

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N.
v.
WHO

129th Session

Judgment No. 4240

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. C. N. against the World Health Organization (WHO) on 1 November 2017 and corrected on 25 January 2018, WHO's reply of 2 May, the complainant's rejoinder of 9 August and WHO's surrejoinder of 13 November 2018;

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 reassign her to the post of Senior Advisor on Innovative Strategic Information, Strategic Information and Evaluation Department (SIE).

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO. At the material time, she was Director, Technology and Innovation Department (TIN), at grade D.1.

From February 2013 onwards the complainant sought advice from the Chief, Governance, about working effectively with the Deputy Executive Director, Management and Governance (the DXD/MER), who had become her new first-level supervisor in 2012.

On 15 June 2015 the complainant was escorted to Health and Medical Services. She was placed on sick leave until 31 January 2016. The Director, Staff Health and Welfare (SHW) wrote to the UNAIDS Executive Director in October 2015, expressing the view that if the complainant returned to her post at the end of her sick leave period, the risk of relapse would be “near certain”*.

On 28 November 2015 the UNAIDS Executive Director informed the complainant of the possibility of reassignment to the position of Senior Advisor, SIE. The complainant asked him to reconsider this offer on the ground that this position carried no substantive responsibility and was, in effect, a demotion. The Executive Director replied on 8 December 2015 that there were no other suitable positions to which she could be reassigned.

By a letter dated 19 January 2016 the complainant submitted a formal complaint of harassment against the DXD/MER which also contained allegations of harassment against two staff members from the DXD/MER’s Office. The complainant also submitted a claim to the Administration to recognize her sick leave as service-incurred. The complainant’s allegations of harassment are the subject of her second complaint before the Tribunal.

By a letter of 28 January 2016 the complainant was informed of the decision to reassign her to the position of Senior Advisor, SIE, at grade D.1. She would maintain her grade and step upon reassignment, which would be effective as of 1 February 2016.

On 23 March 2016 the complainant lodged an appeal against the 28 January 2016 decision. Her appeal was subsequently transferred to the newly-established Global Board of Appeal (GBA), which recommended in its report of 18 July 2017 to dismiss her appeal in its entirety. The complainant was informed of the UNAIDS Executive Director’s decision to follow that recommendation by a letter of 4 August 2017. That is the impugned decision.

* Registry’s translation.

Meanwhile, on 3 November 2016, the complainant was informed of the decision to abolish the post of Senior Advisor, SIE, and, on 23 December 2016, of the decision to reassign her to a position in South Africa, which she declined for family reasons. In March 2017 she was notified of the decision to terminate her fixed-term appointment. She was separated from service on 24 July 2017. She has appealed against all three decisions.

The complainant requests the Tribunal to quash the impugned decision and to order her reinstatement in her former post of Director, TIN, or in another post commensurate with her skills and experience, as of 24 July 2017. Alternatively, she asks for material damages equivalent to the salary and benefits she would have received from her date of separation to the date of expiration of her fixed-term contract, and 80,000 Swiss francs for the removal of her responsibilities as Director and its impact on her ability to secure alternative employment at the same level elsewhere. She claims 50,000 francs in moral damages for the lack of protective measures against retaliation which resulted in her reassignment, 80,000 francs in material, moral and exemplary damages for the prejudicial treatment, as well as all costs, with interest on all sums awarded.

In her rejoinder, the complainant requests WHO to produce the information it sent to the United Nations in order for it to conduct her first-level supervisor's vetting process before her promotion and to explain how she could have been vetted before the end of the investigation into her alleged misconduct.

WHO submits that the complainant's allegations of harassment and her claim for compensation for service-incurred illness are irreceivable as they are the subject of separate appeal proceedings. It asserts that an order to reinstate the complainant to her former post would be impossible to implement, as that post has been abolished. It asks the Tribunal to dismiss the complaint as entirely unfounded and to dismiss all her claims for relief.

With respect to the complainant's request for documents, WHO rejects her assertions and states that it is not in a position to comment on the process used by the Secretary-General of the United Nations to select his senior staff.

CONSIDERATIONS

1. The complainant, who was the Director, TIN, challenged the decision to reassign her to the position of Senior Advisor, SIE, effective as of 1 February 2016. She was informed of that decision by a letter of 28 January 2016. It also informed her that the new post was at the D.1 grade, as was her previous post. Her challenge of the reassignment decision culminated in the impugned decision, dated 4 August 2017, which informed her that the UNAIDS Executive Director, following the recommendation of the GBA in its report of 18 July 2017, dismissed her internal appeal in its entirety. The GBA had concluded that the decision to reassign the complainant was taken in accordance with WHO's Staff Regulations and Staff Rules and was not tainted by personal prejudice, malice, bias, ill-will or by an incomplete consideration of the facts. It further concluded that the Administration had not failed to observe or correctly apply the applicable procedural provisions for reassignment, had carried out the reassignment with due regard for the complainant's dignity and that the classification standards for the post of Senior Advisor were properly applied so that there was no error of law, as she had alleged in her appeal.

2. The complainant applies for an oral hearing pursuant to Article 12, paragraph 1, of the Tribunal's Rules. She states in her brief that "[c]onsidering that the facts of the case are in dispute and that [she] was not able to adduce all the relevant evidence in writing, she requests that an oral hearing be conducted and the issues submitted herein be investigated". She reserved her right to call witnesses after receiving WHO's reply and surrejoinder. In its reply, WHO submits that such a hearing is unnecessary noting, among other things, that the brief states no grounds for the application. The Tribunal notes that the complainant

named no witnesses and did not refer to an oral hearing in her rejoinder. Moreover, the issues raised in the proceedings before the Tribunal can be resolved having regard to the detailed pleas and the documentary evidence which the parties have provided. The application for an oral hearing is therefore rejected.

3. The request, which the complainant made in her rejoinder, for WHO to produce documents relating to her first-level supervisor's vetting process leading to the latter's promotion to another post before the end of the investigation of the harassment allegations, will also be rejected. That matter is irrelevant to the complainant's reassignment.

4. Regarding the regulatory framework for staff reassignment, Article 1.2 of the Staff Regulations empowers the Executive Director of UNAIDS, among other things, to assign staff members to any of the offices of the UNAIDS Secretariat. Article 4.2 relevantly states that the paramount consideration in the reassignment of staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Staff Rule 565.1 relevantly defines "reassignment" as "any formal movement of a staff member with a continuing or fixed-term appointment from one post to another [that] may involve a change in title, grade, duties, salary, post adjustment or official station, or a combination of these changes". Staff Rule 565.2 states that a staff member "may be reassigned whenever it is in the interest of [UNAIDS] to do so [and] may at any time request consideration for a reassignment in his own interest". Staff Rule 570.1 states that "[t]he grade of staff members may be reduced as a consequence of reclassification of the post occupied or reassignment to a different post of lower grade. The latter may result from: [570.1.1] the staff member's own request for personal reasons; [570.1.2] unsatisfactory performance or misconduct; or [570.1.3] as an alternative to termination under Rule 1050."

5. Regarding the applicable principles, the Tribunal has recognized the wide discretion of an executive head of an international organization, in the interest of the organization, to reassign staff members. The Tribunal has therefore stated that it may interfere with a decision

to reassign a staff member only on the limited grounds that the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, if some material fact was overlooked, if there was misuse of authority or an obviously wrong inference was drawn from the evidence. The Tribunal will therefore be circumspect in reviewing a reassignment or transfer. The Tribunal has recognized that reassignment may be influenced by the need to eliminate tensions that compromise the functioning of a unit. It has however reiterated that the organization must show due regard, in both form and substance, for the dignity of the official concerned, particularly by providing her or him with work of the same level of responsibilities as she or he performed in the previous post and matching her or his qualifications. The Tribunal has further stated that the responsibilities that attach to posts are comparable where on an objective basis the level of the duties to be performed is similar, and that the exercise to reclassify a post or to redefine the duties attaching thereto falls within the discretion of the executive head of the organization, on the recommendation of the relevant manager, and it is equally within the power of the management to determine the qualifications required for a particular post. However, every employee has the right to a proper administrative position, which means that she or he should both hold a post and perform the duties pertaining thereto and should be given real work (see, for example, Judgments 4086, considerations 10 and 11, and 3488, consideration 3).

6. The complainant contends that the GBA drew wrong conclusions and that the impugned decision should be set aside because it accepted those conclusions. She submits that, contrary to the GBA's findings, the decision to reassign her was tainted by improper motives, to wit, malice, ill-will, bias, discrimination and prejudice and that the reassignment was a disguised disciplinary measure and a demotion. She states that it is evident that the subject decision was not a genuine one and that it was designed to prejudice her personally and professionally. She seeks to rely on evidence concerning her allegations of harassment against her previous first-level supervisor, the DXD/MER, to support this ground of the complaint. WHO submits that statements concerning harassment are irreceivable and should be expunged from the record of

this complaint as the complainant has made harassment the subject of her second complaint before the Tribunal. This submission is rejected. The complainant makes it clear that she is not relying upon statements concerning harassment to assert that the decision to reassign her “was driven by the claimed harassment of [the DXD/MER] but rather that it occurred as a result of [the DXD/MER’s] malice, ill-will and prejudice against [her]” and that any statements brought into the present proceedings touching allegations of harassment are merely to support her plea that her reassignment was occasioned by these alleged improper motives on the part of the DXD/MER. She is not precluded from relying on statements touching on the alleged harassment to support her plea in these proceedings that she was reassigned as a result of the alleged improper motives (see, for example, Judgment 4149, consideration 7). However, this plea is unfounded.

It was obvious that the complainant had to be relieved from what she referred to as the “toxic and hostile [work] environment”, which she alleges caused her to be diagnosed with burnout in June 2015 and placed on sick leave until 31 January 2016. It is noteworthy that the Director, SHW, wrote to the Executive Director in October 2015 expressing the view that if the complainant returned to her post at the end of that leave period, the risk of relapse would be “near certain”*. The complainant’s evidence is that between July and November 2015, she discussed alternative working options with the Ombudsman, the Chief of Staff, the Director, SIE, the Director, Human Resources Management, and the UNAIDS Executive Director; that on 29 October 2015, the Administration suggested that she could be transferred to a post in the Rights, Gender, and Prevention and Community Mobilization Department under the Director of that Department; that she declined reassignment to that post as it was not in line with her experience, skills or qualifications; that she also declined transfer to the post of Senior Advisor under the Director, SIE, when the Executive Director informed her on 28 November 2015 of her possible reassignment to it, because she considered it a demotion as it carried no substantive responsibilities, whereupon he informed her on 8 December 2015 that there were no other suitable

* Registry’s translation.

positions available to which she could be reassigned. She states that she therefore met with the Director, SIE, on 15 January 2016 to discuss the terms of reference for the post of Senior Advisor in that Department and assumed that post on 1 February 2016 under protest.

7. The complainant also contends that, contrary to the GBA's finding, the reassignment process violated WHO's Staff Regulations and Staff Rules on reassignment. She also contends that, contrary to the GBA's finding, the organization did not justify the decision to reassign her and carried out that process without due regard for her dignity and improperly applied the reclassification standards ultimately failing in its duty of care towards her.

By way of relief, in addition to an order to set aside the impugned decision, the complainant seeks an order to be reinstated as Director, TIN. Alternatively, she asks the Tribunal to appoint her to a D.1 post at UNAIDS, Geneva, with responsibilities commensurate with those which she had in her previous post. This latter request is rejected as an appointment to another post falls within the discretion of the UNAIDS Executive Director and is not within the Tribunal's purview. The Tribunal cannot assign an official to a different post (see Judgment 3848, consideration 10).

8. The complainant's plea that the decision to reassign her was tainted by malice, ill-will, bias, discrimination and prejudice towards her by her first-level supervisor and/or by the Administration, and that the reassignment was a disguised disciplinary measure or an act of retaliation, is unfounded in the context of this complaint. There is no evidence that her first-level supervisor played any part in the decision to reassign her to the Senior Advisor's post. The complainant provides no proof that the decision was based on malice, ill-will, bias, discrimination or prejudice towards her or that the decision was taken in retaliation against her, as she alleges (see, for example, Judgment 3753, consideration 13). There is therefore no basis for the award of the exemplary damages which the complainant claims.

9. The complainant argues that her reassignment violated paragraph 6.5 of the Policy on the Prevention of Harassment at WHO concerning interim measures taken during the consideration of harassment complaints, because the Administration unilaterally and permanently reassigned her to a post which was not commensurate with her grade, skills and experience prior to the resolution of that matter. This plea is also unfounded given that the decision to reassign the complainant to the post of Senior Advisor, SIE, was taken at that time in an attempt to relieve her from what she referred to as a “toxic and hostile [work] environment” which she alleged was unhealthy. The complainant’s further plea that the decision to reassign her is vitiated by WHO/UNAIDS’s failure to provide reasons for that decision is also unfounded, because the reasons were obvious in the circumstances as briefly chronicled in consideration 6 of this judgment.

10. The complainant’s allegation that the impugned decision was tainted by conflict of interest on the part of the UNAIDS Executive Director is also unfounded. The Tribunal’s case law states that it is a general rule of law that an official who is called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds. It further states that it is immaterial that, subjectively, the official may consider herself or himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice (see, for example, Judgment 3958, consideration 11). The Tribunal finds that the evidence which the complainant provides to support the allegation of conflict of interest may raise a suspicion. However, it does not provide reasonable grounds on which to hold that the Executive Director’s impartiality may have been open to question.

11. While the complainant notes the wide discretion which Article 1.2 of the Staff Regulations confers upon the UNAIDS Executive Director to reassign staff, she refers to Staff Rules 565.2 and 570.1 to support her assertion that her reassignment process contravened WHO’s Staff Regulations and Staff Rules. She argues that these rules were not

respected because her reassignment was not in her interest. She insists that it was not in the interest of WHO/UNAIDS, which have not explained how the creation of the new post of Senior Advisor, SIE, in a mere few weeks was in their interest or why it was in their interest to remove her, “an outstanding IT Director”, from a post which she had successfully occupied. The Tribunal observes that this allegation is specifically premised upon Staff Rule 565.2. It fails in the face of the evidence that the complainant was reassigned because of what the Administration reasonably saw as the managerial necessity to eliminate tensions between the complainant and the DXD/MER (see Judgment 2635, consideration 7) and in the interest of the complainant’s health.

12. The complainant’s reliance on Staff Rule 570.1 is essentially based on her assertion that her reassignment to the Senior Advisor, SIE, post was an unlawful demotion. The complainant notes that Staff Rule 570.1 relevantly states that “[t]he grade of staff members may be reduced as a consequence of [...] reassignment to a different post of lower grade. The latter may result from: [...] the staff member’s own request for personal reasons; [...] unsatisfactory performance or misconduct; or [...] as an alternative to termination under Rule 1050”. Her reliance on Rule 570.1 is misplaced as her grade was not reduced when she was reassigned to the Senior Advisor’s post. The D.1 grade of her previous post was maintained and she has not alleged that her financial entitlements were reduced as a result of the reassignment, nor is there any evidence that they were.

13. The complainant submits that her reassignment to the post of Senior Advisor violated WHO’s post classification standards. She presents arguments and a narrative that are highly technical to support this assertion and essentially invites the Tribunal to undertake a technical assessment of that evidence. The Tribunal has consistently stated that such an exercise falls within the purview of persons whose expertise by training and experience fits them to undertake it (see, for example, Judgments 4024, consideration 3, and 4083, consideration 8). It is however within the Tribunal’s purview to determine, as stated in Judgment 3488, consideration 3, whether in keeping with its duty of

care to the complainant, in reassigning her WHO/UNAIDS showed due regard, in both form and substance, for her dignity, particularly by providing her with work of the same level as that which she performed in her previous post and matching her qualifications. That is, whether WHO/UNAIDS ensured that the responsibilities that attached to her new post were comparable, on an objective basis, to the level of the functions that she performed in her previous post (see, for example, Judgment 1343, consideration 9).

14. In its report, the GBA noted that the Senior Advisor's post was rated by a classification expert as D.1 at the 0th percentile while the complainant's former post as Director, TIN, was classified at the 37th percentile. Noting that the complainant had retained her grade and step level, the GBA stated that the percentile had no effect on the grade or step but was indicative of the level of responsibility of the post. The GBA "concluded that in reassigning the [complainant] to the Senior Advisor post, her role in the organization changed from one of directing to providing technical expertise". The GBA further "concluded that this was not a demotion within the meaning of Staff Rule 570 [as the Executive Director] has the authority under Article IV of the Staff Regulations and Staff Rule 565 to reassign a staff member". Having considered the arguments and documents which the parties presented concerning job classification methods and how the classification of the Senior Advisor's post was carried out, the GBA "concluded that the classification was carried out in accordance with the required procedures while noting that the position of Senior Advisor [...] had less responsibility in terms of supervision, accountability (as it reported to a DXD through another Director) and financial responsibility".

15. By arriving at the foregoing conclusions, the GBA had correctly found from reviewing the evidence and documents upon which the classification of the Senior Advisor post was done, that the functions and responsibilities which attached to the post of Senior Advisor, SIE, were not comparable to those which attached to her previous post of Director, TIN. Those documents included the applicable International Civil Service Commission's Master Standard (Tier1), the

Administration's classification summary and a further explanation of the considerations which led to the points that were ascribed to the new post, as well as the job description and terms of reference which the GBA had requested UNAIDS to produce.

16. The GBA however erred when it did not further consider whether, on the basis of the significantly different responsibilities, WHO/UNAIDS had breached its duty of care towards the complainant. The Tribunal has stated in Judgment 2191, consideration 3, that organizations must carefully take into account the interests and dignity of staff members when effecting a transfer to which the staff member concerned is opposed. It should have been obvious to the GBA from its own analysis that the complainant's responsibilities had been reduced materially because of the absence of supervisory or managerial functions from the Senior Advisor post so that that post was not objectively comparable with her previous Director, TIN, post (see, for example, Judgment 4086, consideration 14). There is no evidence in the file to show that the complainant's legitimate objections to the proposed reassignment, particularly concerning her level of responsibility, were properly addressed by the Administration before that decision was imposed on her on 28 January 2016. The complainant's allegation that in reassigning her the Organization breached its duty of care towards her is therefore well founded. Accordingly, the impugned decision of 4 August 2017 which is based on the GBA's report will be set aside.

17. The complainant seeks moral damages for the improper reassignment on the ground, which the Tribunal accepts, that it caused her stress, distress, physical exhaustion, humiliation and adversely affected her career. She will therefore be awarded moral damages in the amount of 10,000 Swiss francs for the injury to her dignity and 8,000 Swiss francs in costs. However, her request for an order to reinstate her to her previous post of Director, TIN, will be rejected as it has been overtaken by subsequent events.

DECISION

For the above reasons,

1. The impugned decision of 4 August 2017 is set aside.
2. WHO shall pay the complainant 10,000 Swiss francs in moral damages.
3. WHO shall also pay the complainant 8,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ