

T. (No. 2)

v.

WHO

131st Session

Judgment No. 4379

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Y. T. against the World Health Organization (WHO) on 18 March 2019 and corrected on 20 April, WHO's reply of 23 July, the complainant's rejoinder of 28 August and WHO's surrejoinder of 20 December 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 impugns the Administration's refusal to provide him in a timely manner with unredacted copies of documents and records relied upon by the Internal Oversight Services (IOS) during the disciplinary investigation.

At the time of the events giving rise to the present complaint, the complainant was the WHO Country Representative to Thailand. In March 2015, Ms E.B., who worked as domestic worker in the complainant's household, alleged that she had suffered assault and mistreatment at the hands of the complainant and his wife and that her salaries had been withheld. She lodged a complaint with the Thai Police accusing the complainant and his wife of human trafficking. The matter was reported in the media. Upon investigation, the Thai Police found Ms E.B.'s allegations of human trafficking to be unsubstantiated and, by a letter of 29 May 2015, it informed the WHO Representation in Thailand that

a non-prosecution order would be issued for the complainant and his wife, as neither had violated human rights laws or the laws of Thailand. The non-prosecution order was issued on 23 July 2015 and the Thai Police relevantly informed the WHO Representation in Thailand on 5 August 2015.

In its Investigation Report of 24 June 2015, IOS found that there was enough evidence to conclude that the complainant had contravened provisions of the Staff Regulations, the Fraud Prevention Policy, the Ethical Principles and Conduct of Staff, the Standards of Conduct for the International Civil Service, and Information Note 28/2011. IOS recommended that the Regional Director of SEARO and the Director of the Human Resources Department take appropriate administrative and/or disciplinary action.

On 13 July 2015 the complainant was informed of the charges raised against him, namely failure to report Ms E.B.'s allegations, inadequate handling of Ms E.B.'s case which exposed WHO to reputational risks, failure to comply with WHO human resources policies, and improper use of WHO resources for personal benefit. He was provided with a redacted copy of the Investigation Report and was asked to provide his response, which he did on 11 August. By a letter of 8 October 2015, he was informed that the Director-General had found the charges to be substantiated and had decided to impose upon him the disciplinary sanction of a reduction in grade (from P.6 to P.5). He was also informed that he would be reassigned to the SEARO Regional Office in New Delhi, India.

Meanwhile, on 28 July 2015, the complainant requested the Administration to provide him with all reports drawn up by the Thai Police, the audio recordings and unredacted copies of all interview records produced by IOS in the course of the investigation, and all communications, both within WHO and with external entities, regarding WHO's handling of the media reports on his alleged misconduct. The Administration responded by an email on 1 August 2015. In an attachment to that email, the Administration provided the complainant with a copy of the 29 May 2015 letter from the Thai Police and a list of the exchanges between WHO communication officers and external entities, including the content of statements made. However, the Administration refused the complainant's request for audio recordings and unredacted copies of interview records.

On 4 September 2015 the complainant filed an appeal with the SEARO Regional Board of Appeal (RBA) against the 1 August 2015 decision. In his statement of appeal the complainant referred in particular to three documents, exhibits to the Investigation Report, which he argued were provided to him “heavily redacted”, namely a Note to File of a meeting on 16 April 2015 between the investigator and Thai Police Colonel T. and the records of interviews of two WHO staff members, Ms I.W. and Dr M.S., of 14 and 15 April 2015 respectively. In his appeal, the complainant asked for the production of unredacted copies of the requested documents and an award of costs. On 19 October 2015 the Administration provided him with unredacted copies of the three documents specifically referred to by the complainant in his statement of appeal. The complainant pursued his appeal before the RBA which, on 10 August 2017, recommended that it be rejected. Further to the Regional Director’s decision to accept this recommendation, the complainant filed an appeal with the Global Board of Appeal (GBA) seeking moral damages and costs. In its report of 24 October 2018, the GBA recommended that the Director-General allow the appeal and award the complainant 5,000 United States dollars in moral damages for the failure to provide to him unredacted copies of the requested documents and 2,500 dollars for the delays in the proceedings before the RBA. The GBA also recommended the award of 6,000 dollars in costs.

By a letter dated 21 December 2018, the Director-General informed the complainant that he had decided to allow the appeal and to pay the complainant the amounts recommended by the GBA. The Director-General explained that, while there were valid reasons for the initial decision to redact the documents requested by the complainant, these reasons were not clearly explained to him. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to recognise that the Director-General erred when he found there were valid reasons to redact the documents requested by the complainant. He claims moral damages and costs over and above the amounts awarded in the impugned decision.

WHO asks the Tribunal to dismiss the complaint as irreceivable or, otherwise, devoid of merit.

CONSIDERATIONS

1. This judgment concerns the complainant's second complaint filed with the Tribunal arising from the disciplinary proceedings brought against the complainant following IOS's April 2015 formal investigation of allegations of misconduct made against him. In Judgment 4378 also delivered in public this day, the Tribunal considered the complainant's first complaint in which he challenged the decision to close his complaint of harassment lodged against IOS. The complainant requests the joinder of this second complaint with his first. However, it is appropriate to consider the present complaint separately, as it raises distinct legal questions from those raised in the complainant's first complaint and merits individual attention.

2. The present complaint stems from the Administration's 1 August 2015 refusal to provide the complainant with audio recordings and unredacted copies of interview records that he requested following his receipt of the letter of charges on 13 July 2015. In particular, in the internal appeal process, the complainant challenged the Administration's refusal to provide him with unredacted copies of the IOS investigator's 5 May 2015 Note to File of a meeting between her and Thai Police Colonel T. on 16 April 2015; and the investigator's records of her interviews of Ms I.W. and Dr M.S., two WHO staff members, on 14 and 15 April 2015 respectively.

The complainant impugns the Director-General's 21 December 2018 decision in relation to the Regional Director's dismissal of his appeal concerning the Administration's refusal to provide him with unredacted copies of these three documents. In his appeal to the GBA, the complainant submitted that WHO violated his due process rights during the investigation and that the RBA violated the applicable time limits. In his claim for relief, the complainant requested 5,000 United States dollars for moral damages arising from the Administration's refusal to provide the requested documents; 10,000 dollars for moral damages for the delays in the RBA appeal; and 6,000 dollars for legal costs.

3. The complainant submits that as the Director-General in his 21 December 2018 decision departed from the GBA's findings of fact without giving reasons, the decision was "not properly motivated" and, therefore, in keeping with the consistent case law, it must be set aside.

In support of this submission, the complainant points out that “the GBA concluded that none of the redacted material raised security or confidentiality issues, and that the redacted material was relevant for [the complainant’s] response to the charges”. The complainant notes that in his decision the Director-General found that there were valid reasons to redact the documents to protect two staff members called as witnesses in the IOS investigation from possible retaliation. The complainant takes the position that in making this finding, the Director-General departed from the GBA’s findings without giving reasons. As well, the Director-General did not give any reason for his conclusion that the redaction of the interview with the Thai Police Colonel was valid. Additionally, the Director-General did not give reasons for his conclusion that providing unredacted versions of the interviews with the two staff members might result in retaliation contrary to the GBA’s “explicit conclusion” that there was no valid reason to redact those interviews.

4. The complainant’s submission is fundamentally flawed. In its report, the GBA examined the redacted information requested by the complainant. In summary, the GBA was not convinced that any of the redacted text raised security or confidentiality issues. The GBA found that the redacted portion of the investigator’s meeting with the Thai Police Colonel, in which the Colonel considered that “[a]t [that] stage there [was] no evidence to support the complaint” against the complainant and his wife, was relevant to the matters for which the complainant was charged. As to the redactions in the interviews with the two staff members, the GBA found that they were not relevant to the matter being investigated and was not convinced that either statement should have been redacted. As well, the GBA found that the complainant may have considered the redacted information relevant to the preparation of his response to the charges against him. The GBA observed that it “could not conclude whether or not the redacted information was used by the Administration in reaching its decision as to the sanction to be imposed and, if so, whether or not the redactions limited the [complainant’s] opportunity to fully respond to the charges prior to the sanctions being imposed”. Further, the GBA also observed that it “[was] not convinced that there was any risk to the integrity of the investigation, if the unredacted documents were shared with the [complainant] prior to him responding to the charges”. In its analysis, the GBA had regard to the Tribunal’s case law in Judgments 2229, 3200 and 3295. The GBA also

considered the delay in the RBA proceedings and found that, given the complexity and seriousness of the matter and the impact on the complainant, the delay in the RBA proceedings was unreasonable.

5. In conclusion, the GBA recommended that “[i]n light of [its] findings and considerations”, the complainant should be awarded 5,000 United States dollars for moral damages arising from the failure to provide the unredacted documents; 2,500 dollars for moral damages for the delays in the RBA appeal; and 6,000 dollars for legal costs.

6. In the impugned decision, the Director-General observed:

“[F]ollowing [the GBA’s] review of the documentation, arguments and applicable provisions, the GBA concluded that the unredacted documents you had initially requested (and which were eventually provided to you) should have been made available to you earlier. While there were valid reasons to redact those documents in order to protect two witnesses in the IOS investigation from possible retaliation, I accept that the reasons for not providing the unredacted documents were initially not clearly explained to you. For this reason, I accept the recommendation of the GBA to pay you moral damages for a total of [...] 7,500 [United States dollars], including compensation for the delay in concluding your appeal before the [RBA]. In addition, I also accept the recommendation of the GBA to pay you [...] 6,000 [United States dollars] for the legal costs related to your appeal, upon receipt of proof of payment of the actual legal costs you incurred for this particular appeal.”

Based on a reading of the impugned decision, the Tribunal finds that contrary to the complainant’s submission, the Director-General did not make any findings of fact. In his decision, the Director-General acknowledged the error in failing to make the unredacted documents available to the complainant earlier. Read in this context, the Director-General observed that in retrospect there were valid reasons to redact the records of interviews with the two staff members to protect them from possible retaliation and acknowledged that the reasons given to the complainant for not providing the unredacted documents were unclear.

7. As well, the complainant’s reliance on Judgment 4167, consideration 4, in support of his assertion that the Director-General violated his duty to motivate his departure from the GBA’s findings is misplaced. As stated in this judgment, consideration 4, “an executive head of an international organisation who departs from a recommendation of an internal appeal body must state the reasons for disregarding it and must motivate the decision actually reached”. This case law only has

application when an authority competent to make a final decision departs from the internal appeal body's recommendation. As the Director-General accepted the GBA's recommendation in its entirety, there was no alternative decision that required motivation. Accordingly, the complainant's submission that the impugned decision was "not properly motivated" is unfounded.

8. As the complainant has not advanced any other arguments regarding the lawfulness of the impugned decision, the complaint will be dismissed, without there being any need to deal with the objections to receivability raised by the Organization.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 January 2021, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

DRAŽEN PETROVIĆ