

B. (No. 2)

v.

WHO

122nd Session

Judgment No. 3684

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr W. B. against the World Health Organization (WHO) on 18 May 2013 and corrected on 28 August, WHO's reply of 9 December 2013, the complainant's rejoinder of 7 April 2014 and WHO's surrejoinder of 8 July 2014;

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 is a former staff member of UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO. He joined UNAIDS as the Chief of the Information Unit in June 2002 and was separated for reasons of health in November 2007. His service history and background facts relevant to this case are to be found in Judgment 2817, regarding his first complaint, in which the Tribunal set aside WHO's decision to remove him from his post as Chief of the Information Centre and awarded him moral damages and costs.

In the present complaint he impugns the decision of 18 February 2013 by which the Executive Director of UNAIDS decided, in consultation with the Director-General of WHO, to accept the recommendations of the

Headquarters Board of Appeal (HBA) that the Advisory Committee on Compensation Claims (ACCC) be requested to review the complainant's compensation claim for a service-incurred illness on its merits and that he be awarded costs to a maximum of 5,000 Swiss francs, but rejected the recommendation that he be awarded moral damages in an amount between 5,000 and 10,000 francs.

Prior to his separation, on 18 April 2007, the complainant had written to the UNAIDS Human Resources (HR) Coordinator seeking, inter alia, clarification on the procedure to be followed for the recognition of his illness as service incurred. The HR Coordinator replied by an e-mail of that same day that HR was not aware if the complainant had already submitted a compensation claim for service-incurred illness and, if not, it was not certain that such a claim would still be receivable, given that it normally had to be submitted immediately after the beginning of the illness and no later than six months after its diagnosis. Attached to the e-mail were copies of the relevant rules. On 16 June 2008 the complainant's counsel wrote to the Secretary of the ACCC to request that the ACCC recommend that the complainant be compensated for damage to his health attributable to the performance of official duties on behalf of WHO. The complainant's counsel asserted that the complainant's serious health condition and disability were directly linked to his work environment and he accused the Administration of being deliberately negligent in submitting his case to the ACCC in breach of its duty to do so. The ACCC recommended that the complainant's claim be rejected as time-barred and, by a letter of 7 April 2009, the complainant was notified of the Director-General's decision to accept that recommendation.

The complainant filed a notice of intention to appeal this decision on 6 June 2009 and on 2 July 2010 he filed his Statement of Appeal. He requested that the contested decision be quashed, that his illness be recognised as service incurred and that he be compensated accordingly, that he be reimbursed for all his medical expenses, that he be paid full salary and allowances as if he had remained in service up until 15 November 2008, and that he also be paid as from 16 November 2008 an annual invalidity pension equal to two-thirds of his annual pensionable remuneration. He also sought material and moral damages, damages for

tort, and costs. In its report of 14 January 2013 the HBA considered that, as there was no clear date from which the six-month deadline for the submission of a compensation claim for a service-incurred illness applied, it was difficult to say that the complainant's compensation claim to the ACCC was late. Also, given the seriousness of his condition, it considered that the Administration ought to have submitted a compensation claim on his behalf as part of its duty of care, especially since it had a responsibility to do so under paragraph 300 of the HR e-Manual and had done so for some other staff members. In light of these considerations, the HBA recommended that the Director-General request the ACCC to reconsider the complainant's compensation claim and to review his case once it had received all relevant information, that the complainant be awarded moral damages in an amount between 5,000 and 10,000 Swiss francs and costs up to 5,000 francs, subject to the provision of receipts. It also recommended that paragraph 300 of the HR e-Manual be reviewed in respect of the Organization's duty of care and reworded so that it is clear when and under what circumstances WHO is expected to submit a compensation claim on behalf of a staff member. By a letter of 18 February 2013, the Executive Director of UNAIDS informed the complainant that he had decided in consultation with the Director-General of WHO to accept the HBA's recommendations regarding the review of the merits of his case by the ACCC and the award of costs, but to reject the recommendation regarding the award of moral damages, because he did not consider that there had been a breach of the duty of care owed to the complainant warranting such an award. That is the impugned decision.

The complainant asks the Tribunal to order WHO and/or UNAIDS to pay him the amount of 2,000,000 United States dollars for breach of contract and/or tort, together with interest at the rate of 5 per cent per annum. He claims 1,000,000 Swiss francs in punitive damages, 400,000 francs in moral damages and 60,000 francs in costs.

WHO invites the Tribunal to dismiss the complainant's arguments and claims on the grounds that they either exceed the scope of the present complaint, or they have not been the subject of a final decision, or they are barred by *res judicata*, or they are time-barred. It asserts that there are no grounds for an award of compensation or damages.

CONSIDERATIONS

1. The complainant is a former staff member of UNAIDS who accepted a fixed-term appointment, effective 3 June 2002, as Chief of the Information Centre at grade P.4. He was promoted to grade P.5 on 1 August 2003. Following a series of heart attacks in February 2004 and December 2005, the complainant's employment contract was terminated for health reasons in accordance with Staff Rule 1030, effective 16 November 2007. Subsequent to his termination, the complainant suffered a third heart attack on 27 November 2007. This is the complainant's second complaint before the Tribunal. In the first complaint, decided in Judgment 2817, the Tribunal set aside the decision to remove the complainant from his position as Chief of the Information Centre and awarded him moral damages and costs.

2. On 16 June 2008 counsel for the complainant wrote to the Secretary of the ACCC and requested that the complainant be compensated for alleged service-incurred injuries. On 7 April 2009 the Secretary of the ACCC informed the complainant of the Director-General's decision to accept the ACCC's recommendation that the complainant's claim for compensation for work-related illness be rejected as time-barred for having been submitted outside the six month time-limit set out in WHO Manual II.7, Annex E, Section IV, paragraph 26(b).

3. The complainant appealed the 7 April 2009 decision before the HBA and sought the quashing of the Director-General's decision, recognition that his medical condition was service-incurred, and a consequent award of full compensation, damages and costs. He also sought full reimbursement of medical expenses, additional compensation relating to the termination of his contract and an invalidity pension. On 14 January 2013 the HBA provided its report to the WHO Director-General. In reference to the substance of the appeal and determining whether the complainant's medical condition was service-incurred, the HBA observed that it was not the right review body for this aspect of the appeal. The Board decided that this part of the appeal fell within the competence of the ACCC. The Board therefore limited its review of the appeal to the

7 April 2009 decision and whether the ACCC should have reviewed the complainant's compensation claim. Ultimately, the HBA found that WHO owed the complainant a duty of care to submit a compensation claim on his behalf and that the ACCC should have accepted the complainant's compensation claim and reviewed it accordingly. On this basis, the HBA recommended: (a) that the Director-General request the ACCC to reconsider the complainant's compensation claim; (b) payment of moral damages in an amount between 5,000 and 10,000 Swiss francs; and (c) payment of legal costs up to 5,000 Swiss francs.

4. By letter dated 18 February 2013, the Executive Director of UNAIDS, in consultation with the WHO Director-General, accepted the HBA's recommendation to request the ACCC to review and consider the complainant's compensation claim. The Executive Director also accepted the recommendation to award the complainant legal costs to a maximum of 5,000 Swiss francs. The Executive Director did not accept the recommendation to award the complainant moral damages.

5. On 18 May 2013 the complainant filed the present complaint with the Tribunal impugning the 18 February 2013 decision. Some nine months later, on 7 February 2014, the complainant was informed that based on the ACCC's recommendation, the Director-General had decided to reject his compensation claim for service-incurred illness.

6. The complainant challenges the Executive Director's decision not to accept the HBA's recommendation to award him moral damages for WHO's breach of the duty of care as a result of its failure to submit a compensation claim to the ACCC on his behalf. The complainant also seeks damages for a purported breach of contract and alleged intentional torts arising from a series of protracted events and actions on the part of WHO that allegedly led to his current medical condition. Additionally, the complainant seeks an order for punitive damages and legal costs.

7. WHO contends that the complaint is limited to challenging the Executive Director's decision of 18 February 2013 to award legal costs in the amount of 5,000 Swiss francs and the decision not to accept

the recommendation of the HBA to grant moral damages in an amount between 5,000 and 10,000 Swiss francs. It says that the arguments brought forward by the complainant in support of his complaint and his allegations of tort refer to events that either exceed the scope of the challenged decision, are not receivable on the grounds that they are time-barred, are subject to the principle of *res judicata* or for which the complainant has not yet exhausted the internal means of redress. Accordingly, the WHO asks the Tribunal to dismiss the complaint and all associated requests for relief.

8. The complainant's claims with respect to breach of contract and intentional tort are beyond the scope of the complaint and are, therefore, irreceivable in accordance with Article VII, paragraph 1, of the Tribunal's Statute for failure to exhaust all internal means of redress. The current complaint was precipitated by the 7 April 2009 decision of the Director-General to accept the ACCC's recommendation that the complainant's claim for compensation for work-related illness be rejected as time-barred. This decision was challenged by the complainant before the HBA, which limited its review of the appeal to whether the ACCC should have considered the complainant's compensation claim. On the basis of the HBA's recommendations, the WHO Director-General requested the ACCC to consider the complainant's compensation claim and legal costs were granted. This is the impugned decision. However, the complainant's allegations of breach of contract and intentional tort are based on purported long-term mistreatments by the WHO, which resulted in the complainant's current health status. Consequently, these claims are far removed from the subject matter of the current complaint and are, therefore, clearly irreceivable. The Tribunal also notes that, subsequent to the filing of the current complaint, the complainant was informed of the Director-General's decision to reject his claim for service-incurred illness on the basis of the ACCC's finding that there was no causal link between the work of the complainant for UNAIDS and his heart condition.

9. The final issue for determination is whether the Executive Director erred in not awarding the complainant moral damages for WHO's

failure to submit a compensation claim to the ACCC on his behalf. WHO takes the position that it had no obligation to submit a claim for service-incurred illness to the ACCC on behalf of the complainant, who was represented by two lawyers and had all the relevant information necessary for submitting such a claim. Furthermore, WHO points out that the complainant's claim for service-incurred illness was ultimately heard by the ACCC. Therefore, WHO considers that no moral damages are payable.

The Tribunal recalls that the WHO Director-General requested that the complainant's compensation claim be redirected back to the ACCC for review. Based on this request, the ACCC reviewed the complainant's case and concluded that his medical condition was not service-incurred. Therefore, despite the allegation that WHO breached its duty of care by failing to submit a compensation claim on behalf of the complainant, the complainant's request for consideration was ultimately granted, thereby mitigating any moral injury he may otherwise have suffered. Accordingly, the complainant's claim for moral damages is without merit.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ