B.

v.

WHO

131st Session **Judgment No. 4349**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. K. B. against the World Health Organization (WHO) on 10 October 2018 and corrected on 22 November 2018, WHO's reply of 27 February 2019, the complainant's rejoinder of 1 May and WHO's surrejoinder of 6 August 2019;

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:

The complainant challenges the decision to consider his harassment complaint closed.

The complainant joined the WHO Global Service Centre in Kuala Lumpur (Malaysia) in February 2015 through an inter-organization transfer from the United Nations Development Programme (UNDP). His appointment was subject to successful completion of a one-year probationary period.

In May 2016, during the probationary year-end review, the complainant's first-level supervisor recommended an overall rating of "Partially unsatisfactory". Following a meeting between the complainant, his first-level supervisor and his second-level supervisor, the overall rating was changed to "Satisfactory" and the appointment was confirmed. Regarding the performance appraisal in the Performance Management

and Development System (PMDS) for 2016, the complainant and his first-level supervisor failed to agree on the objectives for the complainant.

At the beginning of January 2017 the complainant's fixed-term appointment was extended for one year effective 9 February 2017. On 19 January UNDP requested that the complainant be transferred back to UNDP as he had been selected for a position in UNDP. WHO agreed to the transfer. With effect from 13 February WHO downgraded the position encumbered by the complainant from P.4 to P.3. However the complainant kept his grade and corresponding salary until he left WHO on 24 February 2017.

On 23 February 2017 the complainant requested an administrative review of a decision dated 15 February 2017 relating to his 2016 PMDS. He also took issue with his 2015 PMDS, the one-year extension of his fixed-term appointment "without any justification and against the rules" and the decision to downgrade his position. As relief he sought, inter alia, the recognition of the breach of PMDS procedures and undue delay in finalizing his 2015 PMDS as well as "[a]ction against the prejudice suffered and the treatment received", that is professional humiliation and mental harassment over the last two years. The request for administrative review was rejected on 19 April 2017 and the complainant referred the matter to the Global Board of Appeal (GBA). The appeal was registered under the reference GBA 19.

In the meantime, on 20 March 2017, the complainant submitted to the Internal Oversight Services (IOS) a harassment complaint against his first-level supervisor. He enlarged upon the issues raised in the 23 February request for administrative review, reiterated the relief claimed and also sought, inter alia, compensation for "physical and mental torture". Between 30 March and 19 July the complainant enquired about the status of his harassment complaint. The IOS informed him on 2 May that it was reviewing the matter and would revert to him soon and, on 20 July, that his complaint had been reviewed in accordance with paragraph 7.6 of the Policy on the Prevention of Harassment at WHO, that it was not complete as per the requirements of paragraph 7.3 of the Policy and that pending receipt of additional information and clarification the IOS considered the matter to be closed. On 31 July the complainant asked the Director, IOS, to review his decision. The Director confirmed his decision on 8 August.

On 15 September the complainant filed a second request for administrative review, asking, inter alia, that the 20 July decision be set aside, that his harassment complaint, if found to be incomplete, be returned to him and that he be awarded moral damages and legal costs. By letter dated 13 November the complainant was informed that it had been "decided not to issue an Administrative Review Decision". The complainant appealed that decision before the GBA on 10 December 2017, basically reiterating his requests. The appeal was registered under the reference GBA 28.

After joining the GBA 19 and GBA 28 internal appeals, the GBA issued its report on 4 June 2018. Regarding GBA 19, it considered that the administrative review decision had been taken in accordance with WHO's Staff Regulations and Rules, that the claim regarding the 2015 PMDS was time-barred and that the harassment claim was irreceivable as the complainant had not exhausted the proper administrative channels. It concluded that the issues regarding the 2016 PMDS and the downgrading did not affect the complainant's status or his terms of appointment. It also found that the decision to extend his contract by one year had been taken in accordance with the WHO regulatory framework. Regarding GBA 28, the GBA concluded that the non-issuance of an administrative review decision did not breach the Staff Regulations and Rules and that the Director, IOS, had acted in accordance with applicable rules and procedures when he informed the complainant that pending receipt of additional information, he considered the matter closed. It therefore recommended that both appeals be dismissed.

In a letter of 2 August 2018 the Director-General informed the complainant that he had decided to accept the GBA's recommendation to dismiss both appeals. The complainant impugns that decision insofar as it rejected GBA 28.

The complainant asks the Tribunal to set aside the decision dated 2 August 2018 and the decision to close his harassment complaint, to direct the Director, IOS, to return to him his harassment complaint for completion and to award him moral damages under several heads, costs, legal fees and such other relief as it may deem just and fair.

WHO accepts that the complaint is receivable but objects to the receivability of a number of claims. It asks the Tribunal to dismiss the complaint as entirely devoid of merit and to join it with the second

complaint the complainant filed on 28 October 2018 to contest the rejection of GBA 19.

CONSIDERATIONS

1. On 20 March 2017, the complainant initiated the underlying internal proceedings to this complaint by submitting a formal harassment complaint to the IOS, pursuant to paragraph 7 of the Policy on the Prevention of Harassment at WHO (the Policy) contained in WHO eManual Section III.12.5. On 20 July 2017, the Director, IOS, informed the complainant that his complaint had been reviewed in accordance with paragraph 7.6 of the Policy; that it was not complete under the requirements of paragraph 7.3 of the Policy and that pending receipt of additional information and clarification the IOS considered the matter to be closed. As the complainant's requests for administrative review of that decision failed, he appealed to the GBA, which recommended that the Director-General dismiss the appeal. The present complaint impugns the decision of 2 August 2018 in which the Director-General accepted that recommendation. The complainant seeks an order setting aside that decision and the decision to close his harassment complaint. He also seeks an order directing the Director, IOS, to return his harassment complaint to him for completion; an award of moral damages for alleged inordinate delays in processing the harassment complaint; as well as moral damages, among other things, for closing the harassment complaint without authority and for the GBA's alleged unlawful joinder of the internal appeal underlying the present complaint with another internal appeal underlying the complainant's second complaint. He also seeks costs.

2. WHO seeks the joinder of this complaint with the complainant's second complaint, which he filed in the Tribunal on 28 October 2018. In so doing, WHO submits that the two complaints overlap substantively with regard to several allegations which they contain. The complainant opposes the joinder on the ground that the complaints raise "legal and factual issues which have no commonality". He relies on Judgment 656.

3. The Tribunal stated the following in consideration 1 of Judgment 656:

> "Before the Tribunal will join two or more complaints and deal with them in a single judgment two conditions must be fulfilled.
>
> The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.
>
> The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto, should be the same.
>
> The complainants need not all have the same arguments. The Tribunal rules as it sees fit and is not constrained by the parties' submissions, variations between them being immaterial."

4. The Tribunal has rejected applications for the joinder of complaints essentially on the ground that they involved no commonality of legal issues and facts (see, for example, Judgments 3620, consideration 2, 4000, consideration 1, 4114, consideration 2, and 4171, consideration 1). In Judgment 4086, consideration 8, the Tribunal rejected an application for the joinder of the complaint that was the subject of that judgment with another complaint. This was on the ground that that other complaint was not within the scope of the complaint that was the subject of Judgment 4086 and that it was accordingly not convenient to join them. Similarly, WHO's application to join the complainant's second complaint with the present complaint will be rejected as the former is not within the scope of the present complaint and does not raise the same or similar legal and factual issues.

5. The present complaint essentially challenges the lawfulness of the IOS's decision to close the complainant's harassment complaint and is concerned with a very narrow procedural issue, namely, whether the decision to close the complainant's harassment complaint violates the procedures set out in paragraph 7 of the Policy. As the facts disclose, the request for administrative review of 23 February 2017, which underlies the complainant's second complaint, challenged other decisions which do not fall under the investigative procedure of the Policy.

6. Paragraph 7.3 of the Policy sets out what must be included in a harassment complaint that is lodged with the IOS. It states as follows:

> "The formal written complaint must include the following information:
>
> - describing the specific act(s) or conduct that are the subject of the harassment allegation(s), and the date(s), time(s), location(s) and circumstances.
> - providing any other information and evidence relevant to the complaint, including information on any ways in which the alleged harassment has offended, humiliated or intimidated the staff member; has interfered with the staff member's ability to carry out their functions at work; and/or has created an intimidating or hostile work environment.
> - identifying the staff member/s who are alleged to have engaged in the harassment (the respondent/s), any alleged witnesses, and anyone to whom the alleged harassment was mentioned at the time.
> - describing informal resolution efforts made, and the outcome of such efforts.
> - in the event that no informal resolution efforts have been made, describe the reasons, recognizing that staff members are expected to make informal resolution efforts prior to submitting a formal complaint."

7. Paragraphs 7.6 and 7.7 of the Policy are under the rubric "Screening and acknowledgement of complaint" and state as follows:

> "7.6 Director IOS will screen the complaint to ensure that it meets formal requirements, and will acknowledge receipt of the complaint, normally within ten working days of its receipt.
>
> 7.7 If the IOS screening indicates that the complaint is incomplete, it will be returned to the complainant with a request that it be completed."

Paragraph 7.9 of the Policy requires the Director, IOS, to carry out an initial review of the substance of a harassment complaint which is accepted as a formal complete complaint.

8. The complainant submits that the decision by the Director, IOS, to close his harassment complaint violated paragraphs 7.6 and 7.7 of the Policy and that, in spite of several reminders, the IOS did not acknowledge receipt of his complaint before some 45 days. He states that, moreover, the IOS did not return his complaint to him for completion but simply closed his complaint without informing him in what way it was incomplete. He insists that the Director, IOS, has no authority to close a harassment complaint and in doing so acted arbitrarily and with bias.

WHO submits that the IOS's decision to close the case pending receipt of the additional information required under paragraph 7.3 of the Policy is lawful. This, it states, was because after the harassment complaint was screened in accordance with paragraph 7.6 of the Policy and found to be incomplete, the complainant was so informed but he did not take any action to complete it.

9. The evidence discloses that in an email dated 20 July 2017, the Director, IOS, relevantly informed the complainant that his written harassment complaint was not complete as it did not meet all of the requirements of paragraph 7.3 of the Policy. This, he stated, was "because, *inter alia*, it [did] not describe the informal resolution efforts made and the outcome of such efforts". The Director referred to paragraph 5.2 of the Policy, which states that staff members are normally expected to pursue informal means to try to resolve harassment, and paragraph 6.1 of the Policy, which states that informal resolution is the primary method for resolving alleged harassment and that staff members are normally expected to pursue informal means of resolution and to make good faith efforts to address and resolve the problem. The Director further stated that "[p]ending receipt of additional information and clarification of the above, IOS considers this matter to be closed". He invited the complainant not to hesitate to contact him or Ms M. if he had any further questions.

10. In dealing with the harassment complaint, the Director failed to act in accordance with various aspects of the Policy. In the first place, paragraph 7.6 states that the Director, IOS, will acknowledge receipt of the complaint "normally within ten working days of its receipt". The acknowledgement of it some 45 days after its receipt was not in keeping with the Policy's central aim to deal with harassment complaints expeditiously.

11. In the second place, the Director correctly informed the complainant of one particular in which the complaint was incomplete, that is to say that there should have been a reference to informal resolution efforts. However, the Director's use of the term *"inter alia"* was misleading in that it suggested that another or other requirements of paragraph 7.3 were not met. Good faith, which is essential to the proper and expeditious resolution of harassment complaints under the

Policy, required the Director to make all particulars that rendered the complaint incomplete clear to the complainant. They should not have been left to conjecture.

12. In the third place, paragraph 7.7 of the Policy required the Director to return the complaint to the complainant with the request that it be completed. He did not do so notwithstanding the complainant's requests. This is evidence of bad faith on the part of the Director, IOS, as this behaviour had the effect of precluding the complainant from completing his complaint.

13. As a result of the findings in the foregoing considerations, the decision by the Director, IOS, of 20 July 2017, as well as the impugned decision of 2 August 2018, to the extent that it confirmed the Director's decision, will be set aside. The matter will be remitted to WHO to require the Director, IOS, to return the complainant's harassment complaint to him. The complainant and the IOS shall then proceed in accordance with the provisions of the Policy. This direction, however, does not preclude WHO and the complainant from taking steps to settle the case.

14. Given the finding in consideration 12, above, that there was evidence of bad faith, the complainant is entitled to moral damages, for which the amount of 15,000 United States dollars will be awarded.

15. The complainant challenges what he refers to as "the inequity" of the decision by the Chair and the Deputy Chair of the GBA to join his two internal appeals pursuant to eManual paragraph III.12.4.370, which governs the joinder of internal appeals by the GBA. It states as follows:

> "Before a panel is constituted to consider an appeal, the Chair or Deputy Chair may, upon request by either party or at his own initiative, decide to join in a single process appeals lodged separately by the same Appellant that relate to factual or legal elements of the same nature or arise from the same legal relationship."

16. Under this provision, internal appeals lodged separately by the same appellant may be joined if either of two requirements is met. They may be joined if they "relate to factual or legal elements of the same nature". This formulation is of similar effect as the Tribunal's general principle that complaints may be joined if they involve the same or similar questions of fact or law (see, for example, Judgment 4114,

consideration 2) or if one complaint is within the scope of another (see, for example, Judgment 4086, consideration 8). However, the additional words "or arise from the same legal relationship", imprecise as they are, were formulated to provide for an unlimited range of legal relationships enabling the GBA to join internal appeals lodged by the same appellant. The Tribunal will not therefore limit the ambit of those words and determines that given their width, the GBA's decision to join the complainant's two internal appeals was *intra vires* eManual paragraph III.12.4.370. Accordingly, the complainant's claim that the GBA unlawfully joined his two internal appeals is unfounded.

17. The complainant will be awarded 1,000 United States dollars in costs.

DECISION

For the above reasons,

1. The decision by the Director, IOS, of 20 July 2017 is set aside, as is the impugned decision of 2 August 2018 to the extent that it confirmed the Director's decision.
2. The matter is remitted to WHO to proceed in accordance with consideration 13 of this judgment.
3. WHO shall pay the complainant moral damages in the amount of 15,000 United States dollars.
4. WHO shall pay the complainant 1,000 United States dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ