

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.
v.
WHO

128th Session

Judgment No. 4148

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. M. against the World Health Organization (WHO) on 20 July 2017 and corrected on 2 August, WHO's reply of 6 November 2017, the complainant's rejoinder of 19 February 2018 and WHO's surrejoinder of 16 May 2018;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant contests the decision to impose on her the disciplinary measure of suspension without pay for five working days.

The complainant, a staff member of WHO assigned to the Global Services Centre (GSC) in Malaysia, was at the material time the Vice-President of the GSC Staff Association. In March 2015 a tripartite working group (consisting of Staff Association representatives, a representative of the Administration and the Resident Staff Physician) commenced work on identifying ways to minimise the misuse of sick leave by staff in GSC. Effective 1 July 2015, the Director of GSC issued a Centre Guidance Note on the Correct Use of Certified Sick Leave (hereinafter "the Centre Guidance Note"), introducing a procedure to be followed by staff when taking certified sick leave. In subsequent exchanges,

including by email, with the Director of GSC and the Resident Staff Physician, the complainant, in her capacity as a staff representative, expressed serious concerns about the procedure introduced by the Centre Guidance Note and, in particular, the manner in which it had been decided and implemented.

On 6 November 2015 a message entitled “WE HAVE A VOICE” was anonymously posted on a WHO Intranet site, the GSC Suggestion Box. The author of the message criticised the procedure introduced by the Centre Guidance Note and expressed disappointment in the leadership of the then President of the GSC Staff Association, alleging that he had failed to consult with staff on the discussions with the Administration within the working group prior to the introduction of the Centre Guidance Note.

In an email of 9 November 2015 to all staff members, the Director of GSC stated that, while the grievance in the message might have been legitimate, the way it was delivered was disrespectful and unacceptable. He invited the author to present herself/himself, noting that an official complaint had been filed. Soon after, the Director of GSC requested the Director of the Human Resources Department (HRD) to launch an investigation to identify the author of the posted message. The President of the Staff Association and the Resident Staff Physician, both of whom were mentioned by name in the message, filed official complaints against the author of the message. On 1 December 2015, during a meeting with the Director of GSC to discuss her performance, the complainant revealed that she was the author of the message “WE HAVE A VOICE”. By an email of the same day, the Director of GSC informed the Director of HRD of this and requested that disciplinary action be taken against the complainant.

In a memorandum of 1 December 2015, the Director of HRD informed the complainant that she had been charged with alleged misconduct consisting in a failure to meet the standards of conduct expected of WHO staff members and she invited the complainant to respond to the charge. The complainant responded by a memorandum of 14 December rejecting the allegation of misconduct. By a letter of 22 December 2015, the Director of HRD communicated to the complainant

the Administration's decision to impose on her the disciplinary measure of suspension without pay for five working days for having committed misconduct in her official capacity.

The complainant filed an appeal against that decision but, in its report of 1 March 2017, the Global Board of Appeal (GBA) recommended that it be dismissed. By a letter of 28 April 2017, the Director-General informed the complainant that she had decided to endorse the GBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash and reverse the decision to impose on her a disciplinary measure, initially communicated to her by the letter of 22 December 2015 and subsequently upheld by the Director-General in her letter of 28 April 2017. She requests the full retraction of the charge that she committed misconduct, the immediate removal from her personnel file of all documents related to the disciplinary measure, and the publication by WHO of an apology. She claims the retroactive reimbursement of all salary, benefits and entitlements that she lost due to the application of the disciplinary measure. She also claims moral damages, costs, and interest on all amounts awarded at the rate of 5 per cent per annum from the date of imposition of the disciplinary measure through the date that all requested redress is granted in full. She asks the Tribunal to award her such other relief as it deems fair, necessary and equitable.

WHO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. On 6 November 2015 the complainant, a staff member of WHO/GSC, posted a message on a WHO Intranet site, the GSC Suggestion Box. She did not identify herself as the author. The message was highly critical of a newly adopted procedure concerning sick leave embodied in the Centre Guidance Note issued by the Director of GSC effective 1 July 2015. In the message the complainant repeatedly criticised the President of the Staff Association who had participated in discussions with the Administration in a working group, directed to the development of the procedure embodied in the Centre Guidance Note.

She also criticised the failure of the Resident Staff Physician to, as a minimum, fax a copy of the Clinical Attendance Memo (the form required by the procedure to be presented by the staff member seeking medical attention for completion by the consulting physician) to all panel clinics.

2. The posting of the message led to the complainant being charged with misconduct. The Administration decided that the misconduct was established and imposed on the complainant the disciplinary measure of suspension without pay for five working days. That decision was communicated to the complainant by the Director of HRD. Shortly thereafter, the complainant lodged an appeal against the decision to impose on her a disciplinary measure with the GBA which, in its report dated 1 March 2017, concluded that the appeal should be dismissed. By a letter dated 28 April 2017, the Director-General informed the complainant that she agreed with the considerations and conclusions of the GBA and dismissed the appeal. This is the decision impugned in these proceedings.

3. Before considering the reasons and conclusions of the GBA and the Director-General's decision in a little more detail, it is convenient to summarise the contents of the contentious message posted by the complainant. In a printed format, the message extended over two pages. Virtually the entire first page was, in substance, concerned with the extent of the consultation between the President of the Staff Association and the Staff Association executive, and the membership more generally. The complainant alleged in the message that there had been no communication or consultation, as there should have been, and, for this reason, criticised the President for the way in which he had acted as a member of the working group. While this part of the message was replete with capitalised words and sentences and some exclamation marks, the language was not immoderate, though the overall tone was aggressive. In terms of personal insult directed to the President, the high-water mark of this part of the message was the contention of the complainant that the President had "kept mum", perhaps implying a deliberate attempt to conceal. Some of the statements, such as "we are deeply saddened and VERY VERY DISAPPOINTED that [the President]

did not consult ANY STAFF AT ALL” perhaps involved exaggeration though they may not have.

4. At the end of the first page of the printed version of the message and again at the beginning of the second, the complainant was critical of the requirement to present the Clinical Attendance Memo to the consulting physician and, in this context, contended that “[e]verytime we go to the doctor, we are BURDENED BY the F*****G form” and “[t]he last thing we think about is a F*****G form when we are in pain” (as the text actually appears), which was obviously intended to involve the use of a swear word perhaps, or even probably, offensive to many, without fully articulating that word. These two expressions were the first and second specific expressions relied on by the GBA and discussed shortly.

5. Thereafter on the second page of the printed version, there was a paragraph critical of the Resident Staff Physician’s failure (if this was the fact) to send copies of the Clinical Attendance Memo form to all the panel clinics. Sarcasm was deployed in addressing the Resident Staff Physician, as the complainant asserted that “we do more work than you” and contended that “[i]f we can make an effort, so can you”. This comment was the fifth specific expression relied on by the GBA and discussed shortly. The remainder of the second page contained further criticism of the President of the Staff Association. Like the first page, this part of the message was replete with capitalised words and sentences and its tone was aggressive. Specific allegations were made against the President involving a claim that the President was “pro-management, to get into their good books”, by implication, a claim that he was not “fair to all” and was “biased towards a particular department head to benefit his agenda”, and a claim that the President “[didn’t] give a damn” and was “arrogant”. These two last mentioned comments were the third specific expression relied on by the GBA and discussed shortly. The penultimate paragraph of the message said “[w]e don’t trust you to be a just leader. We are very disappointed. We are sad. Be human. Do not treat us like dirt.” These comments were the fourth specific expression relied on by the GBA and discussed shortly.

6. The report of the GBA was broken up into five sections with numbered headings. The fourth heading was “FACTS AND CONSIDERATIONS” and this section contained a number of subsections with headings. Of central importance in these proceedings were a subsection headed “Freedom of Association, Freedom of Speech” and another subsection headed “Misconduct in terms of Staff Rules 110.8.1 and 110.8.4”. In the first of these subsections the GBA noted a submission of the Administration that freedom of association included a right to debate and a right to discussion but that the complainant was disciplined because she had targeted two other staff members by name in an insulting and harmful manner. On this topic, the GBA expressed the view that the right to debate or the freedom of speech “did not include the right to use inappropriate and defamatory language”. The GBA went on to note that “the language of the [complainant’s] message was inappropriate, in particular when directly naming staff members in an injurious manner”. In the second of these subsections, the GBA noted that in the contested decision of 22 December 2015, the Director of HRD had characterised the five specific passages in the complainant’s 6 November 2015 message, referred to in considerations 4 and 5 above, as “vulgar and inappropriate”. After setting out those passages in its report, the GBA said the language was inappropriate and “not compliant with the [...] standards of conduct expected of a WHO staff member” and referred to several provisions of the Staff Regulations and Staff Rules. The GBA went on to observe that the complainant could have expressed her views on the substantive issues without singling out certain participants in the working group or addressing them in “an offensive and injurious manner”. In the impugned decision of 28 April 2017, the Director-General noted the conclusion of the GBA that the language the complainant had used was “offensive and injurious” but did not undertake any further analysis of the contentious message.

7. In their pleas, both the complainant and WHO address the principle of freedom of association, the rights that flow from that and, specifically, the right of staff to discuss and debate issues concerning their employment. There is no fundamental disagreement between the parties about the content of those rights. If comments by a staff member

made in the context of a debate about employment matters are defamatory of another staff member (in the sense that the comments have injured a person's reputation or tarnished her or his good name), the fact that they are defamatory does not, by itself, deny the staff member making the comments the protection afforded by the principle of freedom of association. So much is apparent from the observations of the Tribunal in Judgment 3106, consideration 9. In that judgment the Tribunal noted in consideration 8 (citing Judgment 274, consideration 22) that the existence of a freedom of discussion and debate, inherent in the freedom of association, can have the consequence that when feelings run strong the discussion and debate can spill over into extravagant and even regrettable language. There are, of course, limits on the freedom of discussion and debate that the Tribunal noted in consideration 8 of Judgment 3106. In the present case, the GBA and the Director-General did take into account the complainant's right to freedom of expression within the umbrella of the freedom of association but found that the language was inappropriate. However, the complainant clearly had strong and not obviously illegitimate views about the procedure finally adopted involving the use of the Clinical Attendance Memo form and the role of the President of the Staff Association as a member of the working group. The complainant was able to criticise him and was not obliged to do so, within the umbrella of the freedom of discussion and debate inherent in the freedom of association, in entirely temperate or polite language. The Tribunal is satisfied that what the complainant said was comprehended by her right to freedom of association and was thus not misconduct.

8. The impugned decision should be set aside. The relief to which the complainant is presently entitled, apart from an order setting aside the impugned decision, is an order requiring WHO to pay the complainant all salary and emoluments which she lost as a result of the disciplinary measure being imposed on her, together with interest at the rate of 5 per cent per annum from the date that the suspension without pay was imposed.

9. The complainant seeks moral damages for the injury to her personal and professional reputation and the violation of her right to

freedom of association. No such damages should be awarded on either of these bases. The complainant is entitled to costs which the Tribunal assesses in the sum of 7,000 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 28 April 2017 is set aside, as is the Administration's earlier decision of 22 December 2015.
2. WHO shall pay the complainant all salary and emoluments which she lost as a result of the imposition of the disciplinary measure, together with interest at the rate of 5 per cent per annum from the date that the suspension without pay was imposed.
3. WHO shall pay the complainant 7,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ