

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 2)

v.

WHO

134th Session

Judgment No. 4531

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs J. S. S. against the World Health Organization (WHO) on 19 February 2020 and corrected on 23 March, WHO's reply of 13 July 2020, the complainant's rejoinder of 12 August and WHO's surrejoinder of 23 November 2020;

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

Having examined the written submissions and decided not to order oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to separate her from service on 31 August 2018, being the date on which she reached her retirement age according to the Staff Rules then in force, as well as the decision not to approve an exceptional extension of her appointment beyond retirement age.

Facts relevant to this case can be found in Judgment 4527 on the complainant's first complaint, also delivered in public this day, in which she challenged the decision of the WHO Executive Board to extend the mandatory age of separation (MAS) to 65 as of 1 January 2019 instead of 1 January 2018.

On 23 December 2015 the United Nations (UN) General Assembly decided that “the mandatory age of separation for staff recruited before 1 January 2014 should be raised by the organizations of the United Nations common system to 65 years, at the latest by 1 January 2018, taking into account the acquired rights of staff”.

On 13 January 2016 the Director, Human Resources Department (HRD), informed all WHO staff of the UN General Assembly’s decision stating that “the implementation date for the increased MAS will require an amendment to WHO Staff Rules, which we will submit to the Executive Board. [...] In the meantime, the MAS for WHO staff recruited prior to 1 January 2014 remains unchanged”.

On 15 April 2016 the Director, HRD, sent another email to all staff stating that: “In January 2017, the Administration will also present the necessary amendments to Staff Rules to increase the mandatory age of separation to 65 for staff recruited before 1 January 2014. [...] It is important to note that these amendments are subject to the approval by the Executive Board and will be effective 1 January 2018.”

At the 140th session of the WHO Executive Board in January 2017, the question was raised as to whether the amendment relating to the extension of the mandatory age of separation to 65 for staff members recruited before 1 January 2014 should enter into force with effect from 1 January 2018, in accordance with the UN General Assembly’s Resolution of December 2015, or at a later date, in view of the financial implications for WHO.

On 1 June 2017, during its 141st session, the Executive Board decided that the amendments to the WHO Staff Regulations and Staff Rules on the implementation of the new MAS at 65 would enter into force as of 1 January 2019. WHO staff were so informed by an email of the Director, HRD, of 22 June 2017.

In August 2017 the complainant, as well as other staff members in a similar situation, requested the review of the decision to raise the MAS to 65 years only on 1 January 2019, instead of 1 January 2018. That request was rejected by a decision of 18 October 2017, ultimately leading to the final decision impugned in the complainant’s first complaint.

On 13 March 2018 the complainant's supervisor requested that her appointment be exceptionally extended for one year. The acting Director, HRD commented in a note to senior management that HRD would not support the request for an exceptional extension for the following reasons: the complainant's functions could be taken up by a successor provided that recruitment started immediately; she did not occupy any specialist function; and any extension may create longer-term liabilities well beyond 2019 as she would then be eligible to stay until the age of 65. The complainant's supervisor, after consulting with the Director-General's Office (DGO), decided not to pursue the request further.

In May 2018 the complainant was informed orally that the request for an exceptional extension of her appointment had been rejected.

On 23 May 2018 the complainant was informed that the end of her appointment will be on 31 August 2018, the date on which she would reach the retirement age of 62, in accordance with Staff Rule 1020.1.

On 26 July 2018 the complainant requested the review of that decision, alleging also that the decision not to grant her an exceptional extension of her appointment violated her rights.

On 31 August 2018 the complainant separated from service.

The complainant's request was rejected by a decision of 20 November 2018, which noted that it was substantially the same as the complainant's previous request for review pertaining to the implementation of the MAS of 65 as of 1 January 2019. The decision referred to the decision of 18 October 2017 rejecting her first request for review on the ground that it did not allege any non-observance of the terms of her appointment. As to the complainant's claim that she had not received an exceptional extension of her appointment beyond retirement age in violation of her rights, it noted that her supervisor had brought forward such a request and that it was considered by HRD and the Director-General's Office (DGO). As HRD and DGO did not support such an extension, her supervisor had decided not to pursue the request further and the complainant had been so informed in May 2018. The Director-General, within the context of her request for review, also confirmed that he did not approve the request for the exceptional extension of her

appointment as he did not find sufficient exceptional circumstances to justify such an extension.

On 18 February 2019 the complainant filed an appeal with the Global Board of Appeal (GBA) against the decision of 20 November 2018.

In its report of 24 September 2019 the GBA concluded that the complainant's appeal was not receivable in so far as it reiterated the same arguments as her previous appeal leading to her first complaint before the Tribunal. It also found that the decision to separate her on 31 August 2018 had been taken in accordance with applicable rules and procedures and that the decision not to exceptionally extend the complainant's appointment beyond the retirement age was a discretionary decision, taken without bias, bad faith or discrimination. The GBA recommended that the Director-General dismiss the appeal in its entirety.

On 22 November 2019 the complainant was informed that the Director-General had decided to follow the GBA's recommendation to dismiss her appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement until she reached the new MAS of 65. In the alternative, she asks the Tribunal to be awarded the sum of no less than 398,586 Swiss francs in material damages. She seeks 10,000 francs in moral damages and 10,000 francs in costs. In her rejoinder, the complainant objects to WHO's requests for joinder.

WHO requests that this complaint be joined with her first complaint, as well as with several other similar complaints filed by former staff members challenging the implementation of the MAS of 65, or alternatively, that these complaints be considered at the same session. WHO argues that the complaint is irreceivable as the complainant attempts to substantively challenge the legality of the implementation of MAS 65 in multiple separate proceedings before the Tribunal. It also argues that the complaint is irreceivable *ratione materiae* as she fails to show any non-observance of her terms of appointment and fails to establish a cause of action. With respect to the decision not to grant her an exceptional extension of her appointment, WHO argues that it is irreceivable for failure to exhaust internal remedies. It asks the Tribunal

to dismiss the complaint as unfounded in its entirety. In the event that costs are awarded, WHO requests that the amount of costs be established by the Tribunal and that its payment “be conditional upon the receipt of invoices, proof of payment, and upon the complainant not being eligible for reimbursement from other sources”.

CONSIDERATIONS

1. On 19 February 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 22 November 2019 of the Director-General dismissing her appeal against an earlier decision of 20 November 2018. That earlier decision was to dismiss a request for review by the complainant challenging the decision to separate her from service in August 2018 because she had reached the mandatory age of separation and the rejection of her request for an exceptional extension of her appointment beyond retirement age.

2. In December 2015 the UN General Assembly decided that the mandatory age of separation for staff of UN common system organizations should be raised to 65 years. This decision was to apply to staff recruited before 1 January 2014. The decision contemplated that the introduction of this mandatory age of separation should take place no later than 1 January 2018.

3. Within WHO, staff were notified by email from the Director, HRD, dated 13 January 2016 that the Staff Rules would be amended to reflect this change and an email to staff of 15 April 2016 noted that the amendments would be effective 1 January 2018. This did not occur. As a result of the processes of deliberation and decision-making within WHO, a decision was made on 1 June 2017 by WHO’s Executive Board that the change to the mandatory age of separation as contemplated by the decision of the UN General Assembly, would be effective 1 January 2019. The change would therefore not apply to staff who reached the retirement age of 60 or 62 in 2017 or 2018.

4. By letter dated 23 May 2018, the complainant was informed that "... in accordance with Staff Rule 1020.1, [her] appointment with the Organization will come to an end on [31 August 2018] which marks the date on which [she] will reach the retirement age as specified in Staff Rule 1020". The letter, in this respect, correctly reflected the then operative provisions of the Staff Rules. Staff Rule 1020.1 was in peremptory terms declaring that "Staff members shall retire ..." at one of a number of nominated ages depending on the personal circumstances of the official and subject to a proviso involving a decision of the Director-General to exceptionally extend a staff member's appointment beyond retirement age.

5. While WHO has continuously contested her right to do so, the complainant pursued the processes of internal review and appeal challenging her separation in August 2018, culminating in a report of the GBA of 24 September 2019 recommending that the appeal be dismissed. It concluded, amongst other things, that the decision to separate the complainant pursuant to Staff Rule 1020.1 "was in accordance with the applicable Staff Regulations and Staff Rules". By letter dated 22 November 2019 the complainant was informed that her appeal was dismissed. As noted earlier, this constitutes the impugned decision in these proceedings.

6. The complainant advances what she describes as five substantive legal arguments. The first is that WHO had violated a promise concerning the submission of amendments to the Staff Rules relating to the mandatory age of separation. The second and related argument is that WHO had violated a promise concerning when relevant amendments to the Rules would enter into force. The third is that the perpetuation of the regime embodied in Staff Rule 1020 violated the principle of equality of treatment. The fourth is that WHO unlawfully handled the complainant's extension request. The fifth is that the complainant's separation violated a policy of healthy ageing. There is some ambiguity in the brief about whether this is contended to be a policy of WHO only or the UN more generally.

7. Four of these five arguments (but not the fourth concerning the extension request) have been addressed in another judgment rendered at this session (see Judgment 4527) concerning other proceedings in which the complainant was one of fifteen complainants though the context in which the issues arose in the other proceedings was different. In the present case the lacuna in the complainant's pleas is how any of these four arguments (which, in substance, failed in the other proceedings) have a bearing on the lawfulness of the then operative Staff Rules which were applied to the complainant in the letter of separation of 23 May 2018. In the absence of the complainant demonstrating that the Staff Rules which were applied had no legal effect, WHO was entitled, indeed obliged, to apply them. As noted earlier, the applicable rule was in peremptory terms.

8. However, there remains to be considered the plea of the complainant that a request made on 13 March 2018 for an extension of her appointment beyond retirement age, was not considered in the way required by the Staff Rules and the relevant provisions of the WHO eManual. The proviso referred to at the conclusion of consideration 4 is found in Staff Rule 1020.1.4 which relevantly provides: "In exceptional circumstances the Director-General may, in the interests of the Organization, extend a staff member's appointment beyond retirement age [...]". This provision contains certain qualifications which are not presently relevant because the central issue raised by the complainant's plea concerns whether the decision to reject the request for an extension was actually considered by the Director-General himself. However, additionally, the complainant also contends that the rejection of the extension request violated binding promises earlier made by the Director-General in late 2017, was tainted by error and omission of fact and violated the principle of equal treatment. She also contends that its rejection involved an act of retaliation.

9. The request for an extension arose in the following way. By a memorandum dated 13 March 2018, the Deputy Director-General, Emergency Preparedness and Response (the complainant's supervisor) requested the Director-General to "[waive] the mandatory age of

retirement” for the complainant. This request was considered by the acting Director, HRD, who did not support it. A notation to that effect dated 3 April 2018 was made on the memorandum of 13 March 2018. The request was considered by the Director-General’s Office and a further notation dated 4 May 2018 was made on the memorandum of 13 March 2018 indicating the request was not approved. The complainant was informed of this outcome on or about 15 May 2018. In the material before the Tribunal is a memorandum dated 20 November 2018 from the Director, HRD, to the complainant rejecting, in substance, her request for an administrative review of both the decision to separate her from service because she had reached the mandatory age of separation and the refusal to exceptionally extend her appointment. The documentation from the complainant constituting the request (dated 26 July 2018) and supporting it (21 September 2018) is not before the Tribunal, but the gist of the case she advanced in the request for review is tolerably clear from the memorandum of 20 November 2018.

10. The starting point in considering the pleas of the parties is an argument of WHO that no request for an extension under Staff Rule 1020.1.4 was ever made by the complainant. WHO argues that such a request has to be made in writing and made by the official concerned. There is no express requirement in the Staff Rules to this effect. The provision relied on by WHO, Staff Rule 1225.2, concerns a narrow topic, the implied rejection of a written request and is, at best, equivocal on the question of whether generally any request for any decision must be made by a staff member in writing. The relevant provision in WHO’s eManual concerning requests for extension (paragraph 20 of Section III.10.8) does not require that the request be made directly by the official concerned but simply says such requests must be submitted to the Director-General through the Director, HRD. The memorandum of 13 March 2018 was subsequently treated by WHO as having been made on behalf of the complainant, as is apparent from the decision on the review dated 20 November 2018. The better view is that the obligation of the Director-General to consider a request for an extension under Staff Rule 1020.1.4 can arise in circumstances where it is not actually made by the official concerned but made on her or his behalf though with the official’s

knowledge and consent. That the scheme would embrace a request for an extension on behalf of a member of staff (made by a more senior member of staff), is conformable with first or higher level supervisors making assessments about the needs of the organisation in the face of a staff member's impending mandatory separation and how those needs might be met.

11. This leads to consideration of the plea by the complainant that the request for an extension was not considered by the Director-General. There appears to be no issue that, as a matter of fact, the memorandum of 13 March 2018 was not considered by the Director-General before the request was refused in May 2018. It should have been. However, it is clear from the memorandum dated 20 November 2018 from the Director, HRD, that by this time the Director-General had himself considered the extension request and decided not to approve it. The memorandum provided the reasons for his conclusion and his ultimate conclusion that there were not "sufficient exceptional circumstances to justify an extension [...]". Generally, the process of review creates an opportunity for an administration to reconsider an administrative decision earlier made and the correctness of that decision. It can, in this process, make a decision rectifying or remedying any deficiencies in that earlier decision. That is what happened in the present case. Thus, the failure of the Director-General to initially consider the extension request himself, was remedied by him doing so in the administrative review. An aspect of this is reflected in the Tribunal's case law, which decides that the mere fact that a decision was initially flawed but was later corrected does not suffice to warrant awarding damages for moral injury (see Judgment 4156, consideration 5).

12. Apart from the legal issue concerning the involvement of the Director-General, the complainant argues that the rejection of the extension request involved firstly a breach of a promise earlier made by the Director-General that he would review each request himself and generate a transparent list of criteria, secondly was tainted by error and omission of fact (because the reasons for rejection were at odds with the reasons of the Deputy Director-General, Emergency Preparedness

and Response, for the extension request in his memorandum of 13 March 2018) and thirdly violated the principle of equal treatment (because there was a selective examination of requests of certain staff favouring staff at Headquarters). This last-mentioned point is speculative and based only on numbers of requests approved (see, for example, Judgment 2669, consideration 9). More generally, however, these pleas fail to recognise the wide discretionary power acknowledged and accepted by the Tribunal vested in an executive head to make decisions to retain officials beyond the normal retirement age and the concomitant limits on review by the Tribunal (see, for example, Judgments 2669, consideration 8, and 4016, consideration 10). The conclusion of the Director-General that the complainant's position could be taken up by a properly recruited successor (said to be at odds with the view of the Deputy Director-General, Emergency Preparedness and Response) was based on an analysis undertaken by HRD. It was well within the Director-General's discretionary power to reach that conclusion on that basis, though subject to the following discussion about abuse of power.

13. Notwithstanding the preceding discussion about the width of the discretionary power of an executive head to extend an appointment and the limited scope of review by the Tribunal, such a decision can be challenged on the basis that the power has not been exercised *bona fide* or, described more generally, involved an abuse of authority. The complainant does so on the basis that at least one factor underlying the decision to reject the application for an extension for the complainant was a view that agreeing to it would weaken the Administration's position in connection with the complainant's first internal appeal against the decision to implement the new retirement regime from 1 January 2019 rather than 1 January 2018.

14. The factual foundation for this contention is a document prepared within HRD dated 23 March 2018 as a note to the Director, HRD, recounting that two cases of requests for extension had been received, one concerning the complainant and another concerning another member of staff. The document contains a list of three numbered notes concerning the complainant. The third is in the following terms:

“(iii) Agreeing to this extension would weaken WHO’s Position in connection with [the complainant’s] appeal on MAS 65”. This is plainly an entirely irrelevant consideration. The critical question is whether it influenced the decision of the Director-General. A summary of his reasons in the review decision dated 20 November 2018 identified five grounds. The first was that the complainant’s functions in her position could be taken up by a properly recruited successor, secondly, they were not specialised, thirdly, in the absence of exceptional functional and operational needs, an extension would be contrary to the Executive Board’s resolution [of 1 June 2017], fourthly, it appears, the complainant was aware of her retirement date when she joined WHO and the fifth and related point was that this known retirement date enabled succession planning.

15. Can it be inferred there was a sixth unstated reason influencing the Director-General, namely that the granting of the extension would weaken WHO’s position in other proceedings? It must be borne in mind that if a complainant alleges that a decision was not taken in good faith or was taken for an improper purpose, she or he bears the burden of establishing the lack of good faith, bias or improper purpose (see, for example, Judgments 4264, consideration 10, 4146, consideration 10, 3743, consideration 12, and 2472, consideration 9). It is a serious allegation that must be clearly substantiated. Even allowing for the fact that the summary of the reasons of the Director-General just discussed was in a document prepared by the Director, HRD, it cannot be inferred there was a sixth unstated reason in the face of the five reasons given. Accordingly, the complainant has not demonstrated that the rejection was unlawful retaliation against her. It should be noted that this was also the conclusion of the GBA, which considered the issue in its report.

16. The complainant’s plea that the rejection of the request for extension was legally flawed, is unfounded.

17. It is unnecessary to address WHO’s arguments concerning the receivability of this complaint. WHO, in these proceedings, seeks the joinder of this complaint with others where separation of officials took

place in broadly the same circumstances or, alternatively, asks that they be considered in the same session. The latter has occurred. Joinder is opposed by the complainant. Notwithstanding that the events relied upon in these various complaints are mainly the same and some of the legal argumentation is similar or the same, joinder is inappropriate and each complainant is entitled to the benefit of a judgment addressing their circumstances and their pleas.

18. The complainant has failed to establish that either the decision to separate her from service or the refusal to exceptionally extend her appointment are legally flawed and, accordingly, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ