Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

G.

v.

WHO

124th Session **Judgment No. 3871**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. G. G. against the World Health Organization (WHO) on 17 March 2015 and corrected on 2 April, WHO's reply of 17 July, the complainant's rejoinder of 7 September, WHO's surrejoinder of 17 December 2015, the complainant's further submissions of 22 March 2016 and WHO's final comments of 29 April 2016;

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 WHO's refusal to reinstate him after the decision to dismiss him was set aside.

At the material time, the complainant, who entered WHO's service in 2002, was an Administrative Officer in the WHO Country Office in Chad. On 1 July 2007 he was given a continuous appointment.

The complainant received a first written reprimand for misconduct on 17 March 2008 and a second one on 25 September 2008. On 19 November 2008 he submitted an appeal to the Regional Board of Appeal (RBA) in order to challenge the second written reprimand. By a memorandum of 4 November 2009, a copy of which was sent to

the complainant by email on 6 November, the Regional Director for Africa informed him that, having regard to the conclusions of the RBA, he had decided to maintain the written reprimand of 25 September 2008.

In the meantime, on 25 June 2009, the Regional Personnel Officer advised the complainant that he was accused of breaches of his duties of vigilance and monitoring, which had allegedly caused the Organization "serious financial losses". The complainant provided his comments on 15 July and 30 September 2009. He was informed by a letter of 4 February 2010 that the Regional Director had found that he had committed a "serious breach" of his responsibilities and duties. In view of all the "relevant circumstances", in particular the two above-mentioned written reprimands, the Regional Director had decided to dismiss him for misconduct with one month's notice as from the notification of that decision.

The complainant submitted an appeal to the RBA against that decision, which took effect on 8 March. On 23 September he was informed that, on the basis of the RBA's report, the Regional Director had decided to maintain the decision. On 19 November 2010 the complainant submitted an appeal to the Headquarters Board of Appeal (HBA) seeking the quashing of the decision of 4 February 2010 and the withdrawal of the written reprimands of 17 March and 25 September 2008. He contended that those decisions had caused him substantial material and moral injury. He also alleged that he had been harassed. On 8 January 2013 the HBA suspended its proceedings and referred to the Director of the Office of Internal Oversight Services (IOS) the aspect of the appeal which was related to those allegations, in accordance with a provisional addendum to its Rules of Procedure. Following an initial review of the allegations, IOS concluded that the complainant had not been harassed. The Director-General therefore decided to close the matter in accordance with paragraph 7.11 of the Policy on the Prevention of Harassment at WHO.

In its report of 28 October 2014, the HBA found that the procedure that had culminated in the decision to dismiss the complainant was inadequate and flawed, and that the decision was based on an incomplete examination of the facts and disregarded the principle of proportionality. In its opinion, the misconduct of which the complainant was accused was more in the nature of "substandard performance". The HBA therefore

recommended that the decisions of 4 February and 23 September 2010 be set aside. Emphasising that several years had elapsed since the complainant's dismissal and that, in view of the circumstances, his reinstatement would be "problematic", it recommended that he should be awarded a sum equivalent to 18 times his last gross monthly salary, plus interest at 8 per cent per annum, in compensation for the material and moral injury which he had suffered. Lastly, it recommended that his legal costs should be reimbursed up to a maximum of 10,000 United States dollars.

On 24 December 2014 the Director-General informed the complainant that she rejected his allegations of harassment. She further advised him that, in accordance with the recommendation of the HBA, she had decided to set aside the decisions of 4 February and 23 September 2010 and to award him, in compensation for the material and moral injury which he had suffered, a sum equivalent to 18 times his net basic salary plus post adjustment at the rate applicable at the date of his dismissal. She also granted him 3,000 dollars in compensation for the injury resulting from the undue length of the internal appeal procedure. Lastly, she stated that his costs would be reimbursed up to a maximum of 3,000 dollars upon receipt of documentary evidence. That is the impugned decision.

The complainant principally asks the Tribunal to order his reinstatement in his previous or a similar post as from 8 March 2010 with all the legal consequences that this entails, the payment of interest on all his salary arrears, the reimbursement of his expenditure on his children's schooling since his dismissal, the payment with interest of the "indemnity for the transportation of [his] personal effects" and the payment of interest on his dismissal indemnity. He also requests the withdrawal of the two written reprimands that he received and their removal from his personal file, as well as the publication on the WHO Intranet of that withdrawal, the quashing of the decision to dismiss him and the decisions taken as a result of his reinstatement. He likewise seeks the quashing of the decision of 4 November 2009. Lastly, he claims 200,000 euros in compensation for defamation and 50,000 euros in compensation for moral injury.

Subsidiarily, he asks for the payment with interest of a sum equivalent to the salary, allowances and other benefits which would have been due to him up until 30 June 2028, the date on which his continuing appointment would have expired, and an award of 100,000 euros in compensation for moral injury.

WHO submits that the complaint is irreceivable for failure to exhaust the internal means of redress insofar as it seeks the withdrawal of the written reprimand of 17 March 2008 and the quashing of the decision of 4 November 2009, the publication on its Intranet site of those measures and the payment of compensation for moral injury and for defamation. It states that the complainant received the "transportation indemnity". In addition, it seeks the dismissal of the complaint as groundless.

CONSIDERATIONS

1. By her decision of 24 December 2014, the Director-General set aside the decision taken on 4 February 2010 by the Regional Director for Africa to dismiss the complainant for misconduct. She considered that that measure had been adopted at the end of flawed disciplinary proceedings and that it disregarded the principle of proportionality. She agreed with the HBA that the complainant's shortcomings amounted to "substandard performance" rather than misconduct warranting disciplinary action.

However, the Director-General refused to reinstate him on the grounds that "separation" had occurred "many years" earlier and that such reinstatement would be "problematic". She therefore decided to grant him, in compensation for material and moral injury, a sum equivalent to 18 times his net basic salary, plus post adjustment, at the rate applicable at the time of his dismissal. She explained that she had decided not to deduct from that compensation any occupational earnings he might have received since his dismissal.

2. The complainant principally challenges the refusal to reinstate him.

3. As the Tribunal has consistently held, an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if she or he holds an appointment of indeterminate duration, without first taking suitable steps to find her or him alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, or 2207, under 9). When it has to abolish a post held by a staff member who holds a contract for an indefinite period of time, it must do all that it can to reassign that person as a matter of priority to another post matching her or his abilities and grade. If the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place her or him in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

The above-cited case law relating to the abolition of a post held by staff member holding a contract for an indefinite period also applies when examining the possibilities for reinstating an official with a continuous appointment who has been unlawfully dismissed on disciplinary grounds.

In the instant case, the Director-General therefore had a duty, in principle, to restore the *status quo ante* after having decided to set aside the decision to dismiss the complainant. Thus, regardless of the fact that the complainant's previous post had been abolished, the Director-General was not free to choose between reinstatement and compensation.

4. The Director-General breached these duties. Instead of inquiring whether there were any posts available for the complainant, she merely refused to reinstate him on the assumption that such reinstatement was impossible. In her decision of 24 December 2014 she did not mention any specific circumstance justifying that assumption.

In particular, the time which has elapsed since dismissal does not, in principle, exempt an employer from taking steps to reinstate an official whose contract was ended unlawfully. Were that not the case, the employer could avoid having to reinstate the official following the setting aside of her or his dismissal simply by delaying the internal appeal proceedings initiated to challenge the dismissal.

In its reply, WHO points to the fact that, in 2011, for pressing financial reasons, the Regional Director decided to abolish a number of administrative officer posts in country offices throughout the Africa region, including that which used to be held by the complainant. It submits that this also precluded his reinstatement. In this connection, it provides an extensive account of the staffing situation of WHO at the material time. Considerations of this kind lie outside the scope of the power of review exercised by the Tribunal, which can only examine whether there has been an abuse of discretion. In this case, there is nothing to suggest that such an abuse occurred. However, the Organization still had a duty to look for posts in sectors unaffected by the above-mentioned post abolitions.

For similar reasons, the submission that, in view of the large number of posts which were abolished in the Africa region, it would not have been possible to find one matching "the complainant's qualifications, experience and grade", is also misconceived, since it overlooks the fact that the Organization had a duty to examine whether a post at a lower grade was available, as stated under 3, above.

Lastly, WHO submits that the complainant's reinstatement was not appropriate because it had lost trust in his ability to perform his duties satisfactorily. This submission will not, however, be accepted, as the complainant's dismissal was based not on professional shortcomings but on disciplinary grounds.

On this point, the impugned decision is therefore unlawful.

5. In addition, the complainant asks the Tribunal to cancel the two written reprimands which he received on 17 March and 25 September 2008 and to order their removal from his personal file.

WHO contends that these claims are irreceivable, because internal means of redress have not been exhausted within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal.

6. The case law related to this provision requires that any person who claims to have exhausted internal means of redress must prove that she or he has exactly followed the procedure laid down in the staff

regulations and in particular that she or he has observed the time limits set by the procedure (see, for example, Judgment 1469, under 16).

The submissions in the file show that the complainant did not submit an appeal to the RBA against the decision ordering the written reprimand of 17 March 2008. Insofar as it is directed against this decision, the complaint is therefore irreceivable for failure to exhaust internal means of redress.

7. On the other hand, the complainant did submit an appeal to the RBA on 19 November 2008 to challenge the second written reprimand which he received on 25 September 2008. In a memorandum of 4 November 2009 the Regional Director informed the complainant that, having regard to the findings of the RBA, he had decided to maintain the disputed measure.

8. WHO contends that the complainant did not challenge the Regional Director's decision contained in the memorandum of 4 November 2009 within the prescribed time limits and that, consequently, the complaint is also irreceivable insofar as it challenges the second written reprimand received by the complainant.

However, the complainant alleges that the Regional Director prevented him from exercising his right of appeal by not forwarding that decision to him.

9. According to the Tribunal's case law, it is incumbent upon the sender of a document to prove, in the event of any dispute in this regard, that it was actually received by its addressee (see, for example, Judgment 2074, under 6).

WHO merely states that the complainant was notified of the decision of 4 November 2009 by email on 6 November. The Tribunal notes, as did the HBA in its report, that there is no evidence to support this statement. Moreover, the HBA rightly pointed out that doubts remained as to the circumstances in which the notification of the decision of 4 November 2009 took place.

WHO's submissions concerning the determination of the date on which the complainant learned of the decision of 4 November 2009 will therefore be disregarded.

10. On 19 November 2008 the complainant submitted an appeal to the RBA to challenge the written reprimand of 25 September 2008. The evidence in the file shows that, in the appeal which he submitted to the RBA on 1 March 2010 against the decision to dismiss him, the complainant said that he had still not received a decision on his appeal of 19 November 2008, and he again challenged that reprimand. He states that, since he had not received a decision on his appeal of 19 November 2008, he referred the matter to the HBA on the same date, 1 March 2010. It seems that the complainant is submitting that the HBA also prevented him from exercising his right of appeal because, according to him, it has not dealt with that appeal.

In its report of 28 October 2014 the HBA acknowledged that on 8 March 2010 its secretariat had received, "without a covering letter", "a copy of the documents which the complainant had apparently filed" earlier with the RBA, in other words "a complete copy of his brief [...] together with its annexes". The HBA explained that those documents had not been added to the file of the appeal against the dismissal decision.

It found, however, that "the circumstances in which the reprimand of 25 September [2008] ha[d] been decided and upheld by the decision of [...] 4 November 2008 (*recte* 2009) [were] tainted with several procedural flaws".

It did not draw any consequences from this statement and made no recommendation in respect of the reprimand or the decision of 4 November 2009 upholding it. In her decision of 24 December 2014, the Director-General noted the "procedural shortcomings" recorded by the HBA in relation to the written reprimand of 25 September 2008, but she did not draw any consequences from this.

In these circumstances, the case must be remitted to WHO in order that a final decision may be taken as soon as possible on the complainant's challenge of the written reprimand of 25 September 2008,

after completion of the appeal procedure applicable to disciplinary matters on the date on which this judgment is delivered.

11. This decision renders moot the complainant's requests that the withdrawal of the written reprimand of 25 September 2008 be published on the WHO Intranet and that he be awarded 200,000 euros in compensation for the injury caused by the defamation which he considers he has suffered as a result of the disciplinary proceedings which led to the issuing of this reprimand.

12. The complainant also criticises the procedure followed for the initial review of his harassment complaint and takes the IOS to task for its failure to consider all the evidence which he had submitted in support of his complaint.

The Tribunal's case law has established that the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of. An allegation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see Judgment 3233, under 6, and the case law cited therein).

13. The complainant's criticism of the manner in which the IOS conducted its proceedings is groundless. The IOS rightly found that the complainant had not furnished any substantive, cogent evidence that he had been a victim of harassment and he had not named a single reliable, independent witness. It was therefore open to the Director-General to close the matter on the basis of these findings.

14. However, it follows from what was said earlier, without there being any need to examine the complainant's other pleas, that the Director-General's decision of 24 December 2014 was unlawful. It must therefore be set aside, except in respect of the award to the complainant of a sum for costs arising from the internal proceedings and of damages for the undue length of the internal appeal proceedings.

15. Having regard in particular to the nature and duration of the appointment which the complainant formerly held, the Tribunal will order WHO to reinstate him, as far as possible, as from 8 March 2010, the date on which his dismissal took effect, with all the legal consequences that this entails.

If, however, WHO considers, in view of its staff complement and the availability of budgetary funds, that reinstatement is impossible, it will have to pay the complainant damages for the material injury caused by his unlawful removal from his post.

In this connection, the complainant has no grounds for claiming the payment of all the emoluments which he would have received until he reached retirement age because, although he held a continuous appointment, his contract did not guarantee that he would remain in WHO's service until the end of his career, since the Organization had lost trust in him.

16. The damages to be awarded to the complainant in the event that he is not reinstated by WHO must take account of the following factors. The complainant was 44 years of age when he was dismissed. He had been working for WHO for approximately eight years. He held a grade P-3 post of Administrative Officer in a country office. He was given a continuous appointment in 2007. It is doubtful, to say the least, that after leaving WHO he was in a position to obtain in the medium term, in his region, a status similar to that which he enjoyed when working for the Organization. Moreover, the two jobs which he says he held, one from April 2010 to July 2012 and the other as from July 2012, have provided him with income far below his salary as an international civil servant working for WHO. The complainant has therefore suffered a substantial material loss.

17. In light of all the circumstances of the case, the Tribunal considers that, in the event that WHO fails to reinstate the complainant, it must pay him: the equivalent of the salary and benefits of all kinds which he would have received if the execution of his contract had continued for three years from 8 March 2010, less the indemnities paid

to him pursuant to the impugned decision (except for the sums already awarded to him for costs and in compensation for the undue length of the internal appeal proceedings) and any earnings which he received during that period; the equivalent of the contributions to pension, provident or social security schemes which it would have had to bear during the same period; and interest on all these sums at the rate of 5 per cent per annum from due dates until the date of payment.

18. The complainant also contends that he suffered substantial moral injury and he claims at least 50,000 euros in compensation under that head.

It must first be noted that, contrary to WHO's submissions, the fact that this claim was not raised during the internal appeal proceedings does not render it irreceivable. Consistent precedent has it that the rule laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must first be exhausted does not apply to a claim for compensation for moral injury, which constitutes a claim for consequential relief which the Tribunal has the power to grant in all circumstances (see Judgment 2609, under 10, or Judgment 3080, under 25).

19. The Tribunal considers that the complainant has suffered substantial moral injury owing to the unlawful acts and decisions.

The fact that the dismissal decision was flawed in several respects and the Director-General's refusal to reinstate the complainant after setting aside that decision undermined his dignity. The way in which he was treated is all the more shocking for the fact that he had served WHO for some eight years. Having regard to these matters, the Tribunal considers that the moral injury caused to the complainant may be fairly redressed by awarding him, in any case, compensation in the amount of 15,000 euros.

20. The complainant claims reimbursement of his expenditure on his children's schooling since his dismissal. In view of what is said in considerations 15 to 17, above, this claim must be rejected as his children's

school fees will be paid in accordance with the conditions laid down in the WHO Staff Regulations and Staff Rules.

The complainant also claims the payment with interest of the "indemnity for the transportation of [his] personal effects". The Tribunal finds that this claim has become moot because he has been reimbursed for this expenditure and that, in the circumstances of the case, there are no grounds for granting interest for the delay in paying this sum.

21. Lastly, the complainant requests the payment of interest on the dismissal indemnity which he has already received. There are no grounds for making such an order, since the complainant has provided no evidence of any delay in the payment of this indemnity.

22. Nor are there any grounds for accepting the complainant's claim that WHO should be ordered to publish on its Intranet the setting aside of the decision to dismiss him, since the internal proceedings relating thereto were confidential.

DECISION

For the above reasons,

1. The decision of the Director-General of WHO of 24 December 2014 is set aside, except insofar as it awards the complainant costs and compensation for the injury suffered on account of the undue length of the internal appeal proceedings.

2. The complainant shall, as far as possible, be reinstated in WHO as from 8 March 2010, with all the legal consequences that this entails.

3. If WHO deems reinstatement to be impossible, it shall pay the complainant material damages, plus interest, calculated as indicated in consideration 17, above.

4. To the extent that it concerns the written reprimand received by the complainant on 25 September 2008, the case is remitted to WHO as indicated in consideration 10, above.

5. WHO shall, in any case, pay the complainant moral damages in the amount of 15,000 euros.

6. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ