

B. (No. 2)

v.

WHO

136th Session

Judgment No. 4686

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms K. B. against the World Health Organization (WHO) on 1 May 2020 and corrected on 19 and 24 June, WHO's reply of 30 September 2020, the complainant's rejoinder of 15 January 2021 and WHO's surrejoinder of 19 April 2021;

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 a decision to close the harassment complaint she lodged against her former supervisor without carrying out an investigation.

The complainant joined WHO in 2000 and in 2007 she was offered a continuing appointment. In 2010, she was appointed to a position at grade P.4 but, when this position was abolished in 2015, she accepted a reassignment to another position at grade P.4.

Background facts relevant to this case are to be found in Judgment 4303, delivered in public on 24 July 2020 on the complainant's first complaint to the Tribunal. Suffice it to recall that in July 2015 the complainant was informed of the decision to abolish her post. She

appealed this decision internally and, ultimately, she impugned before the Tribunal the Director-General's final decision, dated 24 August 2018. In Judgment 4303, the Tribunal awarded the complainant 25,000 United States dollars in moral damages for the abolition of her post on the ground that it was not for legitimate reasons and had the effect of removing her from the field of expertise she had developed over several decades.

Prior to that, in November 2013, she had solicited the WHO Ombudsperson's aid to address what she considered to be "a long-standing issue with [her] first and second-level supervisors". Subsequently, in September 2015, she effectively asked the Administration to remove her from her first-level supervisor's line of authority, allegedly because she was being subjected to "constant bullying". Soon after, she was placed under a different first-level supervisor.

By a letter of 23 December 2015, entitled "Formal request for investigation", she filed a harassment complaint against her former first-level supervisor with the Office of Internal Oversight Services (IOS). In that letter, she asserted that for the past eight years she had endured "a subtle but chronic cycle of harassment and defamation", the latest act of which was the abolition of her position in the Unintentional Inquiry Prevention unit, and that she was bringing the matter to IOS for further investigation. IOS acknowledged receipt of the complainant's harassment complaint on 13 January 2016, informing her that it would review the matter as part of its formal intake assessment and might revert to her for further information. On 10 March 2017, the complainant wrote to IOS requesting an update on her harassment complaint but did not receive a response. In his final decision on the complainant's appeal against the abolition of her position, issued on 24 August 2018, the Director-General requested the Human Resources Department (HRD) to bring to IOS' attention, for appropriate action, the Headquarters Board of Appeal's recommendation that swift action be taken to address the complainant's harassment complaint.

In a memorandum of 14 March 2019, the Director, IOS, informed the Director, HRD, that, following a preliminary review, IOS had concluded that there was insufficient evidence to support a *prima facie*

case of harassment and recommended that the matter be considered formally closed. By a letter of 22 March 2019, the Director, HRD, notified the complainant of the decision to close her harassment complaint.

The complainant appealed this decision with the Global Board of Appeal (GBA) which, in its report of 10 December 2019, concluded that the complainant's harassment complaint had been reviewed in accordance with the regulatory framework and that the communication from the Director, HRD, relaying the decision to close the matter was consistent with applicable procedures, considered the facts and was substantiated. However, the GBA also concluded that the time taken by IOS to review the complaint, namely approximately 39 months, was excessive and not consistent with WHO's duty of care and its duty of good governance. The GBA thus recommended that the Director-General allow the appeal in part and award the complainant 5,000 Swiss francs in moral damages and 2,500 Swiss francs in legal fees, subject to the submission of invoices and proof of payment. By a letter of 7 February 2020, the Director-General notified the complainant of his decision to accept the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the Director, HRD's, earlier decision dated 22 March 2015. She also asks the Tribunal to recognise that the delay in investigating her case was "undue and biased", that IOS' three-page report was incomplete and irregular, and that the lack of diligence in processing her claim in a timely manner prejudiced the examination of her harassment complaint by the GBA and "robbed her" of her right of defence. She requests that WHO be ordered to (i) provide full disclosure of the investigation process and the actions undertaken up to the submission of the IOS report to HR, and (ii) initiate an external investigation into IOS practice with a view to rectifying WHO's failure to deal with harassment claims in a timely and professional manner. She claims damages in the following amounts: (i) 207,360 Swiss francs for the undue delay and the emotional anguish and suffering; (ii) 54,000 Swiss francs for the loss of career opportunities since the abolition of her post,

as she was unable to compete for any P.5 positions in her field of expertise; (iii) 27,000 Swiss francs for the forced and abrupt end to the professional career she carefully built over 20 years and which ruined all prospects for her to qualify for a position outside WHO; and (iv) 13,500 Swiss francs for the irregularity of the investigation and the moral prejudice she suffered. She also claims reimbursement of all her legal costs.

WHO asks the Tribunal to dismiss the complaint in its entirety, as there are no grounds to award the complainant damages over and above the amounts already paid to her.

CONSIDERATIONS

1. This is the complainant's second complaint to the Tribunal. The first one concerned the abolition of her post and in Judgment 4303, delivered in public on 24 July 2020, the Tribunal accepted that the abolition was flawed and awarded the complainant moral damages in the sum of 25,000 United States dollars. Much of the relevant background is to be found in that judgment. The complainant also sought to challenge in those earlier proceedings the decision communicated to her in March 2019 that no further action was going to be taken in relation to a formal complaint of harassment she had lodged on 23 December 2015 with the Office of Internal Oversight Services (IOS). In Judgment 4303, consideration 5, the Tribunal said: "But any flaws in that decision including the time taken to resolve her harassment complaint and the consequences of the decision (namely to provide no remedy for the alleged harassment) are not justiciable in these proceedings given that the subject matter is only the decision to abolish the complainant's post". This second complaint raises that issue, namely the lawfulness of the decision made in March 2019 to close the complainant's harassment complaint following a review by IOS. An internal appeal against that decision was largely unsuccessful resulting in the decision of the Director-General of 7 February 2020, which is impugned in these proceedings.

2. In the impugned decision the Director-General accepted the conclusion of the Global Board of Appeal (GBA) that the decision to close the harassment complaint was consistent with applicable procedures, considered the facts presented and was substantiated. He also accepted the GBA's conclusion that there was no evidence of bias or prejudice, a manifest error or misapprehension of the facts in the IOS review. Notwithstanding, he also accepted the GBA's conclusion that the consideration of the complainant's harassment complaint (over a period of about 39 months) was excessive and its recommendation to award the complainant moral damages in the sum of 5,000 Swiss francs and costs in the sum of 2,500 Swiss francs.

3. In her brief the complainant advances her case under three general headings. The first general heading is "Longstanding, Constant Harassment and Discrimination Violating the Organization's Duty of Care and Prevention". Under this general heading are three subsidiary headings, namely the first "Timeline of the various formal complaints I reported, 2008 - 2015", the second "Attempt to informally resolve the case was disregarded", and the third "Timeline of my IOS filing shows flagrant inaction from that unit". The second general heading is "Gross Negligence and Misapprehension of the Facts". Under this general heading are four subsidiary headings, namely the first "Inequality of treatment during the entire review of my harassment case and violation of due process", the second "No expediency in dealing with harassment case", the third "No appropriate prioritization of harassment case", and the fourth "No documented investigation". The third general heading is "The Failure to Act Promptly by the Investigation Unit Has Created Serious and Prejudicial Damages". Under this general heading are two subsidiary headings, namely the first "Lack of evidence due to the inaction of IOS and HRD [the Human Resources Department] had been detrimental to my appeal case [...] on termination of contract" and the second "Professional prejudice and discrimination".

4. The harassment complaint of 23 December 2015 is annexed to the complainant's brief but not the annexes related to the former. The said annexes do appear as exhibits to the IOS memorandum of

14 March 2019 which are in turn annexed to the entire harassment complaint, annexed to WHO's reply in these proceedings. The annexures to the harassment complaint were accurately described, by WHO in its reply, as "predominantly consist[ing] of her Performance Evaluations [...] for the period 2006 to 2014". A material part of the complainant's pleas in these proceedings is directed towards establishing, at least inferentially, she had been the subject of harassment quite apart from how she framed her case in the letter of 23 December 2015. But that is not the relevant legal issue. Rather, it is whether, having regard to WHO's Policy on the Prevention of Harassment, it was open to the Director, HRD, in consultation with the Director, IOS, to decide, among other things, under paragraph 7.11 of the Policy, that "the matter [...] be closed as there [was] no *prima facie* case of harassment and no further action [should] be taken". Under the Policy that step arose after a formal written complaint of harassment had been lodged under paragraph 7.2. Paragraph 7.3 specifies what the formal written complaint must include under five bullet points. It involves the description of specific acts or conduct that are the subject of the harassment allegation and the dates, times, locations and circumstances, and providing other information, including ways in which the alleged harassment offended, humiliated or intimidated the staff member or interfered with the staff member's ability to carry out their functions at work, and/or created an intimidating or hostile work environment. Also, in the formal complaint, the complainant has to identify the staff members who are alleged to have engaged in the harassment and any alleged witnesses. Under the Policy there was no express requirement to interview the complainant before a decision was made under paragraph 7.11.

5. The Tribunal has reviewed the complaint lodged by the complainant on 23 December 2015, including the annexures, the recommendation of the Director, IOS, in his memorandum of 14 March 2019 indicating that no investigation was planned to be undertaken and the matter could be formally closed, together with the decision of the Director, HRD, of 22 March 2019 that "no further action [should] be taken in relation to the matter". Both the recommendation and the decision, in the circumstances, were unexceptionable. Importantly,

apart from the egregious delay, the complainant has not established any procedural or substantive flaw in the consideration of her complaint and the decision to formally close it. This was the conclusion of the GBA in its report, which reflects a balanced and considered review of the material before it and the arguments of the complainant.

6. In relation to the delay, WHO has accepted the time taken to consider and dispose of her complaint was excessive and her arguments that it was excessive are unnecessary, if not beside the point. However, it should be pointed out that the characterization of the delay as egregious is fortified by the actual decision made. That is, a decision based on there being no *prima facie* case. That decision could have been made within a few months, if not weeks, of the filing of the complaint.

7. The complainant is entitled to challenge the quantification of the damages to which she was entitled for that delay. WHO decided on a sum of 5,000 Swiss francs based on the recommendation of the GBA. In her pleas she claims 207,360 Swiss francs as compensation for “the undue delay and emotional anguish [she] suffered and endured”. This sum is calculated on the basis that she is entitled to 128 Swiss francs per day from the filing of her harassment complaint to date. An allied claim is that she receives appropriate compensation for the irregularity of the investigation and for moral prejudice in the sum of 13,500 Swiss francs. This sum is calculated on the basis that she is entitled to 250 Swiss francs per month from the filing of her harassment complaint to date. Additionally, she seeks “financial compensation for the career opportunities [she has] lost” and “financial compensation for the forced abrupt stop to the profession [she] carefully built over 20 years which has taken away all [her] prospects to qualify for senior positions both within and outside the organisation”. Implicit in her pleas is that these claims for moral damages are to compensate her, at least in substantial part, for the moral injury she allegedly suffered because of the alleged harassment. But the consequences of what is alleged by the complainant as harassment is not a matter which arises in these proceedings, which are focused solely on the decision to take no further steps on her formal complaint. It may be accepted that that decision itself caused moral

injury, but the real issue is whether it is compensable moral injury. However, as just discussed, that decision was unexceptionable and no question of financial liability of WHO for that decision can arise. However, it may also be accepted that the uncertainty over several years about the fate of her formal harassment complaint also caused her moral injury. An appropriate amount to compensate for that injury is 20,000 Swiss francs and not 5,000, given that, as discussed earlier, the harassment complaint was rejected on the basis that there was no *prima facie* case. Accordingly, WHO should be ordered to pay the complainant a further amount of 15,000 Swiss francs by way of moral damages. She is entitled to costs assessed in the sum of 2,000 Swiss francs, in addition to the 2,500 Swiss francs awarded by the Director-General. All other claims should be dismissed.

DECISION

For the above reasons,

1. WHO shall pay the complainant a further amount of 15,000 Swiss francs moral damages.
2. WHO shall pay the complainant 2,000 Swiss francs costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 22 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ