Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

106th Session **Judgment No. 2811**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. S. against the World Health Organization (WHO) on 24 August 2007 and corrected on 26 November 2007, the Organization's reply of 7 March 2008, the complainant's rejoinder of 13 June and WHO's surrejoinder of 18 September 2008;

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

Having examined the written submissions;

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

A. The complainant, a Chilean national born in 1952, joined WHO in March 2000 on a two-year fixed-term appointment at grade P.5 as Coordinator of the Programme on Cancer Control in the Noncommunicable Diseases Cluster, which was subsequently renamed the Noncommunicable Diseases and Mental Health Cluster (NMH). This appointment was extended twice.

In February 2004 Dr B. was appointed Director of the Department of Chronic Diseases and Health Promotion (CHP), which had just

been set up within NMH. He was mandated to restructure CHP. The Director-General approved the new structure of the department on 8 April 2004.

On 18 March 2005 the complainant submitted a complaint to the Headquarters Grievance Panel alleging systematic harassment and discrimination by Dr B., who was her second-level supervisor. She contended in particular that shortly after Dr B. had been appointed Director of CHP, he had decided to divest her of her duties as Coordinator of the Programme on Cancer Control and she claimed that this decision was tainted with personal prejudice. In its report of 10 November 2005 the Panel found that the complainant had not been harassed individually but, like other people, she had been sidelined. The Panel, having noted the climate of insecurity associated with the rapid restructuring of the department and the sense of injustice it had caused, issued some general recommendations regarding reorganisation procedures within WHO and some specific recommendations concerning the management of CHP. By a letter of 3 February 2006 the complainant was informed of these conclusions and recommendations and of the Director-General's decision to dismiss her harassment complaint as unproven.

In the meantime, in the context of the Strategic Direction and Competency Review (SDCR), the Director-General, acting on a proposal from Dr B., had approved further restructuring of CHP as of 6 July 2005. On 17 November 2005 the complainant was informed that the Director-General had decided to abolish her post and to offer her a direct lateral reassignment at the same grade or the possibility of participating in the reassignment process for which provision is made in Staff Rule 1050.2 and WHO Manual paragraphs II.9.250 to 370. Her lateral reassignment to the post of Senior Adviser in the Chronic Disease Prevention and Management Unit took effect as of 1 January 2006.

On 9 December 2005 the complainant submitted an appeal to the Headquarters Board of Appeal in which she contested the decision to abolish her post and to "downgrade" her functions. She alleged in particular that this decision had been taken in the context of the

ongoing harassment to which she was being subjected by Dr B. In its report of 17 January 2007 the Board concluded that the complainant had not proved that the decision to abolish her post was based on personal prejudice against her, nor had she suffered any material injury as she had kept her grade and steps. The Board recommended dismissal of her case and all her claims for redress. The Director-General informed the complainant by letter of 23 March 2007 that she had decided to accept the Board's recommendation.

On 6 February 2007 the complainant, relying on the WHO Whistleblower Protection Policy adopted in November 2006, filed a retaliation claim against Dr B. and "others he ha[d] instigated against [her]". On 28 May 2007 the Director of the Office of Internal Oversight Services informed the complainant that the Director-General had rejected her claim on the basis that, contrary to the requirements of the applicable procedure, there was no *prima facie* case of retaliation. That is the impugned decision.

B. The complainant explains that her complaint arises from the abolition of her former post, the downsizing of her responsibilities and the harassment, retaliation and discrimination to which she has been subjected for more than four years. She alleges that she has been ignored, threatened, belittled, berated and publicly insulted by her supervisors and she claims that her career and health have suffered.

The complainant criticises the successive reorganisations of CHP and the way in which it was managed. In this connection she draws attention to the findings of the Headquarters Grievance Panel, especially its reference to "a climate of insecurity and fear, as well as a sense of injustice, associated with the new management style and [with the] rapid decisions on reorganization and several rapid staff appointments within weeks of Dr [B.]'s arrival". Although the Panel recommended the dismissal of her complaint, it made a number of recommendations concerning the management of CHP, but according to the complainant no steps have been taken to implement them. The complainant also points out that the Panel said that it was disturbed by Dr B.'s dismissive attitude towards her. She submits that she continued to be subjected to harassment after he retired in February

2007; she adds that in March 2007 Dr B. had been found guilty of harassing another colleague.

The complainant puts forward six pleas in support of her complaint. Firstly, she submits that the decision to abolish her former post and to reassign her was based on personal prejudice and formed part of the ongoing harassment and discrimination against her by her supervisors. She provides numerous examples of conduct which, in her opinion, demonstrate the existence of such personal prejudice against her.

Secondly, the complainant contends that the decision to abolish her post stemmed from an abuse of authority, that it was arbitrary and totally unjustified, and that it did not respect the principles of justice governing decisions concerning international civil servants. She asserts that the decision to abolish her post was taken by Dr B. not in the interests of the Organization, but rather in order to punish her for having lodged a harassment complaint against him. In this connection she draws attention to the fact that combating cancer, a field where she possesses proven expertise, had been declared a priority by the Director-General, who approved an intensified plan of action against the disease.

Thirdly, the complainant alleges that her lateral reassignment resulted in demotion and thus violated her acquired right not to be given a post involving duties which were not commensurate with those of the post she had been awarded through a competition. She contends that she accepted the post of coordinator because she had been told that she would have managerial and supervisory responsibilities, but that these functions were taken away from her without her consent and without her having any choice but to accept.

Fourthly, she considers that the decision to abolish her post is tainted with procedural irregularities because, in her opinion, inadequate reasons were given for it. She states in this respect that in May 2004 Dr B. told her that she would no longer be a coordinator on the pretext that she was not managing to raise enough funds, although this function was not part of her job description. She also points out

that her harassment complaint was still under investigation when the decision to abolish her post was taken.

The complainant's fifth plea is that the said decision is a disguised disciplinary measure adopted in retaliation for her harassment complaint. She adds that the manner in which the transfer was carried out, without any examination of the facts or any notice, also constitutes retaliation.

Lastly, the complainant submits that she has not been treated with the respect owed to international civil servants. Indeed, the Grievance Panel found that WHO had failed to recognise her skills and expertise.

She requests the production of several documents in order that she may prepare her rejoinder. Amongst other claims listed in her complaint, she asks the Tribunal to set aside the Director-General's decision of 28 May 2007 and to order WHO to pay her damages in the amount of 200,000 Swiss francs for moral injury and at least 15,000 francs in costs. She also claims such other redress as the Tribunal deems "necessary, just and equitable".

C. In its reply WHO submits that the complaint is irreceivable because it is directed against the decision of 28 May 2007, which is not a final decision within the meaning of Article VII of the Statute of the Tribunal, since the complainant has not challenged it before the Headquarters Board of Appeal. It observes that the complainant is attempting to link this decision with her previous appeals concerning her alleged harassment by Dr B. and the abolition of her post. But, in the Organization's opinion the retaliation claim is a new and distinct claim. To the extent that the complaint concerns the decisions of 3 February 2006 and 23 March 2007, it is irreceivable as it is time-barred. Moreover, as some of the claims have been put forward for the first time in the complaint, they must be dismissed because the internal means of redress have not been exhausted.

WHO replies on the merits subsidiarily. It asserts that the decision to abolish the complainant's post as part of the reorganisation of CHP was taken in conformity with the applicable rules and procedures

and with the guidelines established for the SDCR process. This restructuring was approved by the Director-General in the Organization's interests, and indeed the Headquarters Grievance Panel considered that there was "a strong underlying logic" to the restructuring. The complainant was informed of possible changes in her functions as early as May 2004, and in November 2005 she received notification of the decision to abolish her post and to offer her a reassignment to a post at the same grade and step. She was likewise informed that if she refused the post, she would be eligible to participate in the reassignment process provided for in Staff Rule 1050.2.

The complainant's post was not the only one to be abolished. In the Organization's opinion, this demonstrates that she was not subjected to discrimination or a hidden disciplinary sanction. Furthermore, two separate appeal bodies had examined the complainant's allegations of harassment, but had not found in her favour.

With regard to the complainant's allegation that her acquired rights were violated, WHO emphasises that, on joining the Organization, she agreed to abide by the Staff Regulations and Rules. Since these texts permit reassignments there can be no acquired right to a particular post or to particular duties or responsibilities, a fact which has been confirmed by the Tribunal's case law. It denies that the complainant was demoted: she has retained similar duties and responsibilities and she is still working in a field that is suited to her qualifications and expertise.

WHO considers that the complainant's request that numerous documents be produced must be dismissed in the light of the Tribunal's case law. It also argues that the complainant has not shown that she has suffered injury and that she therefore cannot claim damages.

D. In her rejoinder the complainant presses her pleas. She confirms that her complaint is directed against the decision of 28 May 2007, but she emphasises that her retaliation claim was based on the same facts

as those which had given rise to her two previous appeals. Since these appeals had been dismissed, and in view of the Tribunal's findings regarding the WHO Headquarters Grievance Panel in Judgment 2642, she could not count on an objective, fair investigation conducted in good faith by the Organization. In this connection the complainant points out that the recommendations of the Headquarters Board of Appeal are not binding. She explains that she did not file a complaint with the Tribunal against the decision of 3 February 2006 for financial reasons. She notes that the procedure to protect whistleblowers at WHO does not define what is meant by a "*prima facie* case of retaliation", but she considers that she has provided abundant evidence showing that she was harassed. In her opinion, WHO was wrong not to investigate her claim. For all these reasons she considers that she has exhausted all the internal remedies.

The complainant states that, unlike the other two people whose posts were abolished, she was deprived of her supervisory duties and was progressively sidelined. She contends that the Organization cannot be deemed to have fulfilled its duty, in keeping with the Tribunal's case law, to respect the dignity of its staff members merely because she retained her grade, step and salary when she was reassigned.

The complainant takes the Organization to task for refusing to recognise that for four years she was subjected to severe, continuous harassment. She deplores the lack of any sanction against such conduct and states that a recent survey demonstrates the extent of harassment within the Organization.

E. In its surrejoinder WHO maintains its position. It rejects the complainant's arguments regarding receivability and considers that none of the reasons that she puts forward made it permissible for her to file a complaint with the Tribunal before she had exhausted the internal remedies. Nor has the complainant supplied any proof that she had reason to fear that her appeals would not be heard within a reasonable period of time or that the exercise of her rights would be paralysed.

It explains that the complainant's immediate supervisor was reassigned after a review of the structure of CHP in March 2008 and

that he is therefore no longer her supervisor; thus one of her requests for relief has been granted.

CONSIDERATIONS

1. In March 2000 WHO recruited the complainant at grade P.5 as Coordinator of the Programme on Cancer Control in the Noncommunicable Diseases Cluster, which was subsequently renamed the Noncommunicable Diseases and Mental Health Cluster (NMH).

In April 2004 the department where she was working, which then became the Department of Chronic Diseases and Health Promotion (CHP), was substantially restructured by a new director, Dr B. Amongst other changes, this restructuring involved the creation, within CHP, of a Chronic Disease Prevention and Management Unit headed by another coordinator, who then became the complainant's immediate supervisor.

2. On 18 March 2005 the complainant filed a harassment complaint against Dr B., alleging that she was being subjected to systematic antagonism and discrimination, as evidenced in particular by the fact that she had been divested of her previous duties and that a determined effort had been made to isolate her from her department. Since the accusations forming the basis of this complaint were rejected by the Headquarters Grievance Panel, the Director-General decided that the matter should be closed. The complainant was notified of this decision by a letter of 3 February 2006.

3. On 17 November 2005 the complainant was informed that as a result of a further restructuring of her department in the context of the "Strategic Direction and Competency Review" (SDCR), which had been conducted within the Organization, her post was simply being abolished. She was therefore offered a lateral reassignment, which she reluctantly accepted, to the newly created post of Senior Adviser in the Chronic Disease Prevention and Management Unit. Since she felt that, although this new post was also graded P.5, her reassignment amounted to a "demotion" in view of her previous level of

responsibilities, the complainant challenged this measure before the Headquarters Board of Appeal; but in accordance with the Board's recommendation, her appeal was dismissed by a decision of the Director-General of 23 March 2007.

4. In the meantime, on 6 February 2007, the complainant had filed a retaliation claim under the WHO Whistleblower Protection Policy adopted in November 2006. She alleged that Dr B. and several other staff members had engaged in various retaliatory acts against her after she had filed her initial harassment complaint. In accordance with the procedure laid down in the above-mentioned policy, the Director of the Office of Internal Oversight Services made a preliminary determination regarding this claim. Since the Director concluded that there was no *prima facie* case of retaliation within the meaning of the policy, the Director-General rejected the claim by a decision of 28 May 2007.

5. It is this last decision which the complainant is now challenging before the Tribunal. She asks the Tribunal to set it aside and submits various other requests for redress, including claims for compensation.

6. The complainant has requested the convening of an oral hearing. In view of the abundant and very clear written submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

7. In support of her claims the complainant submits that the Organization's behaviour towards her, especially as regards maintaining her previous level of responsibilities, constitutes abuse of authority and discrimination linked to the harassment which she claims to have suffered.

8. As the defendant points out, this line of argument leads the complainant indirectly to criticise the above-mentioned decisions of

3 February 2006 and 23 March 2007 relating to her harassment complaint and the abolition of her former post, respectively. However, the complainant clearly indicated in the complaint form and explicitly confirmed in her rejoinder that she intended to challenge only the decision of 28 May 2007. This is therefore the interpretation that the Tribunal will adopt. Any claims directed against the two earlier decisions mentioned above, which have become final since they were not challenged before the Tribunal within the requisite time limit, would in any case necessarily have been dismissed as being time-barred.

9. However, the Tribunal notes that prior to the filing of this complaint, the Director-General's decision of 28 May 2007 did not form the subject of an appeal before the Headquarters Board of Appeal, a procedure for which provision is made in WHO Staff Rules 1230.1 *et seq.*

The challenging of a decision rejecting a retaliation claim filed by a staff member under the above-mentioned Whistleblower Protection Policy of November 2006 does, however, fall within the scope of this internal appeal procedure, as is plain from the reference in the policy to appeals through "existing appeal mechanisms".

It follows that the claim to have the impugned decision set aside is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, since the internal means of redress available to the complainant under the Organization's applicable rules have not been exhausted.

There is abundant case law confirming that such claims are irreceivable if this requirement that internal means of redress must be exhausted has not been met (see, for example, Judgments 1063, 1653 and 2511).

10. In an attempt to show that her complaint is receivable the complainant submits that, in this case, an appeal to the Board of Appeal or Grievance Panel would not have served any practical

purpose and would therefore have been a “mere waste of time and money”.

In this connection she alleges that since the Organization’s appeal bodies had proved to be ineffective when they examined her harassment complaint and her appeal against the abolition of her post, she had good reason to believe that any appeal against the decision rejecting her retaliation claim would not have been investigated “fairly and in good faith” by the Headquarters Board of Appeal. She further contends that, in any case, bearing in mind the purely advisory nature of this body, the Director-General could have confirmed her initial decision, no matter what recommendation was made to her. Lastly, relying on various Tribunal judgments where complainants were deemed to have exhausted internal means of redress when it transpired that the latter would be inconclusive, she contends that she was likewise in a situation where she was entitled to turn directly to the Tribunal.

11. The Tribunal will not accept this line of argument, since to do so would be tantamount to allowing a staff member, on his or her own initiative, to evade the requirement that internal means of redress must be exhausted before a complaint is filed.

Apart from the fact that this solution would conflict directly with the terms of Article VII, paragraph 1, of the Statute of the Tribunal, it would belie the actual point of making internal appeals obligatory, which is what justifies this provision. However, as the Tribunal has already emphasised, for example in Judgment 1141, under 17, the purpose of the requirement that internal means of redress be exhausted is not only to ensure that staff members do actually avail themselves of any opportunities they may have within an organisation for obtaining redress before filing a complaint with the Tribunal, but also to enable the Tribunal, in the event that a staff member lodges a complaint, to have at its disposal a file supplemented by information from the records of the internal appeal procedure.

The fact that the recommendations of the Board of Appeal are not binding on the decision-making authority does not mean that

they have no weight in the internal appeals procedure, since the Director-General has a legal duty to give such recommendations due consideration and, according to the Tribunal's case law, can lawfully depart from them only for clear and cogent reasons.

12. In addition, the Tribunal finds that, notwithstanding the complainant's submissions, in the present case there is nothing to suggest *a priori* that her internal appeal would not have been examined with due objectiveness and impartiality.

The fact that the Headquarters Grievance Panel and Board of Appeal recommended the dismissal of both of the complainant's previous appeals is not in itself sufficient to give credence to this argument.

Similarly, although the complainant indicates that the Tribunal found in Judgment 2642, delivered on 11 July 2007, that the WHO Headquarters Grievance Panel had displayed serious shortcomings, this judgment should not be construed as general criticism of the way such panels operate. Furthermore, it must be recalled that in the present case the internal appeal available to the complainant lay not with such a panel but with the Headquarters Board of Appeal.

13. Lastly, the complainant is mistaken in believing that she may be deemed in this case to have exhausted internal means of redress. The precedents to which she refers, namely Judgments 1376, 1829, 1968 and 2039, refer to cases where, owing to the excessive length of the internal appeal proceedings, or the organisation's wrongful attempts to impede the examination of such an appeal, the requirement that internal means of redress must be exhausted would have paralysed the complainant's exercise of his or her right to have access to the Tribunal. However, as a general rule, and according to

the same line of precedent, this departure from the application of Article VII, paragraph 1, of the Statute of the Tribunal will be accepted only where complainants have done all that could reasonably be expected of them to have their internal appeal effectively examined, so that they cannot be said to be in any way responsible for a failure to exhaust the internal means of redress available within an organisation. But, this is not the case here where, on the contrary, the complainant quite simply refrained from filing such an appeal and therefore took it upon herself not to comply with this precondition for filing a complaint with the Tribunal.

14. In addition to her claim seeking the setting aside of the decision of 28 May 2007, the complainant has presented numerous other requests for various forms of redress for the injury which she says she has suffered.

15. Some of these requests clearly lie outside the Tribunal's jurisdiction. This is true, for example, of the requests that the Tribunal order the imposition of disciplinary measures on staff members of the Organization, that the complainant be sent a public letter of apology (in this connection see Judgments 968, 1591 and 2605) or that a management audit of her department be conducted by independent experts. This is also true of the request that the Tribunal order the Organization to take steps to ensure that the complainant's immediate supervisor will no longer supervise her.

16. Some of the complainant's other claims, such as her request that the Organization be ordered to pay compensation, may be entertained by the Tribunal; but for the same reasons as those set forth above with regard to the claim seeking the setting aside of the impugned decision, as these claims were not previously submitted to the appeal bodies for which provision is made in the Staff Regulations and Rules, they are irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, because the internal means of redress have not been exhausted.

17. As the complaint is thus irreceivable in its entirety, the Tribunal can only dismiss it and will not examine the merits of the case. It follows that the request that the Tribunal order the production by the Organization of various documents related to the facts on which the complainant relies now serves no purpose.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet