

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

H. (No. 3)

v.

WTO

133rd Session

Judgment No. 4463

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr K. H. against the World Trade Organization (WTO) on 28 February 2020, the WTO's reply of 15 June, the complainant's rejoinder of 7 July, the WTO's surrejoinder of 6 August 2020, the complainant's further submissions of 15 January 2021 and the WTO's final observations thereon of 19 February 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant objects to the disclosure of his medical situation.

For the facts which preceded the facts directly connected to the subject-matter of this complaint and which allow the latter facts to be placed in their overall context, reference is made to the statement of facts in Judgment 4462, also delivered in public today, concerning the complainant's second complaint to the Tribunal.

It should be recalled that, in the proceedings leading to the aforementioned judgment, the complainant reported a breach of medical confidentiality by the Head Doctor of the WTO's Medical Service. Specifically at issue was a memorandum entitled "Medico-administrative situation [of the complainant]" drawn up by that doctor

on 14 November 2017 and sent at the time to the Director of the Human Resources Division (HRD) as well as to three members of that division. It was filed by the WTO as part of its submissions in the context of the complainant's second complaint. The memorandum was a response to an email of 23 October 2017, in which the doctor then treating the complainant asked HRD and the Head Doctor of the Medical Service whether it was possible to change the complainant's working environment. This request was based on the risk that his health would deteriorate if he were to resume the same job on his return from the sick leave that had begun on 31 July 2017. As a result of this memorandum, the director of the division to which the complainant belonged took the decision on 19 January 2018 to rearrange his working environment, in particular by allocating him a workspace separate from that of his former colleagues in the service. It was also as a result of this memorandum that the decision was taken to allow the complainant to work part-time on medical grounds for a certain period when he returned to work.

The complainant observes that he did not learn of the existence of the memorandum of 14 November 2017 and its contents until 26 October 2019, when he received the WTO's reply in the written proceedings before the Tribunal concerning his second complaint.

By letter of 11 December 2019 addressed to the Director-General, the complainant requested the removal of the memorandum of 14 November 2017 from all administrative files concerning him and the deletion of all references to it. In addition, he claimed compensation for moral injury. That same day, the complainant filed a concomitant grievance with the WTO's Office of Internal Oversight (OIO) against the Head Doctor of the Medical Service, alleging a breach of confidentiality and medical confidentiality. On 6 February 2020 the complainant reiterated the same claims to the Director-General.

As he had still not received a reply, on 28 February 2020 the complainant filed a complaint with the Tribunal pursuant to Article VII, paragraph 3, of the Statute of the Tribunal.

In the meantime, however, the WTO, in its surrejoinder of 27 January 2020 concerning the complainant's second complaint, stated that it had taken note of the aforementioned letter of 11 December 2019 and was prepared to consider a mutually acceptable solution.

Subsequently, on 9 June 2020 the complainant's counsel was informed of the decision to remove the memorandum of 14 November 2017 from all "the WTO's internal files and records" and to delete all references to it. The complainant acknowledged this decision by letter of 25 June 2020, but drew attention to the outstanding claim for moral damages in the amount of 20,000 Swiss francs.

Furthermore, following the grievance filed with the OIO on 11 December 2019, the Head of the OIO stated in an email of 26 June 2020 that an investigation in respect of the Head Doctor of the Medical Service was warranted. In its report of 24 September 2020, the OIO found that the doctor had breached her duty of confidentiality and medical confidentiality by including in the memorandum of 14 November 2017 details of the complainant's private life and state of health without having obtained his prior consent. That finding, which only related to four passages of the memorandum of 14 November 2017 and not to all the passages to which the complainant objected, was based on a breach of the following provisions applicable to staff members: (1) WTO Staff Regulation 1.3; (2) Staff Rule 101.1(d); (3) Article 45 of the Standards of Conduct set out in Annex A to the Staff Regulations; and (4) paragraphs 50 and 51 of Administrative Memorandum No. 977 on sick leave, family-related leave, and compassionate leave. However, since the misconduct committed by the Head Doctor of the Medical Service was minor and there were various mitigating circumstances, the OIO recommended to the Organization that it only issue her with a written censure by way of disciplinary measure and instruct her to attend coaching sessions. In a final decision of 22 October 2020, notified the same day, the Deputy Directors-General – who together replaced the Director-General during the vacancy in that post – considered that the various breaches of privacy and medical confidentiality identified by the OIO had been established beyond reasonable doubt, but that it was not appropriate to issue a written censure, taking into account both the existence of mitigating

factors and the disproportionate nature of such a disciplinary measure in relation to the specific circumstances of the case. The Deputy Directors-General hence decided to confine themselves to recommending that the Head Doctor undertake mandatory training and coaching. The complainant's fifth complaint, in which he challenged that decision, was dismissed by the Tribunal in Judgment 4439 of 7 July 2021.

In Judgment 4462, also delivered in public today, the Tribunal stated that it would not take into account the memorandum of 14 November 2017, filed by the WTO, in the proceedings before it.

The complainant seeks the removal of the memorandum of 14 November 2017 from all the WTO's administrative files, including his personal file, and the deletion of all references to it. He also claims moral damages in the amount of 20,000 Swiss francs and 2,000 Swiss francs in costs. The complainant requests the Tribunal to order the WTO to pay interest at the rate of 5 per cent per annum from 14 November 2017 until the date of payment of all amounts due. He further asks the Tribunal to declare all sums paid by the WTO exempt from taxation in Switzerland and to order the WTO to treat them as such. Lastly, the complainant seeks any other redress or relief that the Tribunal deems necessary.

In his rejoinder, the complainant notes the WTO's decision forwarded in June 2020 to remove the disputed memorandum from all the WTO's administrative files and maintains his claim for moral damages.

The WTO requests the Tribunal to dismiss the complainant's pleas and claims as unfounded in their entirety.

CONSIDERATIONS

1. In view of developments in the dispute during the proceedings, it must be considered that the complainant is essentially asking the Tribunal to award him moral damages in the amount of 20,000 Swiss francs on account of a breach of his privacy and medical confidentiality.

2. The complainant requests that oral proceedings be held. However, the Tribunal notes that the parties have presented sufficiently extensive and detailed submissions and documents to allow the Tribunal to be properly informed of their arguments and the evidence. Accordingly, the application for oral proceedings is rejected.

3. After noting that the complainant seeks the setting aside of the implied decision to refuse to “destroy” a memorandum containing a medico-administrative recommendation sent by the Head Doctor of the Medical Service to HRD, the WTO submits that the disputed memorandum has been removed from all administrative files concerning the complainant, including his medical file. The WTO argues that the complaint has hence become moot. As to the claim for moral damages for the alleged breach of medical confidentiality by the Head Doctor of the Medical Service, the WTO maintains that, in the circumstances of the case, no moral damages would be due, even if the impugned decision were to be found unlawful by the Tribunal, in view of the removal of the contested memorandum by the Organization.

4. The Tribunal notes that, following the exchange of pleadings, the sole genuine purpose remaining of the original complaint is, as the parties themselves acknowledge, to ascertain whether the complainant is entitled to compensation for the moral injury he submits he suffered on account of the memorandum of 14 November 2017 being held in the WTO’s files between the date when the memorandum was issued and the date when the WTO removed it from all its files.

The complaint therefore retains a purpose because the Tribunal alone can decide whether the complainant is entitled to moral damages, which is a live controversy within the meaning of the Tribunal’s case law (see, to that effect, Judgment 4060, consideration 3).

5. Next, the WTO argues that the complainant does not, in any event, have a cause of action in this case. It submits that the memorandum of 14 November 2017 merely contained an opinion and a recommendation and was therefore not a decision adversely affecting the complainant’s terms of appointment or the applicable provisions of the Staff Regulations.

The implied decision to refuse to remove this memorandum from all the complainant's files did not infringe his rights at any point and was not liable to cause him any injury. Furthermore, no administrative decision adversely affecting the complainant's rights was expressly taken on the basis of the memorandum of 14 November 2017. The only explicit decision taken on its basis was the decision of 19 January 2018 to reorganise the complainant's working conditions, with the complainant being authorised to return to work part-time on medical grounds. However, that decision cannot have adversely affected the complainant, and, moreover, he did not challenge it in good time. No other explicit administrative decision was subsequently taken on the basis of the memorandum of 14 November 2017.

6. The Tribunal notes, first of all, that the "decision" being challenged is not the memorandum of 14 November 2017 but, as the complainant submits, "the absence of a decision by the Director-General on 27 February 2020 following the grievance lodged by the [c]omplainant on 11 December 20[19] and reiterated by letter dated 6 February 2020". A complaint against an absence of decision is indeed receivable before the Tribunal under Article VII, paragraph 3, of its Statute. Furthermore, it is a matter of settled case law that, as a general rule, a complainant must, in order to raise a cause of action, demonstrate arguably that the impugned administrative decision caused injury to her or him or was liable to cause injury (see, in particular, Judgments 3168, consideration 9, and 4317, consideration 4). Such is the case here, and it follows that the complainant must be allowed to argue before the Tribunal that the effect of the implied decision rejecting his grievance was to allow the injury he submits he suffered to persist.

This objection to receivability must be rejected.

7. The WTO submits that the complainant is motivated by personal animosity towards the Head Doctor of the WTO's Medical Service, as is evident both from the plethora of procedures he has brought against her and from the language he has used and continues to use in her respect. The Organization also emphasises that the grievance submitted by the complainant to the Director-General on 11 December

2019, which led to these proceedings, was solely intended to “artificially” create a cause of action for bringing proceedings before the Tribunal.

8. Whatever animosity the complainant may feel towards the Head Doctor of the Medical Service, the fact remains that, since he was still in conflict with the WTO even after he left its employ, he could legitimately assert that the memorandum of 14 November 2017 was a breach of its duty to respect his private and family life and medical confidentiality.

The complainant was equally entitled to request the Director-General to have the disputed memorandum removed from files relating to him and to be awarded moral damages for the period before their removal.

It follows that the cause put forward by the complainant in support of his action is legitimate for the purposes of a complaint before the Tribunal.

This objection to receivability must also be rejected.

9. The complainant asks the Tribunal to order the production of the entire file submitted by Ms D.F., a psychologist formerly employed by the WTO, to the OIO before she decided to leave the Organization, or at least a “redacted” version of it. He explains this request by his intention to establish that the WTO systematically violates medical confidentiality when managing its staff.

10. However, the Tribunal considers that the request for production of the file is based on extremely general allegations and is therefore merely a “fishing expedition”, which the relevant case law does not allow (see, in particular, Judgments 2097, consideration 23, and 2497, consideration 15). Moreover, even if an examination of this file allowed the existence of questionable practices in respect of the observance of medical confidentiality within the WTO to be proven, the onus would still be on the complainant to prove that medical confidentiality had been breached in the circumstances of this case.

The request for this order is therefore dismissed.

11. Turning to the merits of the complaint, the Tribunal notes that a breach by the Head Doctor of the Medical Service of medical confidentiality and her duty to respect private and family life had been considered proven, albeit to a limited extent, by the WTO in the context of the consideration of the complainant's grievance to the OIO. This was reflected in the final decision of 22 October 2020, notified the same day, in which the Deputy Directors-General considered that various breaches of private life and medical confidentiality identified by the OIO had been established beyond reasonable doubt. The Tribunal may, in consequence, uphold that finding and conclude that there was a breach of medical confidentiality and the right to respect for private and family life.

12. Contrary to what the Organization maintains, the breach of the complainant's basic rights caused him moral injury which must be redressed.

13. The complainant seeks damages under this head in the amount of 20,000 Swiss francs. In support of this claim, he submits, first, that the memorandum of 14 November 2017 was distributed to at least four of the WTO's senior managers and, second, that the memorandum was used by the WTO as part of its submissions in the context of his second complaint to the Tribunal. The complainant also observes that the decision taken at the beginning of June 2020 to remove the memorandum from all files and records concerning him did not eliminate the moral injury which he alleges he suffered during the period preceding that removal, a period which he himself, in his written submissions, places as beginning on 14 November 2017 and ending on 5 June 2020. This amount of compensation is, in his opinion, warranted both by a "gross" breach of medical confidentiality and by the fact "[a]ll this" has resulted in him experiencing "suffering which has further complicated his recovery and longed-for return to a normal life, since he is still undergoing medical treatment and looking for a job".

14. The Tribunal first observes that the moral injury alleged by the complainant relates, as he himself states, to a period that has ended. Moreover, the memorandum of 14 November 2017 was removed from all files relating to the complainant in early June 2020. Lastly, this memorandum, produced in the context of the complainant's second complaint, was disregarded by the Tribunal in Judgment 4462, also delivered in public today.

With regard to the period from 14 November 2017 to 5 June 2020 to which the complainant refers, the following factors should also be taken into consideration.

First, the breach of the complainant's private and family life and medical confidentiality concerned a relatively limited period of time, as the complainant acknowledges. Moreover, for most of this period he was not aware of the moral injury that this violation was liable to cause him, since he admits that he did not learn of the existence of the memorandum of 14 November 2017 until 26 October 2019.

Second, the consequences of this breach were, in any case, also relatively limited: (1) the memorandum was only brought to the attention of the Director of HRD and three other managers in the same division, all three of whom were directly involved in monitoring the progress of the complainant's case; (2) although the managers concerned did take account of the memorandum, it was only so that they could grant the request from the complainant's doctor to adjust his working conditions on account of his health; (3) as the WTO contends, there is nothing in the parties' pleadings or evidence to establish that this memorandum was later taken into account in the adoption of subsequent decisions concerning the complainant; (4) while it is true that the memorandum was submitted in connection with another complaint filed by the complainant with the Tribunal against the WTO, in its Judgment 4462 delivered in public today in that case, the Tribunal stated that it would not take this document into account when considering the complaint; (5) even before the decision was taken by the Tribunal to disregard the memorandum in the proceedings before it, it is self-evident that the Registry of the Tribunal did not give it any further publicity, considering the confidentiality of proceedings before the Tribunal; (6) the WTO

decided during the proceedings, in early June 2020, to remove the contested memorandum from all files concerning the complainant; and (7) lastly, the complainant provides no specific justification for the amount claimed in redress for the alleged moral injury.

15. In view of all the foregoing, the Tribunal considers that the moral injury suffered by the complainant will be fairly redressed by awarding him the sum of 2,000 Swiss francs. Given the nature of this award, interest will not be payable on this sum, despite what the complainant requests. Lastly, the Tribunal has no jurisdiction to order national authorities to exempt from national taxation sums paid by an organisation pursuant to an award by the Tribunal.

The complainant is entitled to costs, which will be set at 750 Swiss francs.

DECISION

For the above reasons,

1. The implicit decision of the WTO's Director-General to dismiss the complainant's grievance of 11 December 2019 is set aside.
2. The WTO shall pay the complainant moral damages in the amount of 2,000 Swiss francs.
3. It shall also pay him costs in the amount of 750 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 22 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ