

110th Session

Judgment No. 2971

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. W. against the World Health Organization (WHO) on 20 October 2008 and corrected on 3 March 2009, WHO's reply of 8 June, the complainant's rejoinder of 11 July and the Organization's surrejoinder of 15 October 2009;

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 Guyanese national born in 1947, was locally recruited by UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS, administered by WHO – on 1 January 2005 as Monitoring and Evaluation Adviser in Georgetown (Guyana) under a two-year fixed-term contract, the first year being a probationary year. Following an unfavourable performance evaluation report for the year 2005, he was informed by an e-mail dated 8 June 2006 that his probationary period was extended for one year until 31 December 2006 and that his within-grade salary increase was

withheld for the same period. He filed an appeal with the WHO Headquarters Board of Appeal on 10 July 2006 challenging his performance evaluation report for 2005 as well as the decision of 8 June 2006. Thereafter, the WHO Administration requested several extensions to allow for full consultation with counterparts at UNAIDS with a view to resolving the issues raised by the complainant in his appeal. Meanwhile, in August 2006 the UNAIDS Administration decided to convert the Monitoring and Evaluation Adviser position in Guyana from a national to an international post.

By letter of 21 December 2006 the complainant was informed that the performance evaluation report for 2005 would be removed from his personal file, that his appointment would be confirmed with effect from 1 January 2006 through 31 December 2006 and that the granting of his annual within-grade increase would be authorised. However, that same letter also informed him that it had been decided not to extend his post beyond 31 December 2006 for “programmatic reasons”, that his appointment would come to an end on this date and that he would receive a payment equivalent to three months’ salary in lieu of notice. The complainant acknowledged receipt of this letter on 9 January 2007.

On 30 April he wrote to the Executive Director of UNAIDS to ask for payment of the three months’ salary in lieu of notice and other monies owed to him. He was subsequently informed that there had been a delay in processing the payment of these sums due to an administrative error by WHO. The payment was completed on 6 July 2007.

In June 2007 the Executive Secretary of the Board of Appeal wrote to the complainant using his professional e-mail address to inform him that she wished to bring his appeal case to a close as it was the Board’s understanding that the negotiations with UNAIDS had been favourable and as he had since been confirmed in his post. Having been subsequently informed that the complainant had left UNAIDS with effect from 1 January 2007, she wrote to him again on 11 October 2007 using his private e-mail address and asked him formally to withdraw the appeal. After the complainant informed her

that UNAIDS had terminated his services, the Executive Secretary requested clarification and suggested that if he wished to pursue the appeal “he could submit an update and supporting documentation on the case”.

The complainant submitted an “Addendum” to his initial appeal on 17 October 2007, challenging the decision of 21 December 2006 not to extend his contract on the grounds that this decision was based on his national origin. By letter of 11 August 2008 the Executive Director of UNAIDS informed the complainant that, on the basis of the Board of Appeal’s conclusions and recommendations, he had decided, on the one hand, that his initial appeal was dismissed because the case had been settled and, on the other hand, that his “Addendum” was also dismissed because the decision not to renew his contract had not been challenged within the prescribed time limits. That is the impugned decision.

B. The complainant contends that UNAIDS breached one of the terms of his contract when the access to his professional e-mail account at work was denied some two days after receiving his termination letter, as all employees of UNAIDS are entitled to access their professional e-mail account for one month after separation from service. He points out that by cutting off his e-mail account UNAIDS contributed to making it difficult for him to challenge the decision not to extend his contract within the statutory time limits.

Further, he contends that the aforementioned decision is discriminatory on the grounds that it was based on considerations of his ethnicity and national origin as an Afro-Guyanese. According to him, the decision was neither based on any objective criteria such as his performance, which was rated satisfactory for 2006, nor on “programmatic reasons”, since there were no significant changes in the nature of the Monitoring and Evaluation Adviser functions. He asserts that the decisions not to extend his contract and to replace him with an internationally recruited Monitoring and Evaluation Adviser were taken in response to the fact that UNAIDS lost the leadership role for monitoring and evaluation in Guyana.

He adds that UNAIDS failed to inform him duly of the decision not to extend his contract and that he had a legitimate expectation to have his contract extended, since his performance was satisfactory and funds were available. Also UNAIDS treated him unfairly by withholding the monies owed to him following the decision not to extend his contract.

The complainant seeks the quashing of the decision to terminate his services, reinstatement, payment of compensation for the months he has been unemployed and for the emotional anguish he suffered, and punitive damages.

C. In its reply WHO challenges the receivability of the complaint, arguing that it is time-barred on the basis of the proceedings before the Board of Appeal. It emphasises that it is on 9 January 2007 that the complainant acknowledged receipt of the decision of 21 December 2006 with no reservations or comments and that he stated in his communication to the Executive Director of UNAIDS dated 30 April 2007 that he accepted the decision to terminate his services. The defendant contends that the “Addendum” filed by the complainant was a distinct action from his initial appeal, being directed against the decision not to renew his contract and as such should have been the subject of a second appeal. However, the “Addendum” dated 17 October 2007 was filed well beyond the time limit of 60 calendar days prescribed by Staff Rule 1230.8.3 and is therefore irreceivable.

On the merits, regarding the alleged breach of contract, the Organization notes that a professional e-mail account is a working tool and access thereto is not part of the contractual terms or conditions of UNAIDS’ employment. Therefore, the deactivation of the complainant’s e-mail account following his separation from service did not constitute a breach of his contract. In any event, UNAIDS’ Information Technology records demonstrate that no action was taken that would have prevented the complainant from accessing his professional e-mail account prior to its automatic deactivation on 30 January 2007.

WHO argues that, even though the complainant was not given three months' notice of the expiry of his appointment, he accepted payment in lieu of notice equivalent to three months' salary and has thus been duly compensated.

The defendant considers that the complainant's allegations of discrimination based on his ethnicity and national origin are unfounded, unsubstantiated and speculative. The decision not to extend his contract for "programmatic reasons" was taken in the context of a review of the needs and interests of UNAIDS over the 2006-2007 financial biennium. The Organization also indicates that payment to the complainant of three months' salary in lieu of notice and other monies was delayed due to clearance formalities and an administrative payroll error; no deliberate action was taken to prevent or prolong the payment of monies owed to him. It is of the opinion that the complainant is attempting to reverse a decision of the Administration that he had previously accepted.

D. In his rejoinder the complainant reiterates his arguments. He maintains that his complaint is receivable, having been filed within the prescribed time limit of ninety days after notification of the Executive Director's decision of 11 August 2008. In his view, although he acknowledged receipt of the letter of 21 December 2006, such an acknowledgement should not be interpreted as an agreement with the content of the letter. He adds that UNAIDS had the obligation to advise him of his right to challenge the decision not to extend his contract. Further, at the time he accepted the said decision, he did not know that he could challenge it and assumed that such a decision had been taken in good faith. He asserts that he was duped into accepting that decision by a series of misrepresentations which led him to believe that the decision was the outcome of negotiations with the Board of Appeal.

Lastly, the complainant contends that UNAIDS had the obligation to make all reasonable efforts to reassign him when it converted his post to an international one.

E. In its surrejoinder the defendant maintains its position. It denies the existence of any obligation to include the complainant in a reassignment exercise.

With respect to the complainant's claim for reinstatement, the Organization draws the Tribunal's attention to the fact that on 10 January 2009 he reached the mandatory retirement age.

CONSIDERATIONS

1. The complainant was employed by UNAIDS in Guyana on a two-year fixed-term contract from 1 January 2005 to 31 December 2006. By a letter dated 21 December 2006 but not received by the complainant until 7 January 2007, he was informed, amongst other things, that, for "programmatic reasons", his contract would not be extended beyond 31 December 2006 and that he would be paid three months' salary in lieu of notice. At the same time, he was informed that he would be granted the relief claimed by him in an appeal to the Headquarters Board of Appeal relating to his performance evaluation report for 2005. As a result of an oversight, that information was not immediately provided to the Board of Appeal. No challenge was then made by the complainant to the decision not to renew his contract.

2. On 11 October 2007 the Executive Secretary of the Board of Appeal wrote to the complainant informing him that she was under the impression that his claims had been satisfied and asking him to withdraw his appeal. The complainant replied on the same day indicating that UNAIDS had terminated his services. He was then told that if he wished to pursue his appeal "he could submit an update and supporting documentation". The complainant admits that, initially, he did not intend to challenge the decision terminating his services. However, there had been delay in the making of separation payments and the complainant had come to the view that the decision not to extend his contract had been taken in bad faith. Thus, on 17 October 2007 he filed an "Addendum" to his initial appeal seeking to

challenge the decision not to extend his contract beyond 31 December 2006. The Board concluded that the “Addendum” was not receivable as it raised a new action that “should have been the subject of a second appeal [and the complainant] should have submitted any challenge to the non-renewal of his contract within 60 days from the receipt of the written decision in conformity with Staff Rule 1230.8.3”.

3. The complainant raises an argument with respect to the cancellation of his e-mail access as from 9 January 2007, suggesting that this may have been the reason why he did not immediately challenge the decision not to renew his contract. This suggestion is rejected. Contrary to the complainant’s argument, his contract did not require that e-mail access be continued after his contract came to an end. Moreover, the complainant was clearly familiar with the procedures for lodging an appeal, having already done so in relation to his performance evaluation report for 2005. Further, the complainant clearly concedes that, originally, he had no intention of challenging the decision not to renew his contract.

4. Article VII, paragraph 1, of the Tribunal’s Statute provides that a complaint is not receivable unless the impugned decision “is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations”. The complainant did not challenge the decision not to renew his contract within the time specified in the Staff Rules. The Headquarters Board of Appeal was correct in its conclusion that his internal appeal was not receivable. The result is that the complainant has not availed himself of available internal remedies and, thus, has not exhausted them. It follows that, in accordance with Article VII, paragraph 1, the complaint is irreceivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet