Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M. (No. 2)

v.

WHO

134th Session **Judgment No. 4539**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. M. against the World Health Organization (WHO) on 13 February 2020, WHO's reply of 13 July, the complainant's rejoinder of 30 July and WHO's surrejoinder of 26 October 2020;

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

Having examined the written submissions and decided not to order 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 separate him from service on 31 October 2018, being the date on which he reached his retirement age according to the Staff Rules then in force, as well as the decision not to approve an exceptional extension of his appointment beyond retirement age.

Facts relevant to this case can be found in Judgment 4527 on the complainant's first complaint, also delivered in public this day, in which he challenged the decision of the WHO Executive Board to extend the mandatory age of separation (MAS) to 65 as of 1 January 2019 instead of 1 January 2018.

On 23 December 2015 the United Nations (UN) General Assembly decided that "the mandatory age of separation for staff recruited before 1 January 2014 should be raised by the organizations of the United Nations common system to 65 years, at the latest by 1 January 2018, taking into account the acquired rights of staff".

On 13 January 2016 the Director, Human Resources Department (HRD), informed all WHO staff of the UN General Assembly's decision stating that "the implementation date for the increased MAS will require an amendment to WHO Staff Rules, which we will submit to the Executive Board. [...] In the meantime, the MAS for WHO staff recruited prior to 1 January 2014 remains unchanged".

On 15 April 2016, the Director, HRD, sent another email to all staff stating that: "In January 2017, the Administration will also present the necessary amendments to Staff Rules to increase the mandatory age of separation to 65 for staff recruited before 1 January 2014. [...] It is important to note that these amendments are subject to the approval by the Executive Board and will be effective 1 January 2018."

At the 140th session of the WHO Executive Board, in January 2017, the question was raised as to whether the amendment relating to the extension of the mandatory age of separation to 65 for staff members recruited before 1 January 2014 should enter into force with effect from 1 January 2018, in accordance with the UN General Assembly's Resolution of December 2015, or at a later date, in view of the financial implications for WHO.

On 1 June 2017, during its 141st session, the Executive Board decided that the amendments to the WHO Staff Regulations and Staff Rules on the implementation of the new MAS at 65 would enter into force as of 1 January 2019. WHO staff were so informed by an email of the Director, HRD, of 22 June 2017.

In August 2017 the complainant, as well as other staff members in a similar situation, requested the review of the decision to raise the MAS to 65 years only on 1 January 2019, instead of 1 January 2018. That request was rejected by a decision of 18 October 2017, ultimately leading to the final decision impugned in the complainant's first complaint.

On 28 November 2017 the complainant's supervisors sent a memorandum to the Director-General to request that his appointment be exceptionally extended by one year.

On 9 February 2018 the complainant's second-level supervisor informed him orally that the request for an exceptional extension was rejected by the Director-General's Office (DGO).

On 10 September 2018 the complainant was informed of the end of his appointment on 31 October 2018, being the date on which he would reach his retirement age of 62, in accordance with Staff Rule 1020.1.

On 11 October 2018 the complainant requested the review of the decision to end his appointment on 31 October 2018 and alleged that the request for an exceptional extension of his appointment beyond the retirement age was denied, in violation of his rights.

On 31 October 2018 the complainant separated from service.

The complainant's request for review was rejected by a decision of 10 December 2018 on the ground that it was substantially the same as the complainant's previous request pertaining to the implementation of MAS 65. With respect to his request for an exceptional extension of his appointment, the decision first noted that he had not made any such request, but instead his supervisors brought forward such a request on his behalf, and that, within the context of the administrative review, the Director-General had confirmed that he did not approve the request as he did not find sufficient exceptional circumstances or operational need to justify an extension. Consequently, the complainant did not demonstrate any non-observance of his terms of appointment and there was no basis for the requested redress.

On 7 March 2019 the complainant filed an appeal with the Global Board of Appeal (GBA) against the decision of 10 December 2018.

In its report of 18 September 2019 the GBA concluded that the complainant's appeal was not receivable in so far as it reiterated the same arguments as his previous appeal challenging the implementation of MAS 65. It also found that the decision to separate him on 31 October 2018 had been taken in accordance with applicable rules and procedures and that the request for an exceptional extension of his appointment was

properly considered. It therefore recommended that the appeal be dismissed in its entirety.

On 15 November 2019, the complainant was informed that the Director-General had decided to follow the GBA's recommendation to dismiss his appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement until he reached the new MAS of 65. In the alternative, he asks the Tribunal to be awarded the sum of no less than 783,212 Swiss francs in material damages. He seeks 10,000 francs in moral damages and 10,000 francs in costs. He objects to the Organization's requests for joinder.

WHO requests that this complaint be joined with his first complaint, as well as with several other similar complaints filed by former staff members challenging the implementation of the MAS of 65, or alternatively, that these complaints be considered at the same session. WHO argues that the complaint is irreceivable as the complainant attempts to substantively challenge the legality of the implementation of MAS 65 in multiple separate proceedings before the Tribunal. It also argues that the complaint is irreceivable *ratione materiae* as he fails to show any non-observance of his terms of appointment and fails to establish a cause of action. With respect to his allegations relating to an exceptional extension of his appointment, WHO argues that they are irreceivable for failure to exhaust internal remedies. It asks the Tribunal to dismiss the complaint as unfounded in its entirety. In the event that costs are awarded, WHO requests that the amount of costs be established by the Tribunal and that its payment "be conditional upon the receipt of invoices, proof of payment, and upon the complainant not being eligible for reimbursement from other sources".

CONSIDERATIONS

1. On 13 February 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 15 November 2019 of the Director-General dismissing his appeal against an earlier decision of 10 December 2018. That earlier decision

was to dismiss a request for review by the complainant challenging the decision to separate him from service in October 2018 because he had reached the mandatory age of separation and the rejection of a request for an exceptional extension of his appointment beyond retirement age.

2. In December 2015 the UN General Assembly decided that the mandatory age of separation for staff of UN common system organizations should be raised to 65 years. This decision was to apply to staff recruited before 1 January 2014. The decision contemplated that the introduction of this mandatory age of separation should take place no later than 1 January 2018.

3. Within WHO, staff were notified by email from the Director, HRD, dated 13 January 2016 that the Staff Rules would be amended to reflect this change and an email to staff of 15 April 2016 noted that the amendments would be effective 1 January 2018. This did not occur. As a result of the processes of deliberation and decision-making within WHO, a decision was made on 1 June 2017 by WHO's Executive Board that the change to the mandatory age of separation as contemplated by the decision of the UN General Assembly, would be effective 1 January 2019. The change would therefore not apply to staff who reached the retirement age of 60 or 62 in 2017 or 2018.

4. By letter dated 10 September 2018, the complainant was informed that "[...] in accordance with Staff Rule 1020.1, [his] appointment with the Organization will come to an end on [31 October 2018] which marks the date on which [he] will reach the retirement age as specified in Staff Rule 1020". The letter, in this respect, correctly reflected the then operative provisions of the Staff Rules. Staff Rule 1020.1 was in peremptory terms declaring that "Staff members shall retire [...]" at one of a number of nominated ages depending on the personal circumstances of the official and subject to a proviso involving a decision of the Director-General to exceptionally extend a staff member's appointment beyond retirement age.

5. While WHO has continuously contested his right to do so, the complainant pursued the processes of internal review and appeal challenging his separation in October 2018, culminating in a report of the GBA of 18 September 2019 recommending that the appeal be dismissed. It concluded, amongst other things, that the decision to separate the complainant pursuant to Staff Rule 1020.1 "was taken in accordance with the applicable Staff Regulations and Staff Rules". By letter dated 15 November 2019 the complainant was informed that his appeal was dismissed. As noted earlier, this constitutes the impugned decision in these proceedings.

6. The complainant advances what he describes as five substantive legal arguments. The first is that WHO had violated a promise concerning the submission of amendments to the Staff Rules relating to the mandatory age of separation. The second and related argument is that WHO had violated a promise concerning when relevant amendments to the Rules would enter into force. The third is that the perpetuation of the regime embodied in Staff Rule 1020 violated the principle of equality of treatment. The fourth is that WHO unlawfully rejected the complainant's extension request. The fifth is that the complainant's separation violated a policy of healthy ageing. There is some ambiguity in the brief about whether this is contended to be a policy of WHO only or the UN more generally.

7. Four of these five arguments (but not the fourth concerning the extension request) have been addressed in another judgment rendered at this session (see Judgment 4527) concerning other proceedings in which the complainant was one of fifteen complainants though the context in which the issues arose in the other proceedings was different. In the present case the lacuna in the complainant's pleas is how any of these four arguments (which, in substance, failed in the other proceedings) have a bearing on the lawfulness of the then operative Staff Rules which were applied to the complainant in the letter of separation of 10 September 2018. In the absence of the complainant demonstrating that the Staff Rules which were applied had no legal effect, WHO was entitled, indeed obliged, to apply them. As noted earlier, the applicable rule was in peremptory terms.

8. However, there remains to be considered the plea of the complainant that a request made on 28 November 2017 for an extension of his appointment beyond retirement age, was not considered in the way required by the Staff Rules and the relevant provisions of the WHO eManual. The proviso referred to at the conclusion of consideration 4 is found in Staff Rule 1020.1.4 which relevantly provides: "In exceptional circumstances the Director-General may, in the interests of the Organization, extend a staff member's appointment beyond retirement age [...]". This provision contains certain qualifications which are not presently relevant. One issue raised by the complainant's plea concerns whether the decision to reject the request for an extension was actually considered by the Director-General himself. However, additionally, the complainant also contends that the rejection of the extension request violated binding promises earlier made by the Director-General in late 2017 and violated the principle of equal treatment. He also contends that its rejection involved an act of retaliation.

9. The request for an extension arose in the following way. It appears not to be in issue that the complainant's first and second-level supervisors initiated a written request for an extension of the complainant's appointment and the reasons justifying this request which were contained in a memorandum dated 28 November 2017 addressed to the Director-General. In its reply WHO, while arguing that any such request had to be made by the complainant, accepts that the memorandum was originated by the complainant's supervisors and also accepts, implicitly, that the request for an extension it contained, was not initially considered by the Director-General himself. WHO says in its reply: "[a]s indicated in signed memorandum, DGO expressed disapproval of the request and the matter was not further pursued by the ADG/MVP or by the complainant's first and second level supervisors who initiated the memorandum". The ADG/MVP was the Assistant Director-General, Access to Medicines, Vaccines and Pharmaceuticals and was the senior manager in charge of the department where the complainant worked. However, as discussed shortly, the request for the extension of the complainant's appointment was considered by the Director-General as an incidence of the consideration of a request for administrative review submitted by the complainant on

11 October 2018 alleging, amongst other things, that in violation of his rights, the complainant was not granted an exceptional extension of his appointment. The administrative review decision was contained in a memorandum of 10 December 2018.

10. The starting point in considering the pleas of the parties, is an argument of WHO that no request for an extension under Staff Rule 1020.1.4 was ever made by the complainant. WHO argues that such a request has to be made in writing and made by the official concerned. There is no express requirement in the Staff Rules to this effect. The provision relied on by WHO, Staff Rule 1225.2, concerns a narrow topic, the implied rejection of a written request and is, at best, equivocal on the question of whether generally any request for any decision must be made by a staff member in writing. The relevant provision in WHO's eManual concerning requests for extension (paragraph 20 of Section III.10.8) does not require that the request be made directly by the official concerned but simply says that such requests must be submitted to the Director-General through the Director, HRD. The memorandum of 28 November 2017 was subsequently treated by WHO as having been made on behalf of the complainant, as is apparent from the decision on the administrative review dated 10 December 2018. The better view is that the obligation of the Director-General to consider a request for an extension under Staff Rule 1020.1.4 can arise in circumstances where it is not actually made by the official concerned but made on her or his behalf though with the official's knowledge and consent. That the scheme would embrace a request for an extension on behalf of a member of staff (made by a more senior member of staff), is conformable with first or higher level supervisors making assessments about the needs of the organisation in the face of a staff member's impending mandatory separation and how those needs might be met.

11. This leads to consideration of the plea by the complainant that the request for an extension was not considered by the Director-General. There appears to be no issue that, as a matter of fact, the memorandum of 28 November 2017 was not considered by the Director-General before the request was disapproved by the DGO in February 2018. It should have

been. However, it is clear from the memorandum dated 10 December 2018 containing the administrative review decision, that by this time the Director-General had himself considered the extension request and decided not to approve it. The memorandum provided the reasons for his conclusion and his ultimate conclusion that there were not "sufficient exceptional circumstances or operational need to justify an extension". Generally, the process of review creates an opportunity for an administration to reconsider an administrative decision earlier made and the correctness of that decision. It can, in this process, make a decision rectifying or remedying any deficiencies in that earlier decision. That is what happened in the present case. Thus, the failure of the Director-General to initially consider the extension request himself, was remedied by him doing so in the administrative review. An aspect of this is reflected in the Tribunal's case law, which decides that the mere fact that a decision was initially flawed but was later corrected does not suffice to warrant awarding damages for moral injury (see Judgment 4156, consideration 5).

12. Apart from the legal issue concerning the involvement of the Director-General, the complainant argues that the rejection of the extension request involved firstly a breach of a promise earlier made by the Director-General that he would review each request himself and generate a transparent list of criteria, and violated the principle of equal treatment (because there was a selective examination of requests of certain staff favouring staff at Headquarters). This last-mentioned point is speculative and based only on numbers of requests approved (see, for example, Judgment 2669, consideration 9). More generally, however, these pleas fail to recognise the wide discretionary power acknowledged and accepted by the Tribunal vested in an executive head to make decisions to retain officials beyond the normal retirement age and the concomitant limits on review by the Tribunal (see, for example, Judgments 2669, consideration 8, and 4016, consideration 10).

13. Notwithstanding the preceding discussion about the width of the discretionary power of an executive head to extend an appointment and the limited scope of review by the Tribunal, such a decision can be

challenged on the basis that the power has not been exercised *bona fide* or, described more generally, involved an abuse of authority. The complainant does so on the basis that at least one factor underlying the decision to reject the application for an extension for the complainant was a view that agreeing to it would weaken the administration's position in connection with the complainant's first internal appeal against the decision to implement the new retirement regime from 1 January 2019 rather than 1 January 2018.

14. The factual foundation for this contention is a document prepared within HRD dated 23 March 2018 as a note to the Director, HRD, recounting that a request for extension had been received concerning another member of staff. The document noted: "(iii) Agreeing to this extension would weaken WHO's position in connection with [the relevant staff member's] appeal on MAS 65". The complainant was also involved in proceedings challenging MAS 65. This is plainly an entirely irrelevant consideration. The critical question is whether it influenced the decision of the Director-General. A summary of his reasons in the review decision dated 10 December 2018 identified two grounds. The first was that the complainant's functions in his position could be taken up by a properly recruited successor, and secondly management had had sufficient time to prepare for the succession of the complainant's duties.

15. Can it be inferred there was an unstated reason influencing the Director-General, namely that the granting of the extension would weaken WHO's position in other proceedings? It must be borne in mind that if a complainant alleges that a decision was not taken in good faith or was taken for an improper purpose, she or he bears the burden of establishing the lack of good faith, bias or improper purpose (see, for example, Judgments 4437, consideration 23, 4146, consideration 10, 3743, consideration 12, and 2472, consideration 9). It is a serious allegation that must be clearly substantiated. Even allowing for the fact that the summary of the reasons of the Director-General just discussed was in a document prepared by the Director, HRD, it cannot be inferred there was an unstated reason in the face of the reasons given. Accordingly,

the complainant has not demonstrated that the rejection was unlawful retaliation against him.

16. The complainant's plea that the rejection of the request for extension was legally flawed, is unfounded.

17. It is unnecessary to address WHO's arguments concerning the receivability of this complaint. WHO, in these proceedings, seeks the joinder of this complaint with others where separation of officials took place in broadly the same circumstances or, alternatively, asks that they be considered in the same session. The latter has occurred. Joinder is opposed by the complainant. Notwithstanding that the events relied upon in these various complaints are mainly the same and some of the legal argumentation is similar or the same, joinder is inappropriate and each complainant is entitled to the benefit of a judgment addressing their circumstances and their pleas.

18. The complainant has failed to establish that either the decision to separate him from service or the refusal to exceptionally extend his appointment are legally flawed and, accordingly, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ