

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3237

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N.-E. B. against the World Health Organization (WHO) on 24 February 2011 and corrected on 16 April, the Organization's reply of 3 August, the complainant's rejoinder of 12 September, WHO's surrejoinder of 9 December 2011, the further submissions filed by the complainant on 3 March 2012 and the Organization's final observations of 10 May 2012;

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 Canadian national born in 1959, entered the Organization's service on 10 November 2007 as an Administrative Officer at grade P-2. He was assigned to the WHO Mali Country Office, where he held a temporary appointment which was due to end on 9 November 2008.

On 15 October 2008 he received a performance appraisal, dated 14 October, in which his supervisor made numerous critical

remarks about his performance and conduct. By a memorandum of 5 November 2008 he was informed that the Organization had decided not to offer him an extension of his appointment which would consequently expire one month after receipt of the memorandum, in accordance with Staff Rule 1040.1. It was explained that his appointment would be extended to cover that period, but that he was exempt from working “during this statutory one-month notice period”. On the same date the complainant invited the Regional Personnel Officer to contact him in order that they might discuss that decision. On 13 December 2008 the complainant, whose appointment had expired on 6 December, sent the Personnel Officer an e-mail in which he stated inter alia that his performance appraisal which, he assumed, formed the basis for the decision not to extend his appointment, contained some false accusations and that he would do all that he could to “preserve [his] reputation and dignity”.

By an e-mail of 13 September 2009 the complainant reminded the Regional Personnel Officer that he had been awaiting his telephone call since 15 December 2008, when he had sent him his contact details, and he asked to be provided with the rules governing the appeal procedure and a certificate relating to the nature of his duties, the length of his service, the quality of his performance and his official conduct. Having received the requested certificate on 18 September, on 24 September he pointed out that it failed to mention either the quality of his performance or his conduct, and he asked the Personnel Officer to supply him with a new one complying with the provisions of Staff Rule 1095.

On 29 September the complainant received some information regarding the procedure to be followed before the Regional Board of Appeal, and on 23 November 2009 he notified the Secretary of the Board of his intention to appeal against the decision not to extend his appointment. On 25 January 2010 he filed a full statement of his case with the Board. In its report of 29 March the Board concluded that the complainant’s appeal was time-barred, because he had not lodged his appeal within sixty calendar days after receipt of the notification of that decision, in breach of Staff Rule 1230.8.3. As the Regional

Director decided to endorse the Board's conclusion and consequently to dismiss his appeal, the complainant lodged an appeal against that decision with the Headquarters Board of Appeal. In its report of 26 July 2011 the latter recommended that the appeal should be dismissed as time-barred. By a letter of 29 July 2011 the Director-General informed the complainant that although she had decided to follow that recommendation, some of the grievances he had raised warranted a review, especially those related to his performance appraisal, the drawing up of a certificate and the reasons for the decision not to extend his appointment.

In his complaint form, the complainant indicates that he is impugning the implied decision to reject his "claim" of 13 December 2008.

B. The complainant contends that, according to the Tribunal's case law, despite the very long delay in the internal complaint proceedings, his complaint is receivable. He argues that his e-mail of 13 December 2008 constituted his statement of intention to appeal against the decision not to extend his appointment and that, since that statement was submitted 39 days after he had received notification of the memorandum of 5 November 2008, in his opinion it complies with the provisions of Staff Rule 1230.8.3. Referring to the case law and, in particular, to Judgment 2345, he points out that "an internal appeal lodged with the wrong authority [...] may serve to meet a deadline", and that the Organization, as part of its duty of care, ought to have helped him to correct his mistake of not sending his statement to the Regional Board of Appeal, but it never informed him of the means of redress available to him. He also accuses the Regional Personnel Officer of engaging in delaying tactics and states that the steps he took between 13 December 2008 and 29 September 2009 show that he meant to exhaust "all the administrative appeal channels available".

On the merits, the complainant argues that, since his appointment was due to expire on 9 November 2008, he ought to have been given notice by 10 October 2008 at the latest. As this was not the case, he submits that his appointment was tacitly renewed for a further year.

Further, he contends that the procedure leading to the drafting of his performance appraisal report was neither fair nor transparent and that, since the decision not to extend his appointment was based on that report, it is flawed, especially because his right to be heard was breached. He also comments that the memorandum of 5 November 2008 did not state the reasons for the aforementioned decision and he submits that it is tainted with misuse of authority.

The complainant asks the Tribunal to set aside the decision not to extend his appointment and to order his reinstatement in his post, or in another post matching his experience and qualifications. He also requests payment of the salary which he would have received between 9 November 2008 and the date of his reinstatement, plus interest, and the reconstruction of his career in terms of pension rights. Should his reinstatement prove to be impossible, he claims a sum equivalent to three years' salary in compensation for all the injury which he considers he has suffered. He further requests the setting aside of the performance appraisal of 14 October 2008 and its removal from his personal file. He wants a new report to be drawn up or, failing this, that the report be replaced in his personal file with a reference to the judgment which will be delivered on this case. In addition, he asks the Tribunal to order WHO to produce all the documents in his personal file, to remove from it the "defamatory, forged documents" placed in it and to issue him the certificate complying with Staff Rule 1095 which he has never received. Lastly, he claims "exemplary damages".

C. In its reply the Organization raises two objections to the complaint's receivability. First, it points out that the complainant filed his appeal on 25 January 2010, i.e. more than 14 months after receiving notification of the decision not to extend his appointment. As he did not therefore respect the time limit of sixty calendar days stipulated in Staff Rule 1230.8.3, his complaint was time-barred. Moreover, in the opinion of WHO, the e-mail of 13 December 2008 was not a written statement of intention to appeal within the meaning of the above-mentioned Rule and it was impossible to deduce from the terms of that e-mail that it constituted an appeal which, according to the case law, it ought to have forwarded to the Regional Board

of Appeal. Secondly, it submits that the aforementioned e-mail did not constitute a claim because in it the complainant simply criticised his performance appraisal of 14 October 2008 and announced that he intended to respond to that appraisal. In addition, since the complainant did not file his complaint with the Tribunal until 24 February 2011, he did not abide by the time limits laid down in Article VII, paragraph 3, of the Statute of the Tribunal.

On the merits, the Organization explains that the complainant's appointment was extended until 6 December 2008 in order to give him one month's notice. It also points out that in her letter of 29 July 2011 the Director-General proposed a review of several issues. As this review is under way, the defendant Organization considers that it is too early to submit its position on these matters for the Tribunal's consideration. It reserves its right to address them in its subsequent submissions.

D. In his rejoinder the complainant contends that the report of the Headquarters Board of Appeal is tainted with numerous errors of fact and that the memorandum of 5 November 2008 makes no mention of his right of appeal.

E. In its surrejoinder the Organization reiterates its objections to the complaint's receivability. It also informs the Tribunal that on 8 August 2011 the complainant accepted the offer of a review made by the Director-General on 29 July 2011 and that several issues have thus been resolved or clarified. It points out that on 7 November 2011 the complainant received a certificate the contents of which he had previously discussed in detail with the Human Resources Services. In view of these developments, WHO considers that most of the complainant's claims have become moot.

F. In his further submissions the complainant contends that the Organization's statement, in its surrejoinder, that he had discussed the contents of the certificate which he received with the Human Resources Services, is misleading. He adds that this certificate does

not comply with Staff Rule 1095 and that it does not satisfy his request.

G. In its final observations the Organization emphasises that the documents annexed to the complainant's further submissions prove that the contents of his new certificate were indeed discussed.

CONSIDERATIONS

1. At the material time the complainant held the post of Administrative Officer at grade P-2 in the WHO Mali Country Office, under a temporary appointment which was due to expire on 9 November 2008. On 5 November he was informed that his appointment would not be extended and that it would end on 6 December 2008.

2. On 13 December 2008 he sent the Regional Personnel Officer an e-mail stating the following:

"I think that it is a pity and regrettable that you have not found time to contact me in order to clarify things contained in your memos informing me of your decision to end my employment contract with WHO. This decision has been prompted by the unilateral 'appraisal' which you submitted to the WHO Representative to Mali in circumstances which you know as well as I do. The appraisal was an appraisal in name only because it is more akin to a demonization of my person than anything else.

[...]

I intend to do everything humanly possible to set the record straight and to preserve the reputation and dignity I have built up over so many years."

An exchange of e-mails ensued on 15 December 2008 and 26 January 2009.

3. On 13 September 2009 the complainant again contacted the Personnel Officer to ask him for information regarding the appeal procedure, inter alia. On 29 September the Secretary of the Regional Board of Appeal sent him a list of items of information to be included

in his statement of intention to appeal against the decision not to extend his appointment. The complainant sent her this notice on 23 November 2009. On 25 January 2010, after receiving a copy of the Board's Rules of Procedure, he filed a full statement of his case with the Board. By a letter of 9 April the Regional Director informed him that, on the basis of the Board's recommendation, he had decided to dismiss his appeal as time-barred.

4. On 13 April 2010 the complainant referred the matter to the Headquarters Board of Appeal. It recommended the dismissal of the appeal on the grounds that the time limit of sixty calendar days laid down in Staff Rule 1230.8.3 had not been respected. On 29 July 2011 the Director-General informed the complainant that his appeal was dismissed as irreceivable.

5. The complainant did not impugn that decision before the Tribunal, since on 24 February 2011 he had already filed a complaint against the implied decision to dismiss the "claim" of which, he alleges, he notified the Organization on 13 December 2008.

6. As the complainant has not impugned the decision of 29 July 2011, the Tribunal will confine itself to a consideration of the complaint directed against the implied rejection of his "claim" of 13 December 2008. This complaint seeks principally the setting aside of the decision not to extend his appointment and his retroactive reinstatement in his post, or in another post matching his experience and qualifications, as from the date of the non-renewal of his contract.

7. WHO maintains that the complaint is irreceivable. It contends, inter alia, that the e-mail of 13 December 2008 did not constitute a valid claim and, moreover, it did not go unanswered. It adds that the complainant did not file his complaint with the Tribunal within the time limit of 150 days after 13 December 2008. It is therefore of the opinion that the conditions laid down in Article VII, paragraph 3, of the Statute of the Tribunal are not met.

8. Article VII, paragraph 3, of the Statute of the Tribunal states that:

“Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days [within which the complaint must be filed] shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration.”

9. In the instant case, the complainant was notified of the decision not to extend his appointment on 5 November 2008. Even if it were possible to regard his e-mail of 13 December 2008 as a claim within the meaning of Article VII, paragraph 3, the complainant did not file his complaint with the Tribunal until 24 February 2011. His complaint is therefore manifestly out of time and hence irreceivable.

DECISION

For the above reasons,
The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 2 May 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet