

106th Session

Judgment No. 2784

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. L. against the World Health Organization (WHO) on 26 July 2007, WHO's reply of 6 November 2007, the complainant's rejoinder of 10 January 2008 and the Organization's surrejoinder of 28 April 2008;

Considering Articles II, paragraph 5, and VII 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, a former official of WHO, is a Canadian national born in 1956. He joined the Regional Office for Europe in Copenhagen on 17 May 2003 as Director of Administration and Finance at grade D.1. With effect from 31 January 2007 he was seconded to the International Criminal Court.

Further to the announcement in early 2005 of his forthcoming marriage to Ms J., who was then Acting Human Resource Services Manager in the Regional Office's Division of Administration and

Finance, the complainant received a visit on 5 April 2005 from the Director of the Office of Internal Oversight Services, who wished to discuss this matter with him following reports of staff as to the potential conflict of interest that it raised. On 20 April the Regional Director for Europe requested Mr A., a former staff member, to analyse the situation that had arisen and to advise him on what could be done to avoid a conflict of interest in the leadership of the Division of Administration and Finance. The following day, in a memorandum addressed to the Regional Director, the Staff Committee in the Regional Office for Europe expressed concerns about a potential conflict of interest arising from the forthcoming marriage between the Director of Administration and Finance and the Acting Human Resource Services Manager, and in particular about the credibility of the future Human Resource Services Manager acting as supervisor to the spouse of his/her own first-level supervisor. It stressed that it would be necessary to take measures to address the situation in line with good practice and the applicable Staff Rules. Mr A. submitted his report to the Regional Director in May 2005. The Organization decided in September to reassign Ms J. However, Ms J. resigned shortly afterwards, and in November 2005 she lodged an appeal against the decision to reassign her.

In a letter to the complainant dated 25 January 2007, the Regional Director stated that Ms J.'s appeal had been found to be replete with information and documents which were only privy to the complainant in his official capacity as Director of Administration and Finance. He requested the complainant to provide his comments with regard to his omission to share with him and the Director of the Office of Internal Oversight Services documents which purportedly summarised discussions in which they had participated. The complainant replied by a letter of 31 January that the documents in question, which had been provided to Ms J. upon her "justified request for clarification on issues pertaining to her", were personal notes and not official documents privy to him in his official capacity.

In a further letter to the Regional Director dated 18 February 2007, the complainant indicated that he was concerned that certain statements made by the Administration of the Regional Office in the context of the appeal lodged by Ms J., his wife, might have been harmful to his reputation. In order to ascertain whether that was the case, he asked to be provided with a copy of Mr A.'s report, a list of the quotations mentioning his name in the Administration's statements in response to his wife's appeal, and any attachment produced by the Administration in the context of that appeal containing a reference to his name. He also asked that he or his counsel be granted access to "the relevant files and staff". In her reply of 2 March the ad interim Director of Administration and Finance told the complainant that Mr A.'s report, which was addressed solely to the Regional Director, was an internal confidential document not intended for distribution. She stated that the Regional Office was not in a position to provide the complainant with extracts or information from the Administration's statements in response to Ms J.'s appeal, given that any appeal before the Internal Appeals Boards was a matter between the parties to the appeal. Concerning his request for access to "the relevant files and staff", she indicated that the Regional Office was not in a position to consider any request for information of such a general nature.

By a letter of 12 March 2007 the complainant filed a notice of intent to appeal with the Regional Board of Appeal against the Administration's decision to deny him access to official documents containing defamatory and incorrect statements. Arguing that his appeal was linked to decisions made by the Regional Director, he requested that the Director-General waive Staff Rule 1230.8.4, which required that his appeal be heard by the Regional Board of Appeal, and allow him to proceed directly to the Headquarters Board of Appeal. In March and April 2007 the complainant made several enquiries about the status of his request for a waiver. He was informed on 30 March that his request was being sent to the Director-General and on 24 April he received confirmation that it had been sent to the latter on 12 April. The complainant was notified on 19 August 2007

that the Director-General had approved his request for a waiver and that his appeal had been forwarded to the Headquarters Board of Appeal. By an e-mail of 23 August 2007 he advised the Headquarters Board of Appeal that, since he had not received a response to his notice of intent to appeal or his request for a waiver for a period in excess of 120 days, he had filed a complaint directly with the Tribunal impugning the implied rejection of his claims as submitted in his letter of 12 March 2007.

B. The complainant contends that he and his wife have been the victims of a long campaign of harassment, intimidation and defamation, which started with his announcement of their engagement and still continues today even after his departure from the Organization. He argues that through various supposedly confidential WHO documents he has been repeatedly accused of sexual harassment, abuse of power, mismanagement as well as disloyalty and conspiracy against the Organization, but that he has never been charged. He states that he was denied a copy of Mr A.'s report and was only allowed to glance at it, even though that report summarised the findings of an investigation into his professional and personal conduct and that of his wife. He recalls being told by the Director of the Office of Internal Oversight Services that either he or his wife, or both, would have to leave the Organization and asserts that, following the lodging of an internal appeal by his wife, the Regional Director sought to retaliate against him by refusing inter alia to produce a performance appraisal for 2006 and by disseminating allegations of unethical conduct on his part.

The complainant submits that the Administration's unreasonable delay in processing his appeal and its disregard of all his queries left him with no other choice but to file a complaint directly with the Tribunal. He accuses WHO of concealing, endorsing and disseminating defamatory documents, without giving him an opportunity to respond, and of violating Staff Rule 410.3.3, which stipulates that "[t]he marriage of one staff member to another shall

not affect the contractual status of either spouse”. Relying on the Tribunal’s case law, he asserts that the Organization failed in its duty to protect him from a defamation campaign, to treat him with dignity and avoid causing him undue and unnecessary injury, and to investigate properly the grave accusations made against him. By denying him access to accusatory documents, the Administration deprived him of the possibility to defend himself, thereby violating the Organization’s Staff Rules and his right to due process.

The complainant requests that the Organization be ordered to provide him with Mr A.’s report, the statements made by the Administration in the context of his wife’s appeal, the report of the Director of the Office of Internal Oversight Services regarding his engagement to another staff member, the “shadow file” which the Regional Office has secretly prepared containing allegations and insinuations likely to affect his career negatively, and a copy of his personal file with pages duly numbered. He also requests that he be allowed to submit a statement to the Headquarters Board of Appeal in the context of his wife’s pending appeal and that the Administration’s allegations against him be properly investigated with his full participation or that of his counsel. He claims compensation for the moral and physical suffering caused by the Administration and exemplary damages for the injury he sustained from the latter’s retaliation following his decision to marry a staff member and his wife’s decision to lodge an appeal. He also claims legal costs.

C. In its reply WHO submits that the complaint is irreceivable on the grounds that the complainant has failed to exhaust the internal means of redress in accordance with Article VII, paragraph 1, of the Statute of the Tribunal. In its opinion, recourse to the Tribunal on the basis of an implied rejection of a claim, provided for under paragraph 3 of Article VII, is also subject to the exhaustion of the internal means of appeal. Moreover, the complainant’s request for a waiver of Staff Rule 1230.8.4 has been approved. Consequently, he has been satisfied and his complaint, on that point, is moot.

Furthermore, relying on Article II of the Statute, the Organization argues that the Administration’s reply of 2 March 2007 not to grant the

complainant access to confidential documents was not a decision that affected his terms of appointment and as such does not provide a basis for an appeal. It denies that there was unreasonable delay in processing the internal appeal or that the complainant was entitled to bypass the internal appeal process, given that the Staff Rules allow a period of at least ten months for the appeal proceedings to be concluded and that consultations were necessary with regard to the complainant's request. According to the defendant, the complainant may not in good faith request that his case be heard by the Headquarters Board of Appeal and then use the time needed for consideration of that request as grounds for filing a complaint directly with the Tribunal. It also argues that the complainant's claim of an alleged harassment campaign is irreceivable because it falls outside the scope of the internal appeal and concerns acts which were not challenged within the prescribed time limits.

The Organization considers that the complaint is without merit. It denies that any information was compiled against the complainant in secrecy or that the Administration's reply of 2 March 2007 was part of a campaign of harassment. With regard to Mr A.'s report, it notes that, apart from the fact that it was an internal confidential document, which was not intended for distribution, no decision affecting the complainant was made on the basis of that report. Contrary to the complainant's allegations, the report was not an investigation into his conduct, but a review of rules and practices concerning spouses working in the same unit. It adds that, as an expression of trust, the Regional Director showed the report to the complainant and also invited him to be involved in subsequent consultations regarding his wife's reassignment. Referring to Staff Rule 410.3.2.1, which prohibits spouses from being assigned to positions in the same line of authority, WHO asserts that the decision of the Regional Director to seek advice from Mr A. was fully justified, because of the impact the marriage of two staff members working in the same hierarchical line

and in the same unit could have on the workplace. Regarding the requests for access to the statements submitted in the context of his wife's appeal and to "the relevant files and staff", the defendant underlines that the complainant enjoys no privileged position which would allow him access to all these confidential documents.

It challenges the complainant's account of events and denies that retaliation of any kind ever took place against him. It rejects his accusations of dissemination of defamatory information as entirely unfounded, and argues that it was he who disclosed confidential information to his wife, thereby confirming the Administration's concerns about a possible conflict of interest.

D. In his rejoinder the complainant asserts that his complaint is receivable. He emphasises that he filed it in accordance with Article VII, paragraph 3, of the Statute of the Tribunal, which allows recourse to the Tribunal in cases where the Administration fails to take a decision upon a claim within sixty days from the notification of the claim to it. He argues that the Director-General's decision to grant his request for a waiver was prompted by the filing of the complaint with the Tribunal, and that in all likelihood without this course of action no decision would have been taken. He presses his pleas on the merits.

E. In its surrejoinder WHO maintains its position in full. It notes that the complainant has in his possession a copy of Mr A.'s report and the Administration's statements submitted in the context of his wife's appeal; therefore, his claim for disclosure of these documents has become moot.

CONSIDERATIONS

1. The determinative issue in this complaint centres on receivability. The complainant filed a complaint with the Tribunal on 26 July 2007, before he had received the Director-General's decision

on his request to have his appeal heard directly by the Headquarters Board of Appeal instead of the Regional Board. On 23 August 2007 he advised the Headquarters Board of Appeal that, since he had not received a response to his notice of intent to appeal or his request for a waiver for a period in excess of 120 days, he had filed a complaint directly with the Tribunal a month earlier. He suggested that in the circumstances his appeal should be held in abeyance pending final instructions from the Tribunal.

2. The complainant indicates that he is challenging the “lack of decision” regarding his request for a waiver to permit a direct appeal to the Headquarters Board of Appeal. He also takes the position that in view of the unreasonable delay in the processing of his appeal, he was left with no alternative but to challenge directly with the Tribunal the decision of 2 March 2007, by which the ad interim Director of Administration and Finance rejected his request for disclosure of certain documents. He asserts that his complaint is receivable in the light of the Administration’s failure to take a decision regarding his request for a waiver.

3. WHO submits that, leaving aside the question as to whether a request for a waiver of the regional appeal procedure could give rise to a complaint to the Tribunal, the complainant’s reliance on Article VII, paragraph 3, of the Statute is misplaced. It argues that while this provision permits the filing of a complaint against an implied rejection of a claim, paragraph 1 of that article also requires that all internal means of redress be exhausted before a complaint is filed. In the defendant’s view, this means that the complainant should have pursued his appeal through the internal appeal proceedings by challenging the absence of a decision before the Regional Board of Appeal and, if necessary, before the Headquarters Board of Appeal. Ultimately, the final decision of the Director-General could be challenged before the Tribunal. The Organization also points out that since the waiver has been approved, the complainant’s request has

been satisfied and the complaint, on that point, is moot. Lastly, it submits that the complainant's own actions in asking for a suspension of the proceedings before the Headquarters Board of Appeal prevented the pursuance of his internal appeal.

4. In his rejoinder the complainant submits that the Director-General's decision to grant his request for a waiver was prompted by the filing of his complaint with the Tribunal. Had the complaint not been filed, in all likelihood no decision would have been taken. The complainant also argues that since only the Director-General has the authority to grant a waiver of Staff Rule 1230.8.4, it would be illogical and inconsistent with the applicable rules to have the Director-General's decision reviewed by a lower-level forum.

5. Although the complainant has linked the receivability of his claim concerning access to documents – which was rejected by the decision of 2 March 2007 – to the issue of his request for a waiver of the regional appeal procedure, the Tribunal observes that these are two distinct matters.

6. Under Article VII, paragraph 1, of the Statute, receivability is, in part, contingent on the decision at issue being a final decision. Article VII, paragraph 3, provides that if the Administration fails to take a decision within a certain time frame, the official concerned may have recourse to the Tribunal and the complaint shall be receivable in the same manner as a complaint against a final decision. Thus, it is clear that paragraph 3 only applies to an anticipated final decision. Receivability is also contingent on an exhaustion of the internal means of redress.

7. In effect, the complainant argues that a decision of the Director-General in relation to a waiver request constitutes a final decision. While it is arguable whether this position is correct, a resolution of this question in the present case is unnecessary. As the

Director-General has approved the complainant's request to grant him a waiver and thus allow him to proceed directly to the Headquarters Board of Appeal, this aspect of the complaint has become moot.

8. The complainant's argument that the Director-General's inaction left him with no alternative but to bring a complaint against the decision of 2 March 2007 directly to the Tribunal is fundamentally flawed. A decision on a waiver request is procedural in nature: it simply establishes the forum in which an appeal on the merits will be heard. The failure to take a decision on the waiver request in a timely manner is not tantamount to a failure to take a decision on the appeal as a whole. Accordingly, the Tribunal finds that the complaint is irreceivable insofar as it concerns the decision of 2 March 2007, as the requirements of Article VII of the Statute have not been met. The Tribunal also finds that this is not an appropriate case for an award of costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-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 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet