

D. W. d. W.

v.

WHO

130th Session

Judgment No. 4304

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. R. M. D. W. d. W. against the World Health Organization (WHO) on 22 December 2017 and corrected on 26 March 2018, WHO's reply of 10 July, the complainant's rejoinder of 12 October, corrected on 24 October 2018, and WHO's surrejoinder of 28 January 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision of the Director-General to cancel the "Falls Below Expectations" overall rating in her 2014 performance appraisal report and the Performance Improvement Plan (PIP) and to restore her entitlements as in the case of satisfactory performance, but not to award her damages or costs.

The complainant joined WHO in 2007 in Abuja, Nigeria. Following an attack against United Nations premises in Abuja, she was placed on sick leave, which was recognized as service-incurred, from 23 April 2012 to 30 March 2014. As from 1 April 2014, she was reassigned to WHO Headquarters within the Policy and Strategic Directions (PSD) Unit, under the supervision of Mr G.S. and Dr I.S., her first and second-level supervisors, respectively. In September

2014 the complainant volunteered to work on WHO's response to the Ebola virus epidemic. Between September and December 2014, she was temporarily assigned to the Ebola Response Mobilization (EBM) Team, under the supervision of Mr L.S, under loan arrangements which were formalized in November 2014.

On 13 March 2015 she received her Year-End 2014 performance appraisal report for the period 1 April 2014 to 31 December 2014, conducted under WHO's Performance Management and Development System (PMDS) (hereinafter "the 2014 PMDS report"). Mr G.S. – who had consulted Mr L.S. – gave her the overall rating of "Falls Below Expectations". Consequently, she was placed, as from 16 March 2015, on a PIP.

On 8 May 2015 the complainant submitted a request for administrative review contesting her 2014 PMDS report. As the Director of the Human Resources Management Department (HRD) decided to uphold the above-mentioned overall rating in his decision of 6 October 2015, on 25 November the complainant filed an appeal with the Headquarters Board of Appeal (HBA). In her statement of appeal, she also challenged the PIP.

In December 2015 the complainant submitted a formal complaint of harassment to the Internal Oversight Services against Mr G.S., but she subsequently withdrew this complaint.

On 3 February 2017 the complainant, who had been placed on sick leave in September 2015, was informed that her contract would be terminated for health reasons as from 2 May 2017.

In its report dated 15 August 2017, the HBA found that the decision to initiate the PIP could not be dissociated from the performance appraisal procedure. While the PIP was never completed due to the complainant's absence on sick leave and, consequently, there was no final decision on the PIP when she submitted her appeal, the HBA found the appeal receivable with respect to both the 2014 PMDS report and the PIP. It found that the performance appraisal procedure overall was conducted in accordance with the applicable rules and that the complainant had not provided sufficient evidence to establish flaws, bad faith or bias in the conduct of the PIP. Nevertheless, it noted that performance supervision during the complainant's temporary assignment to the EBM Team was not properly organized: her objectives were not immediately modified, the

distribution of working hours was not specified although she worked with the EBM Team in parallel to her main duties and Mr L.S. did not have any performance management interviews with the complainant. Consequently, the HBA recommended to cancel the overall rating and replace it with a “No Rating”, to cancel the PIP and to reinstate all the complainant’s entitlements as in the case of satisfactory performance, such as the within-grade step increase. The HBA noted that this solution would automatically result in cancelling her PIP, making the issue of its initiation and conduct moot. A majority of the HBA considered that this would constitute sufficient redress and that it was consequently not necessary to award the complainant damages or costs. The HBA also recommended that, “in view of her service-incurred illness status”, WHO should explore the possibility of transferring the complainant in order “to facilitate her successful reintegration”, and that all other claims should be dismissed.

On 6 October 2017, the Director-General informed the complainant that he accepted the HBA’s main recommendation. Accordingly, all her entitlements, including her within-grade salary increase, had been reinstated as if her performance had been certified as satisfactory. He also explained that, as she had since separated from WHO for health reasons, the recommendation to explore the possibility of a lateral transfer had become moot. That is the impugned decision.

The complainant asks the Tribunal to quash Mr G.S.’s decision to give her an overall rating of “Falls Below Expectations” and to “re-rate” her 2014 PMDS report as satisfactory. She further asks the Tribunal to recommend sanctions against her supervisors for the mismanagement of the performance appraisal procedure, to order an investigation into Mr G.S.’s behaviour and to declare that WHO did not respect its duty of care towards her. She claims material and moral damages, as well as costs.

WHO submits that the complainant’s claims with respect to the initiation and conduct of the PIP, her allegations of harassment and her claims relating to her service-incurred illness are irreceivable for failure to exhaust internal remedies, or because they are beyond the Tribunal’s competence. It asks the Tribunal to dismiss the complaint as entirely devoid of merit.

CONSIDERATIONS

1. This complaint arises from the complainant's first-level supervisor's 2014 Year-End overall rating of her performance as "Falls Below Expectations". In the 6 October 2017 impugned decision, the Director-General accepted the HBA's recommendations and cancelled the overall rating "Falls Below Expectations"; substituted it with "No rating" and cancelled the complainant's PIP. As to the HBA's recommendation regarding the reinstatement of the complainant's entitlements as in the case of satisfactory performance, the Director-General noted that this had already been implemented by HRD prior to the complainant's separation. The Director-General also observed that the HBA's recommendation to explore the possibility of a lateral transfer for the complainant was not possible given her separation for health reasons. Lastly, the Director-General accepted the HBA's recommendation to dismiss all other claims of the complainant.

2. Before considering the merits of the complaint, it is convenient to deal with two preliminary matters. The first concerns WHO's submissions regarding the receivability of the complainant's claims in relation to the initiation and management of the PIP. In the internal appeal process, the HBA rejected WHO's arguments that these claims were irreceivable and concluded that the complainant's claims in this regard were receivable. Before the Tribunal, WHO took the position that the HBA erroneously concluded that these claims were receivable and made submissions in support of its view that the claims concerning the PIP in the complaint were irreceivable. The Tribunal notes that the Director-General accepted the HBA's recommendation and cancelled the complainant's PIP, thus rendering the issue moot.

3. At this juncture, it is also observed that in the complainant's claims for relief she asks the Tribunal to re-rate itself her 2014 PMDS report as satisfactory; to recommend that sanctions be taken against her supervisors for their mismanagement of the performance appraisal procedure; and to "demand" a new investigation into her supervisor's behaviour toward her. The Tribunal has no power to make such orders and the complainant's claims in relation to these matters must be dismissed.

4. The second matter arises from the complainant's complaint of harassment against her first-level supervisor that she submitted to the Director of the Internal Oversight Services on 17 December 2015. She claims that the Administration "obliged" her to withdraw the harassment complaint so that her claim before the Advisory Committee on Compensation Claims relating to her service-incurred illness would be heard first. In her brief in the present proceedings, the complainant alleges that the Administration's neglect of her personal circumstances of which it was aware jeopardized her harassment case and led to the loss of her career. As WHO points out, the allegations of harassment were not raised by the complainant in her internal appeal. Moreover, as the complainant withdrew the harassment complaint, a final decision has not been taken regarding the allegations. Accordingly, the claims of harassment and the related allegation of neglect are also irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute.

5. The main issue in the present complaint is whether, as the complainant submits, she was not adequately compensated for the material and moral injuries she sustained due to the mismanagement of her 2014 performance appraisal, including the absence of a proper rating, and the undue delay in the internal appeal process.

6. Before considering the merits of the complainant's claims for damages, some preliminary observations regarding the performance appraisal procedure are necessary. Between September and December 2014, the complainant was temporarily assigned to the EBM Team under the supervision of Mr L.S. The complainant insists that she devoted 100 per cent of her time to the EBM Team. However, Mr G.S. and Mr L.S. reached an informal agreement to fix the complainant's time spent with the EBM Team at 80 per cent from September to November and at 50 per cent in December. At that point in time there was no formal procedure in place to appraise the performance of staff on loan to the EBM Team.

7. On 26 January 2015, WHO issued Information Note 05/2015 regarding the "Completion of the 2014 ePMDS and preparation of the 2015 ePMDS for staff members deployed on the Ebola response". The parties and, as well, the HBA considered that this Information Note only applied to the 2015 PMDS. While it is correct that the

Information Note did not establish a procedure to appraise the performance of staff on loan to the EBM Team in 2014, it did provide guidance for recording of staff members' contributions to the Ebola response and completion of the 2014 PMDS reports. Relevantly, it states that "[i]n case of deployment to a different organizational unit and/or office, the staff member is responsible for requesting the reporting officer of the receiving organizational unit and/or office to provide him/her and the first-level supervisor with information on his/her performance during the Ebola assignment". As the Information Note was issued after the Year-End discussions between the complainant's first-level supervisor (Mr G.S.) and the complainant in December and after the complainant's Ebola assignment ended, it is understandable that she would not have been aware of the responsibility to request information about her performance from Mr L.S. Presumably, it is this Information Note that triggered Mr G.S.'s request to Mr L.S. for information about the complainant's performance with the EBM Team. This presumption finds support in the fact that in Mr G.S.'s March 2015 Year-End comments in her 2014 PMDS report he followed the statement in the Information Note that the complainant should not be penalized for not having completed all the objectives established at the start of her performance cycle.

8. In the internal appeal, the complainant did not seek material damages. However, in the present complaint, in addition to other redress, the complainant seeks material damages for the serious financial injury she sustained caused by the administration of her case which she alleges resulted in the termination of her contract for health reasons and the shortening of her career rather than obtaining a lateral transfer as recommended by the HBA. The complainant's claims regarding the termination of her contract and consequences of the termination are beyond the scope of the present case. Additionally, the complainant has not established any loss due to the mismanagement of the 2014 performance evaluation for which she would be entitled to an award of material damages.

9. In the present proceedings, the complainant's claim for moral damages regarding her performance in the PSD Unit is based on her assertions that there was no discussion or prior information that would justify her overall rating of "Falls Below Expectations" and that

she was not properly warned about performance issues. The record shows that on a number of occasions Mr G.S. pointed out deficiencies in the complainant's assigned tasks and provided guidance to rectify the problems. The complainant was also made aware of underperformance in one-on-one meetings in November and December 2014. As the HBA concluded, the performance appraisal procedure overall was conducted in accordance with WHO Staff Rules and eManual Section III.5.3.

10. In terms of her performance with the EBM Team, the complainant submits that she did not have any verbal feedback from Mr L.S. nor was she ever warned about any performance issues while she worked with the EBM Team. As well, she did not receive or know about the 3 February 2015 email from Mr L.S. to Mr G.S. about her performance during her temporary assignment with the EBM Team until she received the Director of HRD's decision of 6 October 2015.

11. WHO contends that although at the material time there was no formal procedure established by WHO to appraise the performance of staff on loan to the EBM Team, the record indicates that the complainant received verbal feedback from Mr L.S. while she worked in the EBM Team that was subsequently communicated to Mr G.S. by email for inclusion in the 2014 PMDS report in relation to the "Ebola" objective that was added to the complainant's objectives. The assertion of verbal feedback is rejected. There is no evidence in the record indicating that Mr L.S. gave verbal feedback to the complainant about her performance, let alone, performance issues while working with the EBM Team. It would be expected that, as the complainant's supervisor, Mr L.S. would have made a note if he had given the complainant feedback about performance issues.

12. It is well established in the case law that "[a] staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international organization to act in good faith towards its staff members and to respect their dignity.

That is why it was said in Judgment 2170 that an organization must ‘conduct its affairs in a way that allows its employees to rely on the fact that [its rules] will be followed’” (see Judgment 2414, consideration 23).

13. The complainant submits, in effect, that the “No rating” assessment for her 2014 PMDS report was unlawful. The “No rating” assigned to her corrected PMDS report does not satisfy the Organization’s duty to provide a properly rated PMDS report. Considering the complainant’s separation from service for health reasons and the passage of time, the Tribunal will not send the case back for a new rating, but will consider this element in the award of damages.

14. As Mr L.S. did not inform the complainant orally or in writing of the performance issues identified in the email of 3 February 2015, she could not take any steps to remedy the issue(s) and improve her performance appraisal. This constitutes a breach of WHO’s duty to act in good faith towards the complainant and to respect her dignity for which she is entitled to an award of moral damages.

15. As noted above, the complainant also seeks moral damages for the undue delay in the internal appeal process. The complainant points out that the internal appeal process was initiated on 8 May 2015 and it took two years and five months to arrive at a final decision on 6 October 2017. The consistent case law has it that “[t]he amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal” (see Judgment 4100, consideration 7, and the cases cited therein).

16. As to the length of the delay, it is noted that the HBA proceeding was suspended pending the outcome of the administrative review on 6 October 2015. Subsequently, the complainant filed her Statement of Appeal on 25 November 2015; the parties’ pleadings were completed on 26 February 2016; the HBA took up the appeal on 6 February 2017; the HBA submitted its report to the Director-General on 15 August 2017; and the Director-General issued the impugned

decision on 6 October 2017. It took 19 months from the date the internal appeal pleadings were completed to the date of the impugned decision. By any standard, this is an unreasonable delay. WHO explains that the time taken to complete the complainant's internal appeal was due to the WHO's transition from its existing appeal bodies to the new Global Board of Appeal and the resulting backlog which was accumulated. This explanation, however, does not absolve WHO of its obligation as stated in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organization owes to its staff members (see, for example, Judgments 3160, consideration 16, and 3582, consideration 3).

17. As to the effect of the delay, shortly after the complainant filed her Notice of Intention to Appeal, the complainant went on sick leave as a result of the recurrence of a service-incurred illness that, according to her, in large measure was triggered by the stress associated with the 2014 PMDS rating of her performance that she challenged in the internal appeal. The complainant states that the long delay caused her unnecessary anxiety at a time when she was undergoing treatment for her service-incurred illness. As well, in February 2017, while waiting for the Director-General's decision, she was informed that her contract would be terminated for health reasons on 2 May 2017 without knowing the outcome of her appeal. It is evident that the unreasonable delay significantly impacted the complainant's health. It also prevented the Organization from implementing the HBA's recommendation to "explor[e] a possibility of the [complainant's] lateral transfer to facilitate her successful reintegration into the WHO workforce". Accordingly, the complainant is entitled to moral damages for breach of the duty of care owed to her, occasioned by the very lengthy delay in addressing her internal appeal and the effect of that delay.

18. Given the breach of WHO's duty to issue a properly rated 2014 PMDS report; the breach of its duty to act in good faith in relation to the failure to inform the complainant of performance issues in a timely manner and the unreasonable delay in the internal appeal process, the complainant will be awarded moral damages in the amount of 25,000 Swiss francs. The complainant will also be awarded costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the amount of 25,000 Swiss francs.
2. WHO shall pay the complainant costs in the amount of 5,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 29 June 2020, 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 on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ