

B. (No. 2)

v.

WHO

131st Session

Judgment No. 4350

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S. K. B. against the World Health Organization (WHO) on 28 October 2018 and corrected on 22 November 2018, WHO's reply of 27 February 2019, the complainant's rejoinder of 1 May and WHO's surrejoinder of 6 August 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 WHO's failure to provide him with a peaceful working environment and to protect him against a series of "prejudicial and unjustified adverse actions".

The complainant joined the WHO Global Service Centre in Kuala Lumpur (Malaysia) in February 2015 through an inter-organization transfer from the United Nations Development Programme (UNDP). His appointment was subject to successful completion of a one-year probationary period.

In May 2016, during the probationary year-end review, the complainant's first-level supervisor recommended an overall rating of "Partially unsatisfactory". Following a meeting between the complainant, his first-level supervisor and his second-level supervisor, the overall rating was changed to "Satisfactory" and the appointment was confirmed.

Regarding the performance appraisal in the Performance Management and Development System (PMDS) for 2016, the complainant and his first-level supervisor failed to agree on the objectives for the complainant.

At the beginning of January 2017 the complainant's fixed-term appointment was extended for one year effective 9 February 2017. On 19 January UNDP requested that the complainant be transferred back to UNDP as he had been selected for a position in UNDP. WHO agreed to the transfer. With effect from 13 February WHO downgraded the position encumbered by the complainant from P.4 to P.3. However, the complainant kept his grade and corresponding salary until he left WHO on 24 February 2017.

On 23 February 2017 the complainant requested an administrative review of a decision dated 15 February 2017 relating to his 2016 PMDS. He also took issue with his 2015 PMDS, the one-year extension of his fixed-term appointment "without any justification and against the rules" and the decision to downgrade his position. As relief he sought, inter alia, the recognition of the breach of PMDS procedures and undue delay in finalizing his 2015 PMDS as well as "[a]ction against the prejudice suffered and the treatment received", that is professional humiliation and mental harassment over the last two years. The request for administrative review was rejected on 19 April 2017 as partly irreceivable and partly devoid of merit. The complainant appealed that decision before the Global Board of Appeal (GBA) on 17 July. The appeal was registered under the reference GBA 19.

In the meantime, on 20 March 2017, the complainant submitted to the Internal Oversight Services (IOS) a harassment complaint against his first-level supervisor. He enlarged upon the issues raised in the 23 February request for administrative review, reiterated the relief claimed and also sought, inter alia, compensation for "physical and mental torture". On 20 July, the IOS informed the complainant that his complaint had been reviewed in accordance with paragraph 7.6 of the Policy on the Prevention of Harassment at WHO, that it was not complete and that pending receipt of additional information and clarification the IOS considered the matter to be closed. On 15 September the complainant filed a second request for administrative review, asking, inter alia, that the 20 July decision be set aside, that his harassment complaint, if found to be incomplete, be returned to him and that he be awarded moral damages and legal costs. By letter dated 13 November the complainant

was informed that it had been “decided not to issue an Administrative Review Decision”. The complainant appealed that decision before the GBA on 10 December 2017. The appeal was registered under the reference GBA 28.

After joining the GBA 19 and GBA 28 internal appeals, the GBA issued its report on 4 June 2018. Regarding GBA 19, it considered that the administrative review decision had been taken in accordance with WHO’s Staff Regulations and Rules, that the claim regarding the 2015 PMDS was time-barred and that the harassment claim was irreceivable as the complainant had not exhausted the proper administrative channels. It concluded that the issues regarding the 2016 PMDS and the downgrading did not affect the complainant’s status or his terms of appointment. It also found that the decision to extend his contract by one year had been taken in accordance with the WHO regulatory framework. Regarding GBA 28, the GBA concluded that the non-issuance of an administrative review decision did not breach the Staff Regulations and Rules and that the Director, IOS, had acted in accordance with applicable rules and procedures when he informed the complainant that pending receipt of additional information, he considered the matter closed. It therefore recommended that both appeals be dismissed.

In a letter of 2 August 2018 the Director-General informed the complainant that he had decided to accept the GBA’s recommendation to dismiss both appeals. The complainant impugns that decision insofar as it rejected GBA 19.

The complainant asks the Tribunal to award him moral damages under several heads, costs and such other relief as it may deem just and fair.

WHO accepts that the complaint is receivable but objects to the receivability of a number of claims. It asks the Tribunal to dismiss the complaint as entirely devoid of merit and to join it with the first complaint filed by the complainant.

CONSIDERATIONS

1. WHO seeks the joinder of this complaint with the complainant’s first complaint. The complainant opposes the joinder. For the reasons stated in consideration 4 of Judgment 4349, which is delivered in public this day on his first complaint, the application for joinder is rejected.

2. The grounds on which the complainant challenges the impugned decision may be summarized as follows:

- (1) His first-level supervisor's attempt, with no valid reason, to rate his performance for his 2015 probationary period as "Partially unsatisfactory" was wrong.
- (2) The proposal to establish a Performance Improvement Plan (PIP) for him in August 2016 without sufficient cause was against the rules, in particular eManual paragraph III.5.3.160.
- (3) His first-level supervisor's failure to establish his 2016 work objectives within the set time frame, ultimately failing to finalize his 2016 PMDS and attempting to set the objectives retroactively, violated the applicable rules and procedures.
- (4) The extension of his contract for one year with effect from 9 February 2017, instead of two years, was without any lawful justification.
- (5) The downgrading of his post from P.4 to P.3, which he was notified of by communication dated 25 January 2017, without prior notice, violated Staff Rule 580.2.
- (6) The chain of adverse actions which he experienced during his two years' service with WHO created a hostile, intimidating and degrading work environment.
- (7) The GBA abused the internal justice system by joining his internal appeal underlying the present complaint with the appeal underlying his first complaint, thereby delaying the resolution of his cases.
- (8) Serious procedural impropriety and conflict of interest occurred when the Deputy Chair of the GBA, having decided with the Chair of the GBA to join the two internal appeals, then sat on the GBA panel that considered the appeals.

3. Ground 1 is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute because the complainant failed to exhaust the internal means of redress that were available to him in relation to that claim. Staff Rule 1225.3, read with Staff Rule 1225.1, which were then in force, required a staff member who wished to contest a final administrative decision alleging non-observance of her or his terms of appointment, including pertinent Staff Regulations or Staff Rules, as a first step, to submit a request for an administrative review not later than sixty calendar days from the date on which the staff member received notification

of the contested administrative decision. The complainant, in effect, acknowledged notification of his final 2015 PMDS on 8 June 2016 when he entered his final comments on the PMDS. His request for administrative review, dated 23 February 2017, was submitted some six and a half months out of time.

In any event, the complainant's second-level supervisor had supported the confirmation of the complainant's appointment at the end of the probationary period, suggesting a higher overall rating than "Partially unsatisfactory", and the first-level supervisor had amended his overall rating for the 2015 PMDS to "Satisfactory".

4. Ground 2, in which the complainant contests the proposal to establish a PIP for him, is irreceivable as it was without object on 26 January 2017 when he initiated proceedings to contest its establishment. The proposed PIP was never established.

5. Regarding ground 3, in the impugned decision, the Director-General dismissed the complainant's claim that the failure to finalize his 2016 PMDS within the stipulated time frame violated applicable rules and procedures. The complainant had alleged that that failure arose because his 2016 PMDS objectives were not established within the stipulated time frame. He objected to any attempt by his first-level supervisor and HR to create "retro-objectives" in early 2017 when he was about to separate from WHO as, in his view, that would have violated the applicable rules and procedures for finalizing the objectives. In rejecting these allegations, the impugned decision accepted the GBA's conclusion that the failure to complete the 2016 PMDS did not affect his status or his terms of appointment once he separated from WHO on 24 February 2017, the day after he filed his request for administrative review.

6. Ground 3 is unfounded. The GBA correctly concluded that there was evident and continuing disagreement between the complainant and his first-level supervisor on the content of his 2016 PMDS objectives, which resulted in the failure to advance the 2016 PMDS process. The Board noted that Staff Rule 530.2 and Section V of WHO's Performance Management and Development Framework made both the complainant and his first-level supervisor equally responsible to engage in continuous and meaningful dialogue with each other on the complainant's performance and to establish his objectives. The GBA also stated that

“the Appellant was co-responsible [for] completing the PMDS Objectives”. The evidence shows that in many instances the complainant failed to cooperate with his first-level supervisor to facilitate the finalization of his 2016 objectives, which in turn resulted in the non-completion of his 2016 PMDS within the stipulated time frame.

7. Regarding ground 4, in the impugned decision, the Director-General accepted the GBA’s recommendation to dismiss the complainant’s challenge to the decision to extend his contract by one year, instead of two years, on the ground that that decision had been taken in accordance with WHO’s regulatory framework. In making that recommendation, the GBA noted that although the complainant recognized that granting a one-year contract extension was at the Director-General’s discretion, he nevertheless contended that the decision was arbitrary or was taken in abuse of authority. However, referring to Staff Rule 420.3, which states that a fixed-term appointment is a time-limited appointment of one year or more and that any extension is subject to conditions determined by the Director-General, WHO contends that the impugned decision rightly determined that the one-year extension was in keeping with its regulatory framework and within the Director-General’s discretion.

8. The record shows that on 16 December 2016, HR enquired of the complainant’s first-level supervisor whether an extension of the complainant’s contract would be allowed and also requested that the 2016 PMDS be completed. On 21 December 2016, the first-level supervisor confirmed the extension of the appointment. On that same date, HR responded seeking confirmation “that the renewal will be for 2 years which is the usual practice”. The first-level supervisor replied stating that he doubted whether it was logical to determine the duration of the extension of the contract while the 2016 PMDS had not been finalized. On 10 January 2017, having been reminded by the HR Officer to address the matter of the extension of the complainant’s contract, the first-level supervisor suggested that the contract be extended for one year since they were not aware at that stage whether the complainant’s overall performance for 2016 was satisfactory or not, unless HR had a problem with that “perspective”. HR thereupon proceeded to grant the complainant a one-year extension. In normal circumstances, the Tribunal would hold an organization to its admitted usual practice. However, given that the complainant’s 2016 PMDS, which he was co-responsible for finalizing, had not been established, there was no basis on which to determine

whether the complainant's performance during that period was satisfactory. In these circumstances the Tribunal cannot conclude that the decision to extend the complainant's contract by one year rather than two was flawed. Ground 4 is therefore unfounded.

9. Ground 5, in which the complainant contested the decision to downgrade his post from grade P.4 to P.3, is unfounded. So also are his related pleas that the decision was a hidden sanction; was tainted by abuse of authority and was an insult to his professional standing. The record shows that on 19 January 2017 UNDP requested WHO to release the complainant to return to UNDP and on 20 January 2017 WHO accepted the complainant's release. This communication was copied to the complainant. In a communication dated 25 January 2017, the complainant was notified that the post which he held was downgraded from grade P.4 to P.3. That decision was taken because of a restructuring exercise and was permissible under Staff Rule 570.1. Moreover, as the complainant kept his grade and corresponding salary until he eventually separated from WHO on 24 February 2017, the decision to downgrade the post did not affect his status or terms of appointment and, in the circumstances of the case, caused him no injury.

10. Ground 6 is irreceivable in the present complaint because it is the subject of separate proceedings pursuant to the Policy on the Prevention of Harassment at WHO, contained in eManual Section III.12.5.

11. Ground 7, in which the complainant claims moral damages for the GBA's alleged abuse of the internal justice system by joining his two internal appeals, is unfounded. As the Tribunal has determined in consideration 16 of Judgment 4349 on the complainant's first complaint, which is also delivered in public this day, the decision to join those internal appeals was *intra vires* eManual paragraph III.12.4.370.

12. Ground 8, in which the complainant alleges that there was serious procedural impropriety and conflict of interest when the Deputy Chair of the GBA, having decided with the Chair of the GBA to join the two internal appeals, then sat on the GBA panel that considered the appeals, is also unfounded. The mere fact that a member of a panel decides to join internal appeals does not disqualify that member from continuing to sit on the panel during the ensuing proceedings.

13. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ