerns.

9. In terms of the formal complaint filed with the Grievance Panel, as mentioned above, WHO states that the time taken to bring it to a conclusion was due to a backlog of cases and "the grave and ongoing medical condition" of Mr B.

10. To the extent that the Organization attributes the delay in processing the harassment complaint to Mr B.'s medical condition, the Tribunal makes the following observations. Although a summary of the complaint was prepared and sent to the Director-General and a copy thereof to Mr B., the first step in the process, namely, constituting a Panel to examine the complaint, was not taken until the end of June 2007, approximately 16 months after the filing of the formal complaint. No explanation is offered for the fact that once the Panel was constituted it took until the end of February 2008 to resolve a straightforward question of receivability. It was only then that the Grievance Panel advised that it would proceed with a full investigation and that since Mr B. had only given an initial response he would be given an opportunity to respond fully to the complaint. Up to that point, it cannot be said that the delays were due to Mr B.'s medical condition.

11. It would appear that in March 2008 the Panel wrote to Mr B.'s counsel and advised him of his client's right to submit a reply within 30 days. He was also asked to provide up-to-date information regarding his client's medical condition. Following an exchange of correspondence and receipt of a medical report on 31 July, the Director-General reached the decision that was conveyed to the complainant on 10 October 2008. At best, if any delay can be attributed to Mr B.'s medical condition, it was not more than five months.

12. The question remains whether Mr B.'s medical incapacity to participate in the investigation justified its termination. It must be observed at this point that the state of Mr B.'s health at the material time is based on assertion only. The Organization has not tendered any evidence in support of its assertions. Given its position that it was actively monitoring Mr B.'s medical condition, it would be expected that evidence in support of the assertion would have been adduced.

13. The Tribunal notes that the WHO Formal Process for Harassment Allegations at Headquarters contemplates that the investigation will be continued even if the alleged harasser has not filed a response to the complaint. If this were not the case, an alleged harasser could undermine an investigation by simply not submitting a response. However, that is not what happened in the present case. In its communications with the complainant and in its submissions, WHO characterised Mr B.'s response of 14 March 2007 as only being an initial response. This characterisation is not entirely accurate. Although Mr B. referred to his letter as an initial response, the letter is in fact a detailed foot-noted response to the complaint that deals with procedural matters, issues of receivability and due process, and the merits of each of the complainant's allegations.

14. In these circumstances, WHO was obliged to continue the investigation in accordance with the process it established to deal with harassment complaints. By terminating the investigation, WHO put the interests of the alleged harasser ahead of those of the complainant. In circumstances such as these, the Organization has a duty to provide both sides with an equal opportunity to present their case and to challenge the positions being advanced by the other party to the dispute. The inequality stemming from the termination of the investigation is well illustrated in the present case. As noted above, despite the defendant's assertion to the contrary, not only has the alleged harasser been given an opportunity to provide a detailed response, which the complainant has had no opportunity to challenge, he has also submitted lengthy statements from other individuals challenging the complainant's credibility. The complainant has been

denied the opportunity to challenge these statements or to adduce evidence in response.

15. It must also be added that, even if the investigation had not been terminated, the long delay seriously compromised the integrity of the investigative process. In addition to the diminishing recollection of events with the passage of time, potential witnesses are no longer available. As well, with the passage of time, it may be that those individuals in the Administration responsible for ensuring the protection of the staff member concerned are no longer with the Organization. If so, this would effectively preclude any accountability for the failure to protect a staff member if a finding of harassment were to be made.

16. In Judgment 2642, under 8, the Tribunal framed the obligations of an international organisation in the following terms:

“In Judgment 2552 the Tribunal pointed out that an accusation of harassment ‘requires that an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused’. Its duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account (see Judgment 1376).”

17. In terms of the consequences flowing from the breach of an organisation’s duty of care, in Judgment 2654, under 7, the Tribunal made the following observation:

“By failing to conduct an inquiry to determine the validity of such serious accusations, the defendant breached both its duty of care towards one of its staff members and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations. This attitude is liable to have caused serious injury which the indemnity awarded at the proposal of the Appeals Board does not entirely redress.”

18. In the present case, there were serious allegations of both sexual and psychological harassment. By failing to deal with the informal complaints in a manner consistent with its own policy, by

failing to conduct an investigation in a timely manner when a formal complaint was filed and then by terminating the investigation, WHO breached its duty of care toward the complainant and caused her serious injury. The offer of compensation of 10,000 Swiss francs does not adequately compensate the injury accruing from the long delay and the termination of the investigation. Accordingly, the impugned decision will be set aside. The complainant is entitled to an award of moral damages in the amount of 30,000 francs, inclusive of the amount awarded by the Director-General. As the complainant was from time to time represented during the course of the failed investigation, it is appropriate to award costs for that and the present proceedings in the amount of 3,000 francs.

DECISION

For the above reasons,

1. The Director-General's decision of 10 October 2008 is set aside to the extent that it did not award the complainant more than 10,000 Swiss francs as moral damages.
2. WHO shall pay the complainant moral damages in the amount of 30,000 francs, inclusive of the amount awarded by the Director-General.
3. It shall also pay her costs in the amount of 3,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron

Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet