Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.-K. and others

v.

WHO

134th Session **Judgment No. 4527**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs A. A.-K., Ms E. R. F., Mrs F. F.-A., Mr J. M. G. C., Mr C. L., Mr A. M., Mr J.-P. M., Mr P. L. O., Mr M. O., Mrs C. R.-C. (her second), Mrs B. S., Mrs J. S., Ms P. S., Mr K. H. S. and Mr W. U. against the World Health Organization (WHO) on 16 April 2019 and corrected on 24 May, WHO's reply of 28 August, the complainants' rejoinder of 4 October 2019 and WHO's surrejoinder of 8 January 2020;

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 none of the parties has applied;

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

The complainants impugn WHO's decision to postpone implementation of the mandatory age of separation adopted by the United Nations (UN) General Assembly in Resolution 70/244 of 23 December 2015.

By Resolution 70/244, the UN General Assembly decided that the mandatory age of separation for staff recruited before 1 January 2014 should be raised by the organisations of the United Nations common system to 65 years by 1 January 2018 "at the latest".

By an email of 13 January 2016, the Director, Human Resources Department (HRD), informed all WHO staff that implementation of the mandatory age of separation at 65 would require the WHO Executive Board to amend the Staff Rules.

By another email of 15 April 2016, the Director, HRD, informed all staff that the Administration would present the necessary amendments to the Staff Rules to implement the increased mandatory age of separation in January 2017 and that these amendments, which were subject to approval by the Executive Board, would be effective 1 January 2018.

The Executive Board discussed the date of implementation of the increased mandatory separation age at its 140th session in January 2017. As the Member States were unable to reach consensus, the Executive Board decided to defer the matter to its 141st session and to request the Secretariat to provide it with additional information on the implications of implementing the amendments on a deferred date so as to enable it to take a decision at its 141st session.

Having discussed the matter at its 141st session, the Executive Board decided on 1 June 2017 to approve the amendments to the Staff Rules with effect from 1 January 2019.

The Administration relevantly informed all WHO staff by an email of 22 June 2017, stating that as of 1 January 2019 the age of separation for all staff members holding an appointment on or after that date would be 65 years, although staff recruited before 1 January 2014 would maintain their acquired right to retire with full benefits before the age of 65. However, the amendments implementing the mandatory age of separation at 65 would not apply to staff members reaching the retirement age of 60 or 62 in 2017 or 2018, i.e. before 1 January 2019. Those staff members would separate from WHO upon reaching the retirement age of 60 or 62, unless the Director-General decided to exceptionally extend their appointment.

On 21 August 2017 fifteen complainants who would turn 62 in 2018 submitted individual requests for administrative review of the decision communicated by the 22 June 2017 email insofar as it extended the mandatory age of separation to 65 years as of 1 January 2019, rather than as of 1 January 2018. They requested that the decision be set aside and that they not be separated from service before reaching the age of 65. By individual memoranda of 18 October 2017, the Assistant Director-General, General Management, informed the complainants that, as they did not allege a non-observance of the terms of their appointment, which remained unchanged, their requests fell outside the scope of administrative review under Staff Rule 1225 and that there was thus no basis for the redress sought.

The complainants filed appeals against the 18 October 2017 decisions with the Global Board of Appeal (GBA). They requested that the 22 June and 18 October 2017 decisions be set aside, that their mandatory age of separation be set at 65 years or, alternatively, that they be awarded material damages. They also requested moral damages and costs. Subsequently, twelve out of the fifteen complainants submitted requests for exceptional extension of appointment beyond the retirement age and, relevantly, in their rejoinder to the GBA those complainants argued that their requests in that regard had been handled in an arbitrary manner and the Director-General had failed to uphold his pledge to personally review such requests according to transparent criteria.

Having joined the appeals in a single process, the GBA submitted its report to the Director-General on 21 November 2018 recommending that they be dismissed. In support of its recommendation, the GBA noted that the statements by the Director, HRD, in his emails of 13 January and 15 April 2016 regarding the effective date of the increased mandatory separation age were for information purposes and did not give rise to a legal obligation on the part of WHO, as the Executive Board's approval was required prior to any amendments to the mandatory retirement age becoming effective. The GBA found no evidence of a breach of promise, unequal treatment, bad faith or discrimination. As regards the requests for exceptional extensions beyond the retirement age, the GBA noted

that they were new claims initiating a separate administrative process and warranting the filing of a separate statement of appeal.

By individual letters dated 18 January 2019, the Director-General informed the complainants of his decision to endorse the GBA's recommendations. That is the impugned decision.

The complainants ask the Tribunal to set aside the impugned decision as well as the decision to implement the UN General Assembly Resolution 70/244 on 1 January 2019, instead of 1 January 2018. They also ask the Tribunal to set their mandatory retirement age at 65 and to order WHO to reinstate them in their former positions. Alternatively, they claim material damages in various amounts corresponding to the loss of salary, pension entitlements and other benefits that each of them would suffer as a result of their being prevented from working until the age of 65. Each complainant seeks 30,000 Swiss francs in moral damages and 10,000 Swiss francs in costs.

WHO asks the Tribunal to dismiss the complaints in their entirety as irreceivable *ratione materiae*. In the event the Tribunal finds the complaints receivable, WHO asks it to dismiss them on the merits. Also, should the claim for costs be granted, WHO asks that the amount of costs and fees be established by the Tribunal and that payment thereof "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 16 April 2019 fifteen complaints were filed with the Tribunal, each by a former official of WHO. Each complaint form was in the same terms save in relation to the personal details of each complainant and the precise relief sought. Each complaint impugned a decision of 18 January 2019 and there was only one brief accompanying all 15 complaints. The genesis of the aggregation of these claims was a decision of the GBA to join the appeals of the complainants in the internal appeal process. In the Tribunal, each complainant seeks substantially the same relief though the different personal circumstances of each are

reflected in the precise orders sought. Only one reply was filed by WHO and there was also only one rejoinder and one surrejoinder. In these circumstances, the complaints are joined in order that a single judgment can be rendered.

2. In December 2015 the UN General Assembly decided that the mandatory age of separation for staff of the United Nations common system organisations 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 amendments to the Staff Rules implementing the change to the mandatory age of separation, as contemplated by the decision of the UN General Assembly, would be effective 1 January 2019. This can be viewed as a decision to extend the mandatory age of separation to 65 as of 1 January 2019 instead of 1 January 2018, an expression used by the complainants in their subsequent requests for administrative review. The change would therefore not apply to staff who reached the retirement age of 60 or 62 in 2017 or 2018. This last-mentioned decision was subject to a proviso that the Director-General could exceptionally decide to extend the appointment of a member of staff beyond the existing retirement age (of 60 or 62). Several, but not all, of the complainants unsuccessfully applied for an extension. Each of the complainants was affected by the decision specifying the implementation date of 1 January 2019, as each reached the pre-existing retirement age before then and, accordingly, was then separated from service.

4. Each complainant engaged the processes of administrative review and appeal culminating in a report of the GBA of 21 November 2018 recommending the appeals be dismissed. By letters of 18 January 2019 each complainant was informed their appeal was dismissed. This constitutes the impugned decision in each complaint.

5. WHO raises a number of issues concerning the complaints, including receivability but, in the main, it is unnecessary to address them. However, one such issue should be addressed. Part of the complainants' case in these proceedings is that the rejection of individual requests for an extension of appointment was legally flawed. The gravamen of the case is that notwithstanding a commitment on the part of the Director-General to examine each such extension request individually and that he would generate a transparent list of criteria, no such list was created, the consideration of the requests was biased and arbitrary and, indeed, some requests were not considered at all.

6. The subject matter of the request for administrative review culminating in the report of the GBA and the impugned decisions was described in what was, in effect, a pro forma request dated 21 August 2017 as "[t]he decision to extend the mandatory age of separation to 65 as of 1 January 2019 instead [...] of 1 January 2018". That is, the decision of the Executive Board of 1 June 2017. To the extent it is revealed in the material before the Tribunal, the various requests for an extension of appointment were made after, and mostly many months after, the commencement of the requests for administrative review in August 2017.

7. WHO argues, in its reply, that any challenge in these proceedings to the rejection of the individual requests for an extension of appointment is irreceivable, because the complainants have not exhausted internal means of redress, as required by Article VII of the Tribunal's Statute. In its report, the GBA addressed this topic though in a slightly different context in paragraphs 29 to 31. The GBA noted that the challenge to the rejection of the individual requests for extension was first raised in the complainants' rejoinder in the internal appeal. The GBA characterised this as "a new claim". It also noted the issue of

exceptional extension requests was not raised in the statement of appeal and was not related to the merits presented in the statement of appeal. It further noted that the exceptional extension requests initiated a different and separate administrative process, were new claims, and warranted the filing of a separate statement of appeal. The characterisation of the challenge to the rejection of the exceptional extension requests as a new claim is correct (see Judgments 4185, consideration 3, 3945, consideration 4, and 2837, consideration 3). It was not correct to say, as contended by the complainants in their rejoinder in the Tribunal, this involved new pleas only. WHO is correct in saying that this aspect of the complaints is irreceivable under Article VII of the Statute.

8. A material part of the complainants' case is that WHO breached promises and they are entitled to damages. There is a fundamental difficulty with their case in this respect. In their brief, the complainants identify two promises they say were made to them which were not, on their account, honoured. They say that as these promises were not fulfilled, they suffered injury and they are entitled to damages. Both of the alleged promises concerned the operative date of 1 January 2018 for the alteration of the mandatory age of separation. One promise was said to relate to the submission to the WHO's Executive Board of amendments to the Staff Rules and the other was said to concern when the amendments would enter into force. At least two elements required by the Tribunal's case law for an actionable breach of promise are absent in the present case.

9. The question of what constitutes an actionable breach of promise was discussed by the Tribunal in Judgment 3619, considerations 13 to 15. The following emerges from that discussion. It is not every statement made by or on behalf of an organisation that is capable of being characterised as a promise that gives rise to a legal obligation on the part of the organisation to honour the promise.

10. The various elements of a promise and surrounding circumstances that give rise to a legal liability to honour the promise, are fourfold. The first element is that there must be a promise to act or not act, or to allow. The second element is that the promise must come from someone who

is competent or deemed competent to make it. The third element is that the breach of the promise would cause injury to the person who relies on it. The fourth is that the position in law should not have altered between the date of the promise and the date on which fulfilment is due. The third element has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of non-fulfilment of the promise. As the Tribunal noted in Judgement 3619, there are numerous decisions of the Tribunal applying these principles (see, for example, Judgments 3204, consideration 9, 3148, consideration 7, 3005, consideration 12, 2158, consideration 5, 2112, consideration 7, and 1278, consideration 12). However, they have, as their foundation, the decision of the Tribunal in Judgment 782 which was discussed in Judgment 3619. It is unnecessary to repeat that discussion in detail.

11. However, it is useful for present purposes to recall that the complainant in the proceedings resulting in Judgment 782 was successful because the defendant organisation failed to honour a promise (that the complainant would be granted an indefinite appointment) which he relied on (by leaving existing stable long-term employment), which caused him injury (lost future income). The complainant in the proceedings resulting in Judgment 3619 failed on the plea of breach of promise because she failed to establish reliance on the alleged promise, let alone that her reliance on the promise caused her injury. As the Tribunal said in that judgment, in consideration 17, "the injury (ordinarily financial injury) must flow from and occur by reason of the failure of the defendant organisation to honour the promise made and relied upon". The complainant in proceedings leading to a more recent judgment, Judgment 3677, failed on a very similar plea of breach of promise for substantially the same reasons.

12. In the present case, the complainants identify, in their brief, three elements of the injury they say they suffered. The first element was the mere breaking of the promise which was said to be an injury. This does not found a claim (see Judgment 3619, consideration 17). The second was that the postponement of the change to the mandatory

age of separation had the result that their appointments were shortened by three years and the third, and related, was that the shortening of their appointments deprived (or will deprive) them of certain benefits. In an annex to the brief (Annex A) particulars are provided for each of the complainants of the losses they say they have suffered. It is sufficient, in order to illustrate the nature of loss claimed, to refer to the first of the particularised loss in Annex A, namely for Mrs A.A.-K. She was separated from WHO on 31 December 2018, aged 62. She contends that had the alteration of the mandatory age of separation taken effect on 1 January 2018, she would have continued in employment until 65 years of age, that is, until 31 December 2021. She calculates the difference between the salary she would have received and the pension she would receive as 396,138 United States dollars. Her yearly pension entitlement was reduced, by virtue of her separation at age 62, from 61,994 dollars to 49,056 dollars which, having regard to female life expectancy in France, was in aggregate a loss of 258,760 dollars. By this mechanism, she calculated her financial loss as a minimum of 654,898 United States dollars.

13. Nowhere in the complainants' analysis is it established that they relied on a promise and that this reliance caused them injury. WHO's conduct cannot be characterised as the making of a promise or promises. The only statement relied on by the complainants, which would found their claim, is the email of 15 April 2016 from HRD saying the changes to the retirement regime would take effect on 1 January 2018. But, plainly, this statement was qualified by the observation that these new amendments were subject to approval by the Executive Board. Accordingly, the existence of this qualification shows the email is not an unqualified promise and, accordingly, cannot found a claim based on its breach.

14. Moreover, the complainants simply continued in employment subject to then subsisting provisions concerning the age of retirement. They did not rely on a promise in doing this. Indeed, it is clear they hoped that by continuing in employment they would gain the benefit of an altered mandatory age of separation. While that hope was not

realised, they did not act to their detriment because of any promise. The plea based on breach of a promise is unfounded.

15. In their pleas, the complainants raise the issue of equality of treatment. The gist of their argument is this: before 1 January 2019 (when the mandatory age of separation was increased to 65 years for all staff subject to the right of an individual staff member to invoke the pre-existing provision), Staff Rule 1020.1 provided for three mandatory ages of separation which were dependent on the time at which the member of staff became a member of the United Nations Joint Staff Pension Fund. If it was before 1 January 1990, the age of separation was 60, if between that date and 31 December 2013, the age of separation was 62, and if on or after 1 January 2014, the age of separation was 65. The complainants say this regime was unfair and constituted unlawful unequal treatment, and it was perpetuated for an additional year by the decision to implement the mandatory age of separation as uniformly 65 years on 1 January 2019, rather than 1 January 2018. The short answer to this argument is that the Tribunal has recognised in Judgment 3071, considerations 12 and 13 (citing Judgment 2915), that differing ages of retirement referable to different pension entitlements are not inherently discriminatory. These cases are referred to by WHO in its reply and the complainants do not, in their rejoinder, seek to establish, other than by assertion, the contrary was true. Rather, they focus on the reasons for the decision to implement the mandatory age of separation a year later than originally proposed. If, however, the pre-existing regime was not demonstrated to be discriminatory, then its perpetuation for a further year does not establish otherwise. This plea is unfounded.

16. The complainants argue that the decision not to implement the mandatory age of separation of 65 until 1 January 2019, rather than 1 January 2018, was contrary to WHO's policy of healthy ageing. Even if true (which is by no means self-evident), nothing of substance is said about the legal consequences of this inconsistency. It is not at all obvious that there are any. This plea is without merit and unfounded.

17. The next issue raised by the complainants is that they were denied the right to effective appeal. That is so, it is contended, because the GBA did not address two issues which had been raised by them in the internal appeal, namely the breach of the promise, as mentioned in consideration 8 above, to submit to the WHO's Executive Board the necessary amendments to the Staff Rules to implement the mandatory age of separation as 65, operative on 1 January 2018 and, secondly, the alleged breach of WHO's policy on healthy ageing. The last-mentioned alleged breach of WHO's policy is devoid of substance and the GBA cannot be criticised for not addressing it in depth though, plainly, it was aware it was an issue as it was identified as such in its report on page 3.

18. The characterization of WHO's conduct as involving two promises is a construct the complainants used when formulating their pleas in the internal appeal. It does not reflect something actually or expressly said by an official on behalf of WHO. This characterization of two promises was included in the GBA's summary of the complainants' statement of appeal and in its commentary before setting out the terms of the Director, HRD's, emails of 13 January and 15 April 2016. At that point and thereafter in its reasoning, the GBA spoke of promise in the singular. The GBA was not obliged to embrace the complainants' construct of WHO's conduct as involving the making of two promises. What it was obliged to do, and did, was address the substance of the conduct in the context of an alleged breach of promise. Whether its analysis was correct or not is beside the point. There was, in this respect, no denial of an effective right of appeal. This plea is unfounded.

19. One final procedural issue should be addressed. WHO seeks the joinder of these complaints with another complaint filed by a staff member of UNAIDS or, alternatively, that they be considered in the same session of the Tribunal. The latter has happened. Joinder is opposed by the complainants. They point to the fact that a different employer is involved, any final administrative decision was made by a different executive head and, insofar as there is a common plea about breach of promise, the factual foundation of the existence of the promise is different. Indeed, there is a difference between the promises alleged in

these proceedings and those in the other proceedings. In all these circumstances it is inappropriate to join the complaints in this matter with the complaint in the other matter in order to render one judgment.

20. The complainants have failed to establish that the decision to extend the mandatory age of separation to 65 as of 1 January 2019, instead of 1 January 2018, is legally flawed and, accordingly, these complaints should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 4 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