

**107th Session**

**Judgment No. 2817**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr W. B. against the World Health Organization (WHO) on 19 December 2007 and corrected on 28 February 2008, the Organization's reply of 6 June, the complainant's rejoinder of 8 September and WHO's surrejoinder dated 17 December 2008;

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

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

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

A. The complainant, a Canadian national born in 1958, joined the programme known as UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO – on 3 June 2002 as Chief of the then Information Centre (hereinafter “the Centre”) at grade P.4, under a two-year fixed-term contract. He was promoted to grade P.5 the following year and his contract was extended in June 2004 for a further two years. In 2005 a review of the functions and structure of UNAIDS' Advocacy, Communication and Leadership Department was carried out by a consulting firm, which issued its

report in October. In early 2006 another consulting firm was requested to provide further advice concerning the review of the functions and structure of the department.

In the meantime, the complainant had been placed on sick leave with effect from 14 December 2005. During his absence, the Executive Director of UNAIDS informed him by a letter dated 1 February 2006 that, following the reorganisation of the Advocacy, Communication and Leadership Department, he would no longer be Chief of the Centre. He also indicated that an audit performed by WHO's Internal Oversight Services had brought to light serious issues concerning the complainant's management of the Centre, that two staff members had lodged internal complaints against him with the WHO Headquarters Grievance Panel, alleging harassment, and that it had been decided to commission external experts to conduct an investigation into those allegations. The complainant replied on 1 March, seeking clarifications as to the reasons for the decision to remove him from his functions and the procedure that would be followed to deal with the harassment complaints. He requested a meeting with the Executive Director. On 9 March the Grievance Panel notified him of the charges levelled against him.

On 4 April 2006 the complainant initiated an appeal against the decision to remove him from his functions. In June his contract was extended for another year until 30 June 2007 and he was informed that, as he had exhausted his sick leave entitlements on 14 April, the Administration had requested that he be placed on sick leave under insurance cover with retroactive effect from 15 April 2006 for a maximum of 52 weeks. He wrote to the Executive Director on 28 August 2006, referring to statements from the Administration which, in his view, contradicted those made in the letter of 1 February 2006. He again sought clarification and requested a two-year contract extension.

By a letter of 13 April 2007, the complainant was advised that his sick leave under insurance cover was to expire the following day, and that he would be placed on special leave with full pay from 25 May until 31 July 2007, after which his contract would be terminated for

health reasons in accordance with Staff Rule 1030. The complainant wrote to WHO's Director-General on 1 May 2007, asking her to reconsider the decision to terminate his contract for health reasons. On 4 June the Director of WHO's Human Resources Management notified him that it had been decided to cancel the decision of 13 April 2007 and refer his case to the United Nations Joint Staff Pension Fund in order to determine whether he was entitled to a disability benefit.

In its report of 6 July 2007, the Headquarters Board of Appeal considered that the decision of 1 February 2006 inappropriately linked the issue of the reorganisation of the Advocacy, Communication and Leadership Department to the issues of misconduct, performance and harassment. It concluded that the decision to remove the complainant from his functions was arbitrary, as it was based on the consultant's report issued in October 2005, which had been superseded in 2006 by another report, issued by a different consulting firm. It recommended that the decision of 1 February 2006 be quashed and that the complainant be awarded moral damages and costs. On 7 August the complainant was notified that the Pension Fund had determined that he was entitled to a disability benefit and that his appointment would be terminated for health reasons on 15 November 2007. By a letter of 10 September 2007, the Director of UNAIDS Human Resources Management conveyed to him the decision – which the complainant impugns before the Tribunal – to endorse the Board's recommendations concerning the award of moral damages “on compassionate and exceptional grounds” and the reimbursement of costs, and to reject its recommendation to quash the decision of 1 February 2006. The complainant was separated from service on 16 November 2007.

B. The complainant submits that the impugned decision is based on a disguised, irregular disciplinary measure, since the decision of 1 February 2006 led to a change in his status which circumvented the relevant provisions of the WHO Manual and Staff Rules and Staff Regulations. The decision of 1 February 2006 was taken without any prior warning and was based on the pretext of the reorganisation of the Advocacy, Communication and Leadership Department as well as

unsubstantiated allegations of mismanagement and harassment. It is therefore tainted with bad faith. According to the complainant, the reorganisation of the department had not yet been implemented in February 2006 and, ultimately, it did not affect the Centre or indeed his functions. In addition, Internal Oversight Services have not reached any conclusion regarding his alleged mismanagement of the Centre. On the contrary, its preliminary report did not mention any significant problem in that regard. The complainant also contends that the investigations into allegations of harassment were procedurally flawed and breached his due process rights. The decision of the Executive Director of UNAIDS to launch an investigation was tainted by prejudgement and based on incomplete facts since he had not, at the time, received a summary of the harassment claims from the Headquarters Grievance Panel. Moreover, he failed to mention that the complainant had also lodged an internal complaint alleging that he was a victim of mobbing. The Administration failed to pursue a mediation process before the proceedings were initiated before the Panel. Additionally, the external firm conducted an investigation with no clear terms of reference and in parallel with the procedure before the Panel; it did not hear the complainant, and he was not present when it interviewed witnesses.

He contends that all actions taken after the decision of 1 February 2006 are tainted with procedural flaws. He asserts that, in view of his good performance appraisals, he had a legitimate expectation of being offered another two-year fixed-term contract but that he was instead offered a one-year contract extension without any prior warning or valid reason. He also submits that the Organization terminated his contract while settlement discussions were pending, thus breaching its duty of good faith. He was not provided with information concerning the system for determining his pension rights and reassignment possibilities, as required by Staff Rule 1030. Moreover, the impugned decision, which should have been taken by the Executive Director rather than the Director of UNAIDS Human Resources Management, failed to provide grounds for departing from the recommendation of the Board of Appeal. He states that the Organization paid him only part of his termination indemnity and part of the costs of the internal

proceedings and that he has not received payment of his disability pension, nor the moral damages which UNAIDS had agreed to pay.

The complainant considers that he has been treated in a disrespectful manner, especially in view of his serious health condition, and that his dignity and professional reputation have been impaired. In particular, the Administration failed to respond to his requests for clarification. He asks the Tribunal to quash the impugned decision as well as the decision of 1 February 2006 and to consider all investigations and disciplinary procedures against him as null and void. He seeks reinstatement in his former post under a two-year contract, with all legal effects. He claims moral damages in an amount equivalent to two years' gross salary plus 200,000 Swiss francs. He requests access to the content of the final report of the Internal Oversight Services and asks that an investigation be conducted into his own allegations of mobbing. He also seeks reimbursement of all costs which have not yet been paid to him.

C. In its reply WHO argues that the complaint is receivable only insofar as it challenges the decision of 1 February 2006 as maintained in the impugned decision. In particular it is irreceivable for failure to exhaust internal means of redress to the extent that it is directed against the decisions to offer him a one-year extension and to terminate his contract for health reasons. The Organization notes in this respect that the allegations of harassment are still pending before the Headquarters Grievance Panel and that the issue of the contract extension was not part of the recommendations of the Headquarters Board of Appeal.

On the merits it submits that, since no administrative action was taken to implement the decision to remove the complainant from his functions, there was in fact no change in his status. There was no sense in quashing that decision after he had been notified in August 2007 that his contract was to be terminated for health reasons, and since he was not fit for work it would in any case have been impossible to reinstate him. WHO also emphasises that the complainant did not suffer any prejudice as he kept his salary and grade. It refutes his assertion that the decision of 1 February 2006 and all subsequent actions amount to

disguised disciplinary measures. It states that there is no acquired right to a title, post or function, and it maintains that the decision of 1 February 2006 was taken as a result of the reorganisation which was initiated in 2006, based on the first and second reports issued by the consultants, as well as Senior Management's own assessment of the situation. In view of the complainant's absence and serious health condition, it would not have been appropriate to involve him in the review. WHO rejects as unfounded the allegations concerning due process. The case was not about misconduct or mismanagement. The audit of the Internal Oversight Services did not concern the complainant himself or his performance but the processes of the Centre, and no report was ever finalised. Likewise, although an external investigation had been at first envisaged, the only proceedings that are pending are those before the Headquarters Grievance Panel.

The Organization asserts that the impugned decision was duly taken by the Executive Director and communicated through the Director of Human Resources Management. It further affirms that it has already paid compensation for moral damages to the complainant, in accordance with the Headquarters Board of Appeal's recommendation.

D. In his rejoinder the complainant reiterates his arguments. He points out that the letter of 1 February 2006 explicitly referred to allegations of harassment, and he submits that the Tribunal should consider the issues of his contract extension and termination when assessing the treatment he was subjected to. He contends that the decision to remove his title and change his status was never officially withdrawn, and that it could not have been based on a reorganisation as no such reorganisation occurred: the Centre was merely renamed but the functions and grade of its head are similar to those listed in his former post description. He stresses that the letter of 1 February 2006 did mention that the audit conducted by the Internal Oversight Services had targeted his management of the Centre. The fact that the audit and external investigation were discontinued at some stage does not

diminish the procedural irregularities, nor the damage caused to his dignity and professional reputation.

The complainant presses his claims, whilst specifying that he seeks payment of moral damages in an amount equivalent to two years' gross salary plus 195,000 Swiss francs only if reinstatement is not possible. He also asks the Tribunal to order UNAIDS to take all steps towards restoring his reputation, internally and externally, in a public manner.

E. In its surrejoinder WHO maintains its position. It adds that the termination of the complainant's contract is the subject of a pending appeal before the Headquarters Board of Appeal and that that issue is therefore irreceivable for failure to exhaust internal remedies. As the complainant filed a claim for financial compensation with WHO's Advisory Committee on Compensation Claims in June 2008, on which the Director-General will in due course take a decision, his claim for moral damages in lieu of reinstatement is also irreceivable. The Organization produces a copy of a letter dated 5 June 2008 – which was returned undelivered to UNAIDS – by which the Executive Director informed the complainant that he had decided to withdraw his letter of 1 February 2006.

## CONSIDERATIONS

1. The complainant is a former staff member of UNAIDS who commenced work as Chief of the Information Centre at grade P.4 in June 2002. He was promoted to grade P.5 in 2003. He was placed on sick leave on 14 December 2005 following a heart attack and was not thereafter able to return to work. His appointment was terminated for health reasons with effect from 16 November 2007.

2. While absent on sick leave, the complainant received a letter dated 1 February 2006, from the Executive Director of UNAIDS. After referring to the complainant's heart attack, the Executive Director informed him that, following “a reorganization exercise”

in relation to the Advocacy, Communication and Leadership Department, he had “taken the opportunity to staff the leadership [...] differently, based on the requirements of the posts most especially in the area of management” and that he, the complainant, would no longer be Chief of the Centre. The Executive Director also informed him that an audit of the Centre “point[ed] to serious issues [...] linked to [his] overall management of the unit” and that it had been decided “to expand [the audit] to ensure that [a] correct picture [...] was presented to senior management”. The letter also referred to the submission to the WHO Headquarters Grievance Panel of two internal complaints of harassment against the complainant. It was added that:

“To expedite a review of these allegations, an investigation into the validity of the complaints will be conducted by external experts in the next few weeks.”

3. The complainant wrote to the Executive Director on 1 March 2006 asking the reasons for the decision to remove him as Chief of the Centre, and requesting an urgent meeting to discuss that and the other issues raised in the letter of 1 February 2006. He stated that the audit had initially been quite positive and that he had been provided neither with an opportunity to answer specific charges nor with the final report. So far as concerns the claims of harassment, the complainant pointed out that it was for the Grievance Panel to decide if there was a need for external support and asked for information as to the basis on which a parallel, external investigation was to be conducted and for its terms of reference.

4. Having received no reply to his letter of 1 March 2006, the complainant initiated an appeal on 4 April 2006. According to the report of the Board of Appeal of 6 July 2007, the appeal was with respect to the “decision to change his status”. In his appeal, the complainant claimed that the decision of 1 February 2006 was a disguised disciplinary measure and asked that it be quashed, that he be reinstated in his former title and post with retroactive effect, that he be awarded “compensation for damages to his health, life expectancy and career”, as well as costs.

5. In the appeal proceedings, the Administration claimed that there had been no change to the complainant's post or job description and that, when he returned to work, discussions would be held "to identify suitable functions for him, either in the context of the new structure of [the Advocacy, Communication and Leadership Department] or elsewhere in the Organization". It asserted that the decision was unrelated to the complainant's performance or to the allegations of harassment and that it was taken solely in view of the restructuring of that department. The Board of Appeal concluded that the decision was arbitrary in that, although there had been a consultant's report on restructuring the department that concerned the complainant's post, that report had been replaced in March 2006 by a second report that did not support the recommendations of the earlier one. That later report was not disclosed to the Board by the Administration. The Board also expressed the view that, given the terms of the letter of 1 February 2006 and the failure to reply to the complainant's letter of 1 March, the decision could "easily be perceived as a form of covert disciplinary action". The Board was critical of the Administration, including with respect to its conduct during the appeal, and found that the complainant "had been treated in a disrespectful manner, especially in view of his health situation, and that this caused him moral injury by impairing his professional dignity, which warrant[ed] compensation". It recommended that the decision of 1 February 2006 be quashed and that the complainant be paid 5,000 Swiss francs in moral damages and costs that were not covered by other sources.

6. On 10 September 2007 the complainant was informed that UNAIDS was prepared to award him "as recommended by [the Board's] report, on compassionate and exceptional grounds" the sum of 5,000 Swiss francs in moral damages and to pay his legal costs not covered by other sources. However, "the recommendation to withdraw the letter [...] dated 1 February 2006" was rejected, no reasons being given for that course. In the complaint form, the complainant impugns the decision conveyed to him on 10 September 2007. He seeks the quashing of the decision of 1 February 2006, reinstatement in his

former title and post, the issuing of a two-year contract instead of the one-year contract issued in July 2006, compensation for “damages to [his] current health, life expectancy and career”, as well as costs.

7. The complainant’s arguments extend beyond the decision of 1 February 2006 and refer to the subsequent decisions in June 2006 to extend his contract for one year, rather than two years, and, later, to terminate his employment for health reasons, as well as the audit, the internal complaints of harassment and the decision to conduct an external investigation into those complaints. The Organization accepts that the complaint is receivable insofar as it concerns the decision of 1 February 2006 and the decision contained in the letter dated 10 September 2007 but not otherwise. It is correct in this submission. More particularly and although the complainant sought a two-year extension of his contract in his rejoinder in the internal appeal proceedings, the decision to extend the complainant’s contract for one year, rather than two, was neither the subject of his appeal nor the impugned decision. Accordingly, internal remedies have not been exhausted with respect to that decision and, in accordance with Article VII, paragraph 1, of the Tribunal’s Statute, the claim for a two-year extension is irreceivable. However, the Tribunal may have regard to the various matters raised by the complainant insofar as they are relevant to his argument that the decision of 1 February 2006 was taken in bad faith.

8. In its reply the Organization rejects the complainant’s contention that the decision of 1 February 2006 was “based on an irregular disciplinary measure breaching Staff Rules and Regulations and indicative of bad faith”. It contends that the letter of 1 February “was triggered by the strategic and structural review of the [department] where the complainant worked” and adds:

“However, in fact no administrative action was ever taken to implement [the] decision. The complainant continued under the previous title of Chief [of the Centre] on the previous post and with the same post description until his separation from UNAIDS for health reasons.”

Somewhat inconsistently, it is argued in relation to the impugned decision that:

“there was no sense in quashing the managerial decision taken eighteen months earlier. If nothing else, it would be impossible to reinstate someone who had not been medically fit for work at the time and was not medically fit for work eighteen months later on a function and under a title that ceased to exist effective 1 February 2006.”

9. It is clear from the fact that another person was appointed Chief of the Centre ad interim in December 2005 and confirmed in that position in June 2006, and from the further fact that there was a subsequent consultant’s report rejecting the recommendations of the first report on which, according to the argument advanced both here and in the internal appeal, the decision of 1 February 2006 was based, that there was not, at that stage, any restructuring relevant to the complainant’s post. Indeed, this is implicit in the argument of the Organization that the complainant retained his title and post until his separation from service. Thus, the reason given to the complainant for the decision that he would no longer be Chief of the Centre was spurious. And as the Organization contends that the complainant continued under the previous title of Chief of the Centre in his previous post and with the same post description until his separation from service, the argument that it would have been pointless to reinstate him to a post that ceased to exist from 1 February 2006 is equally spurious. At least that is so to the extent that he could be reinstated administratively. Accordingly, the impugned decision must, to that extent, be set aside. So, too, the earlier decision of 1 February 2006 must be set aside. And to ensure that that decision has no further adverse effect, the letter of 1 February 2006, if placed on the complainant’s personal file, should be removed from it.

10. Although the decision of 1 February 2006 must be set aside, it cannot be concluded that that decision was a disguised disciplinary measure. However, there are a number of matters pointing to the conclusion that the decision was taken in bad faith. First, there is the fact that, at 1 February 2006, there was no restructuring relevant to the complainant’s post, although there was then a proposal to that effect.

Further, no discussions were then held with the complainant with respect to the restructuring of the Advocacy, Communication and Leadership Department; he was not informed in a timely manner that the restructuring proposal had been replaced with another proposal on 3 March 2006 – a fact that was not disclosed to the Headquarters Board of Appeal by the Organization. No answer was given to his letter of 1 March 2006 and none to a subsequent letter of 28 August 2006 in which he asked, amongst other things, to be informed as to the outcome of the external investigation into the claims of harassment. It emerges for the first time in the reply of the Organization that, although “at one time, it had been envisaged to conduct an investigation by an external consultant [...] this idea was subsequently dismissed”. So, too, it emerges for the first time in the reply that the audit referred to in the letter of 1 February 2006 did not “concern the complainant himself or the performance of his functions”, did not attribute any fault to him and, although it was under way in February 2006, no report or findings were ever made and the process was eventually stopped.

11. Although neither the above matters nor any of the other matters relied upon by the complainant point to any particular improper purpose, they are sufficient to justify a finding that the decision of 1 February 2006 was taken in bad faith. It is therefore unnecessary to refer to those other matters. Moreover, it is undesirable to do so as they are either the subject of ongoing proceedings or negotiations.

12. The finding of bad faith requires reconsideration of the recommendation of the Headquarters Board of Appeal that the complainant be paid moral damages in the amount of 5,000 Swiss francs for impairment of his professional reputation. The Board made no recommendation for damages with respect to his dignity, nor for the consequences to his health. Although there is no specific evidence relating the decision of 1 February 2006 to the complainant’s health, the decision must have caused him considerable stress and, thus, impeded his recovery. Having regard to these matters, the fact that,

contrary to the Tribunal's case law, no reasons were given for rejecting the recommendation that the decision of 1 February 2006 be quashed (see Judgment 2092) and the further fact that, as is clear from the impugned decision, the amount of 5,000 francs was agreed to "on compassionate and exceptional grounds", rather than as compensation for damage to the complainant's professional reputation, there should be an award of moral damages in the amount of 10,000 francs in addition to the amount that the Organization has already agreed to pay. Although the complainant has asked for "reimbursement of legal costs not already reimbursed by other sources", there will be an order, in the interests of finality, that the Organization pay the complainant's costs of the present proceedings in the amount of 5,000 francs.

### DECISION

For the above reasons,

1. The decision of 10 September 2007 is set aside to the extent that it maintained the decision of 1 February 2006, as is that earlier decision.
2. If the letter of 1 February 2006 has been placed in the complainant's personal file, the Organization shall remove it forthwith.
3. The Organization shall reinstate the complainant administratively in his post with the title of Chief of the Information Centre with effect from 1 February 2006.
4. It shall pay the complainant moral damages in the amount of 10,000 Swiss francs, in accordance with consideration 12, together with costs in the amount of 5,000 francs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 8 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba  
Mary G. Gaudron  
Dolores M. Hansen  
Catherine Comtet