D. (No. 4)

v.

WHO

(Application for review)

123rd Session **Judgment No. 3722**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 3583 filed by Mr P. D. on 19 May 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 3583, delivered in public on 3 February 2016, the Tribunal dismissed the complainant's third complaint. It held that his request for the reclassification of his post from grade NO-C to grade P-4 and that he be promoted accordingly was rendered moot by a reclassification exercise which the Administration had expressly conducted because of his request for the reclassification. The Administration had initially rejected his request and had so informed him by a memorandum dated 2 July 2008. On 13 August 2009 the Director of Human Resources Management (HRD) reversed the decision of 2 July 2008. Following a subsequent desk audit of the complainant's post, on 16 March 2010 he was informed that his post would be upgraded to grade NO-D, and that

he would be promoted accordingly. In Judgment 3583 the Tribunal further held that since the complainant had originally challenged the decision of 2 July 2008, but the letter of 13 August 2009 from the Director of HRD had reversed it, the fact that the outcome of the review did not meet his expectation for the post to be reclassified to grade P-4 did not obviate the mootness of his request. The Tribunal held, additionally, that if the complainant disagreed with the decision which reclassified his post to grade NO-D, his option was to appeal that decision. As he did not do so, that aspect of his complaint was irreceivable for failure to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute.

2. In support of his application the complainant states three grounds on which he seeks review, as follows:

(1) Material error;

(2) Failure to take account of essential facts; and

(3) Failure to adjudge the issues involved in light of the Tribunal's case law.

3. According to a consistent line of precedent, pursuant to Article VI of its Statute, the Tribunal's judgments are "final and without appeal" and carry the authority of *res judicata*. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As stated in Judgments 1178, 1507, 2059, 2158 and 2736, for example, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review (see, for example, Judgments 3001, under 2, 3452, under 2, and 3473, under 3).

4. It is taken that, by the first ground, the complainant intends to assert that there was a material error involving no exercise of judgement, which is a reviewable ground. He submits that the Tribunal "essentially proceed[ed] on a misconception that the decision of the Director of Human Resources Management to conduct a Desk Audit dated 13 August 2009 reverse[d] the decision of 2 July 2008 [...] which formed the genesis of [his] action [and] [i]t [was] on that basis that the Tribunal [decided] that the complaint was irreceivable, as the subsequent decision of 13 August 2009 [...] which was communicated by way of a letter of 16 March 2010, was not appealed". He further submits, in effect, that the Tribunal erred in not realizing that his initial request was for his post to be classified at grade P-4 to which the Administration replied that it could not be done and provided its reasons for that response by way of the letter of 2 July 2008. He insists that the decision of 13 August 2009 had no bearing on the decision of 2 July 2008 as he had requested that his post be classified to grade P-4 and that that request was not granted, "and more specifically, there [was] no declaration that the decision of 2 July 2008 was annulled" but the Tribunal proceeded on the basis that the decision of 13 August 2009 "reversed the decision of 2 July 2008". He further insists that the Tribunal then proceeded on its "erroneous appreciation" to declare that he should have appealed the decision of 13 August 2009 when there was no need for him to have appealed that decision, "which merely re-classified him from Grade NO-C to Grade NO-D" as this reclassification was "an additional and independent event not having a bearing on [his] prayer to be reclassified to Grade P-4" and that "a perusal of the [m]emorandum of 2 July 2008 would show that the reason given for not classifying [him] at Grade P-4 was that such a classification belonged to an entirely [d]ifferent [c]ategory".

5. On the ground that the Tribunal failed to take into account essential facts, the complainant repeats, in effect, that the Tribunal failed to appreciate that the exercise by which he was promoted from grade NO-C to grade NO-D "had no nexus with [his] pending appeal". He submits that this is explained by the procedural history of the matter, which shows that the parties had agreed to have the matter conciliated. His appeal was not withdrawn but suspended by agreement for the period

from 9 April to 15 November 2010 and his consistent request for relief was to be reclassified to grade P-4 or for the creation of an entirely new post at grade P-4, in the alternative. He points out that the Administration, in its response of 18 August 2010 to his e-mail of 12 August 2010, admitted that he was not interested "in [the] retroactive application of promotion to [grade] NO-D as an alternative to [g]rade P-4". He states, in addition, that "the [Administration's] reply also admits that implementation of promotion to Grade NO-D [was] only acceptable to [him] in conjunction with either a reclassification to Grade P-4 or [the] creation of a new post for [him] at Grade P-4" but it "subsequently rejects the proposal [...] made [by him] vide [the] e-mail dated 12 August 2010". He then points to his response of 27 August stating the reasons why grade NO-D was "not an accept[able] reclassification instead of [his] request for reclassification to Grade P-4" and he sets out a summary of those reasons.

6. The complainant insists that his continuous request has been that he be reclassified to grade P-4 and he argues that the subsequent desk audit which resulted in the decision of 16 March 2010 to promote him to grade NO-D "could only be accepted as a final decision on his pending appeal had [he] withdrawn his appeal before the [Headquarters Board of Appeal] (HBA) or accepted this unilateral promotion as an alternative remedy [...] to his actual request for reclassification to Grade P-4". He further submits that the decision to promote him did not therefore "reverse" the decision of 2 July 2008 "since the decision of 2 July 2008 involved answering [his] prayer for reclassification to Grade P-4 and this was conclusively answered by the Administration with the remarks 'the exercise couldn't be done' [so] the two events cannot be interpreted to be connected [...] so as to make [his] prayer before the ILO Tribunal 'without object', as has been misconceived in Judgment 3583". The complainant also submits that the Tribunal mistakenly held that the parties reached a settlement in lieu of the ongoing proceedings before the Tribunal. Accordingly, he asserts that "a combined reading" of the communications regarding the possibility of settlement during the suspension of the proceedings before the HBA clearly shows that he refused to accept the offer of the classification of his post to grade NO-D as an alternative to or in settlement of his claim to be

classified at grade P-4 and the Tribunal's material error in this respect is "the erroneous finding that the 'negotiations' [...] were a settlement of the [...] dispute." He further insists that the desk audit by which his post was reclassified to grade NO-D "was merely a belated exercise which ought to have been undertaken notwithstanding the appeal proceedings before the HBA [so that] the re-classification to [grade] NO-D cannot logically be presumed to be a settlement of any kind between the parties, especially in light of the HBA itself continuing proceedings on [his] request".

7. The Tribunal observes that the third stated ground of review: failure to adjudge the issues involved in light of the Tribunal's case law, does not fall within the admissible grounds for review that are set out in the Tribunal's case law.

8. The Tribunal holds that none of the complainant's alleged grounds of review gives rise to a reconsideration of the decision taken in Judgment 3583. First, the Tribunal made no finding, as the complainant alleges, that the negotiation between the parties was a settlement of the dispute. Second, notwithstanding that the HBA resumed the appeal proceedings regarding the complainant's request to have his post reclassified to grade P-4, it limited its review to the issues of moral damages and legal costs. The Director-General concluded that the complainant's appeal against the decision of 2 July 2008 was without object given that a decision had been taken in August 2009 to conduct a review of the complainant's post. Third, the complainant's submissions in the present case have been detailed, as they show that he has failed to appreciate that the effect of the decision of 2 July 2008 having been overtaken by the decision of 13 August 2009 was that his request for promotion to grade P-4 was rendered moot by the subsequent reclassification exercise. He has also failed to appreciate that in the circumstance, his remedy was to challenge the new decision which reclassified his post to grade NO-D, of which he was informed by the letter of 16 March 2010.

9. In the foregoing premises, the Tribunal must summarily dismiss the application for review in accordance with the procedure provided for under Article 7 of its Rules.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 28 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ