

G.
v.
PAHO

120th Session

Judgment No. 3488

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Dr C. H. G. against the Pan American Health Organization (PAHO) (World Health Organization) on 17 December 2012, PAHO's reply of 5 April 2013, the complainant's rejoinder of 1 July and PAHO's surrejoinder of 15 November 2013;

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:

In his complaint before the Tribunal the complainant challenges the Administration's decision to transfer him to PAHO's Country Office in Barbados asserting that his transfer was the result of harassment and retaliation.

At the material time, the complainant, who joined PAHO in 1997, held the P-4 post of Advisor, Health Services Information Systems. As a result of restructuring, he was reassigned with his post, effective 1 March 2003, to the Area of Health Analysis and Information Systems (AIS). Throughout 2003 the working environment in AIS was characterised by conflict and the complainant's relationship with

Mr C.-S., his first-level supervisor and AIS Area Manager, was strained. In February 2004 he was verbally informed of the decision to transfer him to PAHO's Country Office in Barbados effective 1 September 2004. Invoking family reasons, he requested that his transfer be postponed. This request was granted and he was transferred to the P-4 post of Advisor, Health Information Systems, in the Country Office in Barbados on 1 June 2005. Effective 1 May 2008, he was reassigned to PAHO's Country Office in Chile.

Prior to that, on 25 June 2004, he filed a complaint of harassment against Mr C.-S. and Mr L., another AIS staff member, and on 13 August 2004 he submitted a notice of his intention to appeal the decision to transfer him to PAHO's Country Office in Barbados. On 15 September 2004 his counsel filed a full statement of appeal arguing, in particular, that the complainant was being transferred to a less prestigious and responsible post "as part of the harassment aimed at him". On 16 September 2004 the Board of Appeal referred the complainant's allegations of harassment to the Harassment Grievance Panel and stayed its consideration of the appeal, pending receipt of the Panel's report. The Panel submitted its report on 7 July 2005. It concluded unanimously that several of Mr C.-S.'s actions amounted to harassment against the complainant and it recommended that he receive a written reprimand and that his within-grade increase be withheld for one year. With regard to Mr L., the Panel found that his actions towards the complainant did not constitute harassment. On 21 December 2005 the Area Manager of Human Resources Management (HRM) decided to accept the Panel's findings and recommendation. However, this decision was subsequently rescinded due to procedural irregularities in the Panel's review, and a new Harassment Grievance Panel was established to conduct a fresh examination of the complainant's allegations. The complainant was informed of this by a letter of 25 May 2006.

The new Panel submitted its report on 9 September 2009. It found by a majority that, although Mr C.-S. had engaged in harassment against the complainant, there was not sufficient information to establish that he had been involved in the decision to transfer the

complainant to the Country Office in Barbados. It recommended that Mr C.-S. receive a written reprimand and that his within-grade increase be withheld for two years. As to Mr L., it found that he had merely tolerated harassment and it recommended that the case against him be closed. On 9 November 2009 the new Area Manager of HRM informed the complainant of her decision not to accept the Panel's findings and to consider that his allegations of harassment had not been substantiated because, although Mr C.-S. had failed to properly exercise his managerial responsibilities, there was insufficient evidence to establish that his actions towards the complainant constituted harassment or that he was involved in the decision to transfer him to Barbados. She also informed him that she would take into consideration the Panel's recommendations in determining whether administrative or disciplinary action was warranted. She added that, in the event that the complainant did not agree with this decision, he had the right to appeal it to the Board of Appeal.

In July 2010 the Board of Appeal formally resumed its consideration of the complainant's appeal against his transfer to Barbados, but a number of procedural issues, including the Board's request that the complainant clarify his arguments, its examination and rejection of the complainant's application for an oral hearing and an amendment with effect from July 2011 to the rules governing the Board's composition, delayed the completion of the internal appeal proceedings. The Board issued its report on 20 July 2012 concluding that the decision to transfer the complainant to the Country Office in Barbados had been taken by the Director of the Pan American Sanitary Bureau, the PAHO's Secretariat, in the proper exercise of her discretion and that it had not violated the complainant's rights. It nevertheless found that there had been excessive delays in the appeal process for which the complainant should be awarded 5,000 United States dollars in compensation. By a letter of 18 September 2012 the Director informed the complainant of her decision to endorse the Board's findings and recommendation. That is the impugned decision.

The complainant submits that he suffered irreparable professional and personal damage that warrants an award of damages. In particular,

he lost the opportunity to serve PAHO in a P-5 position over a period of five years, and while waiting for a decision to transfer him back to his former post, he missed other career opportunities. In addition, he had to maintain two households for almost four years with an extra cost of more than 95,000 United States dollars and he had to pay over 200,000 dollars for university fees for his daughters. He considers that the amount of 5,000 dollars paid to him does not adequately compensate him for the harassment that he endured over a period of one and a half years and the excessively long internal appeal proceedings.

PAHO replies that the complainant is responsible for the consequences of his own actions. He did not suffer moral damage and PAHO appropriately compensated him for any delay by awarding him 5,000 dollars.

CONSIDERATIONS

1. The full reproduction of the statement of appeal, which was filed on behalf of the complainant in his internal appeal to the Board of Appeal on 15 September 2004, will provide a helpful context for this case. It states as follows:

“[The] Appellant alleges that he is one of a number of persons aggrieved by harassment that occurs in the AIS unit in Headquarters. He alleges that as part of the harassment against him, he has been transferred to Barbados to a post of less prestige and responsibility and which is not in line with his professional background.

Since under the rules of PAHO’s harassment policy, this appeal must be suspended pending the Grievance Panel’s treatment of the harassment allegations made by the appellant, this Statement of Appeal consists of all the allegations made by [the] appellant in his formal complaint to the Grievance Panel which is attached.

[The] Appellant appeals for a reversal of the decision to transfer him to Barbados and for reassignment to an appropriate post in headquarters.”

The complainant filed an amended Statement of Appeal on 24 August 2010 and his internal rejoinder on 14 December 2010.

Regarding his plea in the internal appeal for a reversal of the decision to transfer him to Barbados and for his reassignment to an

appropriate post in headquarters, he asserted, in effect, that in addition to being part of the alleged harassment against him, his reassignment was contrary to PAHO's Staff Regulations and Staff Rules, and that it was done for improper motives, including retaliation, discrimination and prejudice. He sought compensation by requesting, among other things, that PAHO should provide a fair opportunity for the recovery of his personal prestige. The substance of his claims before the Tribunal is similar.

2. PAHO's Staff Regulations and Staff Rules give the Director of the Pan American Sanitary Bureau (hereinafter "the Director") wide discretion to assign and reassign staff members within the Organization. Staff Regulations 4.1 and 4.3 empower the Director to appoint staff members as required on a competitive and non-discriminatory basis. Staff Regulation 1.2 provides that all staff members are subject to the authority of the Director and to assignment by him or her to any of the activities or offices of the Bureau. Staff Rule 510.1 states that staff members in the professional category, as the complainant was, may be assigned by the Director to any activity or office of the Bureau. It further states that in determining any assignment, consideration shall be given, to the extent possible, to the staff member's particular abilities and interests.

3. These provisions confirm the Tribunal's well established principle that, in the interest of an international organisation, an executive head of the organisation has a wide discretion regarding restructuring, staff appointments and assignments. The Tribunal may interfere only on the limited grounds that the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, if some material fact was overlooked, if there was misuse of authority or an obviously wrong inference from the evidence. The Tribunal will be circumspect in reviewing a reassignment or transfer (see Judgments 883, under 5, 1556, under 5, and 2635, under 5). A reassignment may be influenced by the need to eliminate tensions that compromise the functioning of a unit (see Judgments 2229, under 3(a), and 2635, under 7). However, the organisation must show due regard, in both

form and substance, for the dignity of the official concerned, particularly by providing her or him with work of the same level as that which she or he performed in his previous post and matching her or his qualifications (see Judgments 2191, under 3, 2594, under 14, 2819, under 8, and 2839, under 11).

4. In the impugned decision of 18 September 2012, the Director accepted the recommendation by the Board of Appeal to dismiss the complainant's claim for the reversal of the decision to transfer him to Barbados on the ground that that decision fell within the lawful bounds of the Director's discretion to reassign staff members. The complainant had alleged, among other things, that his reassignment was done in a manner that was contrary to PAHO's Staff Regulations and Staff Rules and for other unlawful reasons, including retaliation, discrimination, prejudice and to discredit him. The Board found no evidence to support these allegations, but noted, as the Tribunal does, the clear evidence that there was a very toxic working environment in the AIS. This necessitated the reassignment of some staff members in an effort to relieve the conflicts within the AIS.

5. The Tribunal notes that the post to which the complainant was reassigned in Barbados was a vacant one. His appointment to it did not constitute a demotion. PAHO appears to have gone to great lengths to accommodate him and to preserve his dignity in the reassignment process. It postponed his reassignment for some nine months at his request to permit him to make arrangements for his family to accompany him to Barbados. He eventually travelled to Barbados alone while his family relocated to Chile, their home country. In May 2008, the complainant was reassigned to Chile. The complainant has provided no evidence that supports his allegation that his reassignment was motivated by prejudice. This ground of his complaint is therefore unfounded and will accordingly be dismissed.

6. In his internal appeal the complainant complained of mismanagement and collective harassment in the AIS under the direct responsibility of Mr C.-S., the AIS Area Manager. He alleged that the

latter, who was also his first level supervisor, and Mr L. ignored, isolated and devalued him; excluded him from work-related activities; divested him of his work responsibilities; prevented him from carrying out his responsibilities by not providing necessary funding; prepared biased reports against him; assigned him work that was outside of his area of expertise and reassigned him to Barbados as a form of retaliation because he protested the treatment. He also alleged that he suffered much anxiety and hardship because Mr C.-S. unjustifiably delayed reviewing his contract.

7. PAHO argues that the harassment claim is irreceivable and should be dismissed. It submits that the decision of 9 September 2009 by the Area Manager of HRM, which dismissed that claim, was a final decision. It insists that that decision fully and finally settled the harassment claim and conclusively determined the issue of harassment and the complainant failed to appeal that decision within the required time or at all. This assertion is rejected as it is untenable.

8. Section VII.D of PAHO's Policy on the Prevention and Resolution of Harassment in the Workplace (hereinafter "PAHO's Policy on Harassment") makes provision regarding the relationship between the Grievance Panel and the Board of Appeal. Its provisions are expressly to avoid the duplication of action. Section VII.D, paragraphs 1 and 2 state that to avoid duplication of action, where a staff member appeals against an administrative decision affecting his or her appointment status, which includes an allegation of harassment, the appeal is to be filed with the Board of Appeal. The latter is then to refer the harassment complaint to the Grievance Panel for resolution of that claim only. The Board will then stay its consideration of the appeal until it receives the report of the Panel on the harassment claim and "[t]he Grievance Panel's report will be taken into account by the [Board of Appeal] in making its final recommendations to the Director". The latter words are critically important, as will be discussed later.

9. It seems clear that in the expressed interest of preventing the duplication of action, where an internal appeal contains a harassment

claim, as well as other claims, the intention of Section VII.D, paragraphs 1 and 2 is to constitute the decision by the Director on the report of the Board of Appeal to be the final decision on all claims in the appeal. It was for this reason that the Board stayed its own consideration of the appeal, when its Secretary referred the harassment claim to the Grievance Panel, pending its receipt of the Panel's report on that issue. This procedure is in contrast to what obtains under the relevant provisions that were considered in Judgments 2484, under 9 to 12, and 3069, under 7 and 8, which were interpreted to have provided for a free-standing harassment report by the Grievance Panel. In these cases the impugned decision was that which was based on the recommendations of the Grievance Panel. In the present case, however, the impugned decision would have been that of the Director based on the Board of Appeal's recommendations on all aspects of the internal appeal, including the harassment claim. From that perspective, the harassment aspect of the present complaint is receivable, as are the other aspects of the complaint. PAHO's preliminary objection on the ground of irreceivability is therefore unfounded.

10. The Tribunal notes that, in paragraph 70 of its report, the Board of Appeal elaborated on its role with regard to a decision of the Grievance Panel on harassment in the following terms:

“The panel stress[es] that it could not substitute its judgment for that of the Grievance Panel and the procedure followed in accordance with PAHO's Policy on the Prevention and Resolution of Harassment in the Workplace. It is not the role of the Board to examine the allegations of the Appellant in the framework of the Harassment procedure, but to determine whether there was a formal or procedural flaw or whether a clearly mistaken conclusion was drawn from the evidence, or whether there was an abuse of authority.”

11. This statement indicates awareness by the Board that it was expected to address the Grievance Panel's consideration of the harassment claim in its final report to the Director. It is noteworthy to this end that the letter of 16 September 2004 in which the Secretary to the Board referred the harassment claim to the Grievance Panel stated, in part, that “[t]he Grievance panel's report will be taken into

account by the [Board of Appeal] in making its recommendation to the Director”.

12. However, the Board then erred when, contrary to its statement in paragraph 70 of its report, it stated in paragraph 71:

“In accordance with PAHO’s Policy on Harassment in force in 2004, a Grievance Panel investigated the allegations and issued a report with its conclusions. Consequently, the Area Manager, HRM, took a decision on 9 November 2009, finding that the allegations of harassment were not substantiated and underlined to the Appellant his right to appeal [to the Board of Appeal] in the event that he is unable to accept the HRM’s decision. **The panel noted that the Appellant did not appeal the HRM’s 9 November 2009 decision and therefore concurred with the Administration that this decision was final and that the Appellant[‘s] renewed allegations of harassment and procedural errors in the handling of his complaint of harassment by the Grievance Panel may not be considered by the Panel of Board of Appeal in its consideration of the merits on the appeal.**” [Emphasis added.]

The Board erred when it did not include any consideration of the harassment claim in its report to the Director, who repeated that error in the impugned decision.

13. However, the evidence does not support the complainant’s allegations that he was reassigned to Barbados because of harassment, retaliation, discrimination or prejudice. There is no evidence to show that the persons whom he named as his harassers played any part in the decision for that reassignment. The evidence shows that, at the material time (between March 2003 to August 2004), the work environment in the AIS was highly charged and was characterised by serious conflicts and hostility, dysfunction and polarization in which the complainant was not necessarily an innocent party. There was hostility between the complainant and his first level supervisor and the AIS Area Manager. It is obvious that the restructured AIS experienced serious change management issues. Some members of staff complained to the Staff Association that they were harassed.

14. PAHO took steps to deal with the problems in the AIS at the behest of the Staff Association, and, among other things, commissioned

a study by a private consultancy. That study confirmed that inadequate management practices in the AIS had caused some staff members to work in conditions of insecurity and lack of trust. It also found that the work environment in the AIS was affected by a practice of dysfunction and harassment. The decision to reassign and reposition some staff members of the AIS in an attempt to resolve the problems was one result of the study.

15. There is however evidence that, notwithstanding these internal problems in the AIS, the complainant suffered harassment by conduct that was not simply subsumed in the foregoing general dysfunctional circumstances. The evidence shows that the complainant's first level supervisor was to some extent responsible for the delay in the extension of the complainant's contract. It also shows that the complainant invariably did not receive written responses to his work-related reports. It also shows that, contrary to Staff Rule 530, his first-level supervisor often did not meet with him to discuss technical and administrative matters. In some instances, he left Mr L. to carry out first-level supervisory duties with regard to the complainant, when Mr L. had no supervisory relationship with the complainant. There is also evidence that the complainant was not given the financial resources that he should have received to permit him to carry out his assigned responsibilities. The evidence also shows that his first-level supervisor did not conduct a proper PPES review for the complainant in 2003 or a feasibility review, as required, but then requested only a one-year contract extension on the ground of inadequate performance and poor conduct.

16. The foregoing is evidence of conduct which a reasonable person would have found offensive, demeaning, humiliating and embarrassing thus constituting harassment in the terms set out in the Appendix to PAHO's Policy on Harassment. Accordingly, the complainant's claim that he suffered harassment is well founded.

17. Taking into account the overarching considerations within the AIS at the material period, the evidence that the complainant

suffered from harassing conduct and the circumstances and the length thereof, the Tribunal will award the complainant moral damages for harassment.

18. The Tribunal finds, as did the Board of Appeal, that the delay in the internal appeal process was inordinate and unjustified. A period of eight years from the filing of the internal appeal on 15 September 2004 to 18 September 2012, when the Director took her final decision on the complainant's appeal, is too long. On the recommendation of the Board, the Director awarded the complainant 5,000 dollars as compensation for the delay, which he has already received. The Tribunal considers this amount inadequate in all of the circumstances. Accordingly, the Tribunal will award the complainant a total of 25,000 United States dollars moral damages for the delay and harassment, in addition to the 5,000 dollars he has already received.

DECISION

For the above reasons,

1. The impugned decision dated 18 September 2012 is set aside to the extent that the Director dismissed the complainant's harassment claim.
2. PAHO shall pay the complainant 25,000 United States dollars moral damages.
3. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2015, Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ