G. C. (No. 2)

v.

WHO

134th Session **Judgment No. 4535**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. M. G. C. against the World Health Organization (WHO) on 10 February 2020, WHO's reply of 15 June, the complainant's rejoinder of 9 July and WHO's surrejoinder of 12 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 21 May 2018 the complainant's first-level supervisor sent a memorandum to senior management to request that his appointment be exceptionally extended until the end of August 2019.

On 29 May 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 6 June 2018 the complainant's first-level supervisor informed him orally that his request had not been forwarded to the Director-General as his second-level supervisor and senior management did not support the request.

On 20 July 2018 the complainant requested the review of the decision to end his appointment on 31 October 2018 and alleged that a request for an exceptional extension of his appointment made by his supervisor 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 11 December 2018 on the ground that it was substantially the same as his previous request pertaining to the implementation of MAS 65. With respect to his request for an exceptional extension of his appointment, the decision noted that he had not submitted a request for an exceptional extension of his appointment to the Director-General and that the Director-General had, within the context of the administrative review, confirmed that he did not approve the request as he did not find sufficient exceptional circumstances or operational need to justify such 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 11 December 2018.

In its report of 7 October 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 leading to his first complaint before the Tribunal. 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 he had not exhausted internal remedies with respect to the extension of his appointment, as he had not filed a request for an exceptional extension as required by Staff Rule 1020.1.4 and paragraph 20 of Section III.10.8 of the WHO eManual. In any event, the Director-General had reviewed the request giving considered reasons for not granting an extension. It therefore recommended that the appeal be dismissed in its entirety.

On 6 December 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 retirement age of 65. In the alternative, he asks the Tribunal to award him the sum of no less than 446,717 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, as he did not request an exceptional extension prior to submitting his request for review. 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 10 February 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 6 December 2019 of the Director-General dismissing his appeal against an earlier decision of 11 December 2018. That earlier decision was to dismiss a request for review by the complainant challenging the decision to separate him 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 29 May 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 7 October 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 applicable Staff Regulations and Staff Rules". Insofar as the appeal challenged a request for an extension of the complainant's appointment, the GBA concluded, amongst other things, that no such request had been made by the complainant. By letter dated 6 December 2019 the complainant was informed 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 handled 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 the 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 29 May 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 21 May 2018 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. In his pleas the complainant argues that the extension request was not actually considered by the Director-General himself who, as described in the pleas, simply "rubber-stamped" the Administration's rejection of the request. 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. In the material before the Tribunal are several memoranda dated 21 May 2018. One is said by the complainant to be a request for an extension of his appointment by his supervisor. It is not necessary to detail their contents nor characterise their status. Suffice it to note that in a memorandum of 9 November 2018 from the Assistant Director-General, General Management (ADG/GMG) to the Director-General the following is said about earlier events concerning a request for extension of the complainant's appointment:

> "Based on information provided by [the complainant] a request for exceptional extension beyond the age of retirement was prepared and originated by his supervisor, Dr [D.L.-B.], Coordinator (HQ/CDS/HIV/SIP), but was not supported by the Director, HIV Department or by the ADG/CDS. In light of this lack of support from senior management, the extension request was not forwarded to the Director-General. Dr [D.L.-B.] largely confirmed the information provided by [the complainant] and stated that a signed copy of the extension request memorandum was not retained. Following a request for additional information from HPJ, [the complainant] provided an unsigned draft memorandum of 21 May 2018 from Director, HIV to DG."

From the material before the Tribunal this appears to accurately reflect what happened. What is important, for present purposes, is that the memorandum of 9 November 2018 assumed that there was an extension request which the Director-General needed to consider.

10. Notwithstanding the approach just discussed, WHO argues in these proceedings 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 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 such requests must be submitted to the Director-General through the Director, HRD. The memorandum of 21 May 2018 was subsequently treated by WHO as having been made on behalf of the complainant, as is apparent from the memorandum of 9 November 2018 and the decision on the review dated 11 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 irregularly considered by the Director-General. There appears to be no issue that, as a matter of fact, any memorandum of 21 May 2018 which might reasonably be viewed as an extension request was not considered by the Director-General before the complainant's separation on 31 October 2018. On 11 December 2018, the complainant was sent a memorandum containing a decision on a request he had made for administrative review on 20 July 2018 of the decision to end his appointment on 31 October 2018 and also the denial of the exceptional extension request made by his supervisor. However, it is clear from the memorandum of 11 December 2018 from the ADG/GMG, 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. However, the complainant's pleas go one step further and he argues, in effect, that the Director-General did not make a genuine assessment himself of the extension request concerning the complainant. The exhibit containing the memorandum of 9 November 2018 referred to in consideration 9 above also contained the decision of the Director-General signed on 13 November 2018. The format of the memorandum is not atypical in administrative decision-making, particularly by senior officials. The format involves a brief written by a subordinate setting out the facts even if in a summary way and, if qualified, advancing their

own preliminary views about the merits of the case being addressed (or repeats in a summary way the views of other qualified officials) while inviting the senior official to make their own decision often by electing between one or a number of choices to be simply signified by, literally, ticking a box. In this case, the Director-General did just that by ticking a box saying that he did not grant the exceptional extension for the complainant. However, it cannot be inferred, as the complainant invites, that the Director-General did not bring to bear his own views and reach his own conclusion, after reading the memorandum of 9 November 2018, about whether the complainant's appointment should be extended notwithstanding the view recorded in the memorandum that HRD did not support granting the exceptional extension. Cogent reasons were given by HRD for its position and recorded in the memorandum while describing the complainant as a "highly experienced and competent staff member who made significant and positive contributions to the work of his Department in the Organization as a whole". This plea of the complainant is unfounded.

13. 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 secondly 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).

14. The complainant also argues that he was the subject of unlawful retaliation. He does so by reference to a document prepared within HRD which alludes to the effect on other proceedings (in which the complainant

was also involved) of granting an extension request to another member of staff also involved in those other proceedings. For reasons given in the judgment concerning that other member of staff this session, Judgment 4531, this plea should be rejected.

15. 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.

16. 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