

**110th Session**

**Judgment No. 2974**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs B. K.-M. against the World Health Organization (WHO) on 3 April 2009 and corrected on 31 July, WHO's reply of 30 October 2009, the complainant's rejoinder of 14 January 2010 and the Organization's surrejoinder of 14 April 2010;

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. Facts relevant to this case are given in Judgment 2973 on the complainant's first complaint, also delivered this day. Suffice it to recall that the complainant joined UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS, administered by WHO – in September 2003 under a short-term contract at grade P.4 as Manager, Best Practice, in the Information Centre. She was employed with the same title and at the same grade under a series of short-term contracts until she separated from service on 30 November 2005.

By a memorandum of 16 August 2004 from Human Resources Management the complainant was informed that the offer of appointment for her second contract, due to begin on 13 September 2004, was subject to a satisfactory performance evaluation report covering the duration of her previous contract. Shortly thereafter she asked her first-level supervisor, Mr B., to complete her evaluation report for the period in question. Between October 2004 and May 2005 both she and the Administration sent numerous e-mails to Mr B. reminding him of his obligation to finalise her evaluation reports.

On 17 June 2005 the complainant sent an e-mail to Mr B., Ms M. – who was then her direct supervisor – and Ms G., the Chief of Human Resources Management, in which she expressed her dissatisfaction with Mr B.’s attitude regarding the evaluation process and what she perceived to be the acquiescence of the Administration in that attitude. Her outstanding performance evaluation reports were subsequently finalised and all of the overall ratings by her first-level supervisors indicated that she “fully met performance expectations”.

A vacancy notice for the position of Manager, Best Practice, in the Social Mobilization and Information Department / Information Centre was advertised on 7 July 2005. The complainant applied for the post on 8 July and was subsequently shortlisted and interviewed. After her interview, on 23 November she wrote a letter to Ms E., the Director of the Programme Support Department, to which she attached copies of e-mails showing that she had reported to both Ms M. and Ms G. sexual harassment and mismanagement on the part of Mr B. She expressed concern that she had been ostracised by members of UNAIDS’ management as a result of these reports and that it was possible that she would suffer discrimination during the selection process for the vacancy for which she had applied. A week later, on 30 November 2005, she wrote to Ms E. again and stated that she had been verbally informed of her non-selection for the post. She challenged the selection process and the composition of the selection panel and enquired as to whether any member of the selection panel had also been a member of the Appointment and Promotions Committee. She also questioned whether her non-selection was a consequence of her

reports of harassment and mismanagement on the part of Mr B. That same day she separated from service.

By an e-mail of 8 January 2006 the complainant informed Ms G. that she still had not received written notification of her non-selection for the post. She challenged inter alia the composition of the selection panel on the grounds that some of its members were close friends of Mr B. and she requested a transparent review of the selection process. On 16 February she lodged a formal complaint with the WHO Headquarters Grievance Panel – which is the subject of Judgment 2973 – alleging that she had been subjected to sexual and psychological harassment by Mr B. In a memorandum of 10 March 2006 Ms G. informed the complainant that her appeal would have to be filed with the WHO Headquarters Board of Appeal (HBA) and that a notification of the result of the selection process had been sent to her UNAIDS e-mail address on 5 December 2005. The complainant wrote to Ms G. on 12 April 2006 requesting a copy of the e-mail in question on the grounds that she had not had access to her UNAIDS e-mail account since her separation from service.

On 5 May 2006 the complainant submitted to the HBA a statement of her intention to appeal. On 26 May she submitted her full statement alleging that her non-selection for the post of Manager, Best Practice, was the result of personal prejudice on the part of the selection panel as well as the failure by the Administration to apply correctly the Staff Rules and Regulations. In its report of 22 December the Board recommended inter alia that a new Appointment and Promotion Committee be convened immediately, with full membership, to review the selection process for the post in question. It added that the complainant's allegations of harassment would be dealt with by the Grievance Panel and that it would consider her claim for moral damages after the Director-General's final decision on the Panel's recommendations had been transmitted to her.

By a letter of 26 March 2007 the complainant was informed that a properly constituted Appointment and Promotion Committee had been convened. The Committee had reviewed the selection process and the report of the Interview Panel for the post of Manager, Best Practice,

and recommended another candidate to the Executive Director of UNAIDS, who had accepted that recommendation. Soon after the complainant filed an appeal against that decision, based on the same grounds as her first appeal. She asserted that the decision “perpetuate[d] the presumption of bias” and did not address the issues she had raised in her first appeal. In its report to the Executive Director relating to the complainant’s second appeal, the HBA noted that the report of the reconvened Appointment and Promotion Committee simply contained a statement of its conclusion, with no details as to how that conclusion had been reached. The Board concluded however that it appeared that correct procedure had been followed and it recommended rejecting the appeal.

By a letter of 10 October 2008 the Director-General of WHO informed the complainant that Mr B.’s medical condition had prevented his full participation in both the investigation into her allegations of harassment and the Headquarters Grievance Panel proceedings. As a result, the Panel had been unable to provide her with the information she needed and it was therefore not possible for her to take a decision on the merits of the complaint. Acknowledging the unsatisfactory nature of this outcome for all the parties concerned and noting the delay in the proceedings, she awarded the complainant 10,000 Swiss francs.

By a letter of 4 November 2008 the complainant was informed that, in accordance with the HBA’s recommendation, the Executive Director had rejected her second appeal. In a memorandum of 21 November the Board informed the Executive Director that, as no substantive conclusion had been reached regarding the complaint of harassment before the Headquarters Grievance Panel, and in view of the compensation that the complainant had been awarded, it had concluded that there was no basis for recommending additional compensation for moral damages. By a letter of 8 January 2009 the complainant was informed that, in accordance with the HBA’s recommendation, the Executive Director had decided that no further award was warranted. That is the impugned decision.

B. The complainant contends that the selection process was tainted with irregularities. Before the vacancy was advertised, she had repeatedly reported a pattern of harassment, marginalisation and “character assassination” to senior management but the Administration took no action to address her complaints. This included harassment on the part of Mr B., who subjected her to inappropriate behaviour and repeatedly refused to fulfil his obligation with respect to her performance evaluation reports, and a “marginalization campaign” on the part of Ms M. in response to her e-mail of 17 June 2005. She argues that, although the HBA found that there was insufficient evidence to establish personal prejudice on the part of the members of the selection panel or that they acted in a biased manner, the Administration has never denied that two of its members as well as the person responsible for overseeing the entire selection process were close friends of Mr B. Consequently, in the interest of fairness, those two staff members should not have taken part in the selection. Referring to the Tribunal’s case law, she asserts that it is an important aspect of the principle of equality that all candidates be considered objectively and that a person’s candidacy should not be evaluated by a person whose impartiality is open to question on reasonable grounds.

The complainant further contends that her qualifications are superior to those of the candidate who was selected for the post, in particular with respect to managerial competencies, education and language skills, and that it is not enough, given the circumstances surrounding this case, for the Organization to state merely that another candidate was chosen without providing the reasons for that choice.

She challenges the review conducted by the reconvened Appointment and Promotion Committee and points out that it failed to take minutes of its meeting. In her opinion, had the review been conducted in good faith, there would have been a record of the deliberations.

As the HBA reserved its recommendation regarding her claim for moral damages until the Grievance Panel made a finding with respect to her harassment complaint, the complainant asserts that the failure by

the Panel to make such a finding has left her without proper and adequate redress. In addition, it is not clear why the Director-General granted her 10,000 Swiss francs with respect to the Grievance Panel proceedings, nor is it clear how that amount was determined.

The complainant asks the Tribunal to reverse the decision taken on her first appeal before the HBA and, by extension, to reverse also the decision taken on her second appeal before that body. She seeks reinstatement in her former post and compensation for the losses she has suffered as a result of the impugned decision. She claims the equivalent of two years' salary at grade P.4, step 3, for the adverse effect on her career resulting from her non-selection for the post; moral damages for the unfair and undignified manner in which she was treated, for the failure by the Administration to conduct an investigation and provide her with the opportunity to substantiate her allegations of harassment and for the failure by the Headquarters Grievance Panel to produce a conclusive report regarding those allegations; compensation for the failure by UNAIDS to provide a suitable work environment and to protect her from unfair and discriminatory administrative procedures; and costs.

C. In its reply WHO submits that the complaint is receivable only insofar as it challenges the decision of the Executive Director of 8 January 2009 to reject the complainant's claim for moral damages in relation to her non-selection for the post of Manager, Best Practice, as originally advanced in her first appeal before the HBA. It notes that her claims related to harassment and to the Administration's failure to address those allegations are already the subject of a first complaint before the Tribunal. As for her claims regarding her non-selection for the post, it argues that they are irreceivable as time-barred because, although they were thoroughly examined in both of the appeals she lodged with the HBA, she failed to file, within the prescribed time limits, a complaint challenging the Executive Director's final decisions thereon. Her claims regarding the review conducted by the reconvened Appointment and Promotion Committee are also irreceivable as time-barred. Her claims related to her performance evaluation reports are likewise irreceivable because she did not file a

timely complaint challenging the Executive Director's final decision on the matter. Furthermore, she has addressed the issue of her evaluations in her first complaint before the Tribunal, and the principle of *res judicata* precludes her from doing so again. Lastly, WHO submits that the complainant's claims regarding the actions of Ms M. are irreceivable because she advances them for the first time in her second complaint and has therefore failed to exhaust the internal means of redress.

On the merits, the defendant asserts that as the complainant has already been awarded 10,000 Swiss francs in respect of her harassment complaint she is not entitled to any additional award. It denies her contention that she was marginalised by Ms M. and argues that Ms M. took reasonable steps to respond to the complainant's reports. Furthermore, the positive nature of her performance evaluation reports contradicts her assertions that the time taken to complete those reports and the alleged hostility on the part of Mr B. adversely affected her candidature for the post in question.

The Organization denies that there was personal prejudice on the part of the members of the selection panel. Although two of the members shared the same nationality as Mr B., they were chosen because they possessed technical knowledge relating to the vacant post and they performed their functions appropriately. Furthermore, this issue was thoroughly examined by the HBA in the complainant's first appeal.

With respect to the complainant's allegations regarding the review by the reconvened Appointment and Promotion Committee, the defendant asserts that this was done in accordance with the Executive Director's final decision dated 16 February 2007 and that the initial procedural irregularity identified by the HBA was duly corrected by that review.

WHO denies the complainant's assertion that she was better qualified than the candidate who was selected for the post. Referring to the case law, it argues that the Tribunal will only interfere in the selection of a candidate if it appears that the choice rests on a mistake of fact or law or that there has probably been a misuse of authority; the

complainant has not demonstrated that there have been any such mistakes or that the Organization has misused its authority.

D. In her rejoinder the complainant affirms that her complaint is receivable. The lengthy delay in the appeal proceedings was attributable to the Organization. She was compelled to wait for the Executive Director's final decision on her first appeal, which was dependent on a finding by the Grievance Panel regarding her claim for damages, before she could file her second complaint with the Tribunal. She argues that the atmosphere created by the fact that her harassment complaint remained "unheard" led to an unfavourable environment which negatively impacted her chances of being treated equitably during the selection process. In addition, the same officials are involved in both of her complaints before the Tribunal and, in her view, in order for her second complaint to be given full and fair consideration, her harassment complaint must also be considered. She submits that she raised the issue of Ms M.'s behaviour because it constitutes evidence of the atmosphere that existed during the selection process.

E. In its surrejoinder the Organization maintains its position, in particular regarding the receivability of the complaint. In addition, it points out that the complainant initiated her complaint before the Headquarters Grievance Panel on 16 February 2006, that is after she was informed of the outcome of the competition for the vacancy and, consequently, the selection process could not have been influenced by her harassment complaint.

## CONSIDERATIONS

1. The complainant challenges her non-selection for the post of Manager, Best Practice, which she occupied on short-term contracts at UNAIDS from 16 September 2003 until 30 November 2005. This post was advertised as a fixed-term appointment in July 2005. The complainant applied, was shortlisted and interviewed.

However, ultimately she was not selected and was informed of this on 30 November 2005, her last day of work. On 16 February 2006 she lodged a formal complaint of harassment against Mr B. with the WHO Headquarters Grievance Panel. The outcome of this harassment complaint is the subject of Judgment 2973, resulting from the complainant's first complaint to the Tribunal, also decided this day.

2. In May 2006 the complainant filed a first appeal against her non-selection with the Headquarters Board of Appeal (HBA), on the basis of personal prejudice and a breach of the Staff Rules and Regulations. In its report of 22 December 2006 the Board concluded that "there was insufficient evidence to establish a link between [Mr B.'s] friendship or shared nationality with two of the members of the selection panel and the adverse outcome of the selection for the [complainant]". As well, the Board saw no evidence that Mr B. was acting behind the scenes to influence the outcome of the selection process. It found that there was insufficient evidence to make a finding of personal prejudice or bias on the part of the selection panel members. The Board, however, also found that by holding a meeting of the Appointment and Promotion Committee without the presence of a representative of the Staff Association, UNAIDS had failed to abide by its own policy. It thus recommended that a new Appointment and Promotion Committee be convened immediately, with full membership present, to review the selection process for the post of Manager, Best Practice, with due regard paid to the assessment by the Interview Panel of the candidates' specific skills and competencies. With respect to the complainant's claim for moral damages, the Board decided that it would be considered once the Director-General had made a final decision on the harassment complaint.

3. The Executive Director accepted the HBA's recommendations and the selection process was reviewed by a reconvened Appointment and Promotion Committee. However, the complainant was again not selected. She filed a second appeal with the HBA against the decision not to select her. This second appeal was ultimately dismissed.

4. As to the harassment complaint, the complainant was awarded 10,000 Swiss francs as compensation for the inability of the Headquarters Grievance Panel to conclude an investigation into her allegation of harassment. The HBA then addressed the outstanding issue of the claim for moral damages submitted in the complainant's first appeal. It concluded that there was no basis for recommending additional compensation. By a letter of 8 January 2009 the complainant was informed that the Executive Director had decided to follow this recommendation. She impugns that decision before the Tribunal.

5. The complainant contends that her harassment complaint negatively impacted her chance of being selected for the post in question and that the selection process was opaque, tainted with irregularities, personal prejudice and bias. She seeks a reversal of the decision taken on her first appeal before the HBA and also by extension a reversal of the decision taken on her second appeal before that body, reinstatement in her post, and compensation for the losses she has suffered as a result of her non-selection and for the failure by UNAIDS to provide a suitable work environment. She also seeks moral damages and costs.

6. The Organization submits that the complainant's claims are either irreceivable as time-barred, or for failure to exhaust internal means of redress, and/or were already included in her first complaint to the Tribunal. In its view, the second complaint should be restricted to the issue of moral damages.

7. According to the complaint form initiating this proceeding, the impugned decision is the Executive Director's decision of 8 January 2009 regarding the complainant's "outstanding request for compensation for moral damages contained in [her] first appeal with the Headquarters Board of Appeal". Accordingly, the complaint is receivable only in relation to the decision not to award the complainant additional compensation for moral damages. All other claims must be dismissed as irreceivable.

8. On the merits, the complainant contends that the Executive Director erred by linking the finding on damages regarding her non-selection with the damages in the harassment complaint. She maintains that the latter proceeding concerned different allegations of harassment and not the personal prejudice alleged in the non-selection process: while the personal prejudice was informed by the harassment, they are different claims and should be assessed separately.

9. There was no error in the Board's finding that there was insufficient evidence to make a finding of personal prejudice or bias on the part of the selection panel members. Thus, there is no basis upon which the Executive Director's decision not to award additional moral damages can be disturbed.

#### 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