

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 2)

v.

WHO

134th Session

Judgment No. 4538

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs B. S. against the World Health Organization (WHO) on 9 January 2020, WHO's reply of 12 June, the complainant's rejoinder of 15 July and WHO's surrejoinder of 14 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 her from service on 30 September 2018, being the date on which she reached her 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 she 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 11 April 2018 the complainant's first-level supervisor sent a memorandum to her second-level supervisor requesting that her appointment be exceptionally extended for one year. The memorandum was never transmitted to the Director-General as, following consultations with senior management, her second-level supervisor decided not to pursue the request further.

On 9 July 2018 the complainant was informed of the end of her appointment on 30 September 2018, being the date on which she would reach her retirement age of 62, in accordance with Staff Rule 1020.1.

On 20 July 2018 the complainant requested the review of that decision and of the decision not to exceptionally extend her appointment beyond the mandatory age of separation.

On 13 September 2018 the complainant met with the Director-General to discuss her concerns about her retirement age.

The complainant's request for review was rejected by a decision of 16 November 2018 on the grounds that it was substantially the same as the complainant's previous request pertaining to MAS 65, that she had not filed a request for an extension of her appointment and that she did not demonstrate any non-observance of her terms of appointment.

On 18 January 2019 the complainant filed an appeal with the Global Board of Appeal (GBA) against the decision of 16 November 2018.

In its report of 13 August 2019 the GBA concluded that the complainant's appeal was not receivable in so far as it reiterated the same arguments as her previous appeal challenging the delayed implementation of MAS 65. It also found that the decision to separate her on 30 September 2018 had been taken in accordance with applicable rules and procedures. A majority found that her claims related to the consideration of her extension request were not made out since she had not requested an extension of her appointment as required by Staff Rule 1020.1.4 and eManual paragraph 20 of Section III.10.8. One member found that the Organization did not respond to her request in a transparent manner. The majority recommended that the Director-General dismiss the appeal in its entirety, while one member recommended allowing the appeal in part and recommended the payment of one-month salary for

not responding to the complainant's extension request in a transparent manner.

On 11 October 2019 the complainant was informed that the Director-General had decided to follow the GBA's majority recommendation to dismiss her appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement until she reached the new MAS of 65. In the alternative, she asks the Tribunal to award her the sum of no less than 799,576 Swiss francs in material damages. She seeks 10,000 francs in moral damages and 10,000 francs in costs. She objects to the Organization's requests for joinder.

WHO requests that this complaint be joined with her 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 she fails to show any non-observance of her terms of appointment and fails to establish a cause of action. With respect to her allegations relating to an exceptional extension of her 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 9 January 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 11 October 2019 of the Director-General dismissing her appeal against an earlier decision of 16 November 2018. That earlier decision was to

dismiss a request for review by the complainant challenging the decision to separate her from service on 30 September 2018 because she had reached the mandatory age of separation and the rejection of her claim relating to an exceptional extension of her 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 9 July 2018, the complainant was informed that "[...] in accordance with Staff Rule 1020.1, [her] appointment with the Organization will come to an end on [30 September 2018] which marks the date on which [she] 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 her right to do so, the complainant pursued the processes of internal review and appeal challenging her separation in September 2018, culminating in a report of the GBA of 13 August 2019 recommending, by a majority, 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 regulatory framework and the separation procedures were properly followed”. By letter dated 11 October 2019 the complainant was informed that her appeal was dismissed. As noted earlier, this constitutes the impugned decision in these proceedings.

6. The complainant advances what she 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 brought by fifteen complainants including the present complainant 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 9 July 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 the handling of a request for the extension of her appointment beyond retirement age was unlawful. 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.

9. The purported request for an extension arose in the following way. This is the account given by the complainant in her brief. In March 2018 the complainant informed her first-level supervisor of her interest in remaining with WHO until the age of 65. The first-level supervisor agreed that it would be in WHO’s interests for her to remain at least until ongoing projects involving the complainant could be completed. The first-level supervisor sent a memorandum dated 11 April 2018 to the complainant’s second-level supervisor, namely the Global Travel Manager. In her brief, the complainant describes this as “the extension request of 11 April 2018”. The complainant was not sent a copy of this memorandum. The first-level supervisor went on extended sick leave shortly thereafter. On 19 April 2018 the complainant spoke to the Global Travel Manager asking that she be provided with updates on the status of the extension request of 11 April 2018. The Global Travel Manager informed her that he was discussing the issue with senior management. On 13 September 2018, the complainant met with the Director-General. It is to be recalled that the date of the complainant’s separation was to be 30 September 2018. The complainant’s account of that meeting was that they: “met to discuss the complainant’s concerns regarding her employment age. After hearing the complainant’s concerns regarding her early retirement due to the postponement of MAS 65, the Director-General assured her that he would examine her situation.”

10. On 20 July 2018 the complainant filed a request for administrative review. In the administrative review decision dated 16 November 2018, the Assistant Director-General, General Management (ADG/GMG) discussed what had happened with the 11 April 2018 memorandum concerning

the complainant's extension. It was to the effect that senior management discussed the 11 April 2018 memorandum with the Global Travel Manager (the complainant's second-level supervisor) and agreed that there were no exceptional circumstances that would justify pursuing an extension request with the Director-General. They agreed that with proper succession planning they should be able to find a suitable replacement. The matter was then considered closed. The import of the complainant's account of these events was that it was only on reading the decision of 16 November 2018 that the complainant became aware there had been agreement that the extension request would not be pursued.

11. A complainant bears the burden of establishing her or his case, including the evidentiary burden (see, for example, Judgment 4381, consideration 31). For the following reasons, the complainant has failed to establish that an extension request had been submitted on her behalf and was being considered. As found by the GBA's majority no extension request had been submitted by the complainant, or on her behalf, and accordingly an essential element in her challenge to the rejection of her claim relating to the extension request is absent.

12. As noted earlier, the complainant describes in her brief the memorandum of 11 April 2018 as "the extension request of 11 April 2018". This misdescribes the memorandum. In the memorandum the complainant's first-level supervisor who wrote it recounted how he and the complainant's second-level supervisor, the Global Travel Manager, had been discussing in the preceding weeks the extension of appointment of staff generally or the extension of the appointment of the complainant or, perhaps, both. The memorandum, in this respect, is not clear. However, what is clear is that the first-level supervisor was requesting that the Global Travel Manager reconsider the case of the complainant and request a one-year extension for her. The memorandum was, itself, not such a request and the first-level supervisor was proceeding on the assumption that were such a request to be made, it would be made by the Global Travel Manager.

13. Again, as noted earlier, the complainant recounts how on 19 April 2018 she contacted the Global Travel Manager and requested, as she described it, updates on the status of the extension request of 11 April 2018. How she came to know of the memorandum and anything about its contents is not addressed in her narrative. In the conversation of 19 April 2018 with the Global Travel Manager, the complainant was told that he was still discussing the issue with senior management. The appropriate inference to be drawn from this account is that the complainant did not actually speak of “the extension request of 11 April 2018” because it is probable that the Global Travel Manager would have disabused her of belief that such a request had already been submitted. What, more likely, was said by the Global Travel Manager was that whether such a request would be submitted was still being discussed by him and his supervisors.

14. Many months passed and, in the complainant’s narrative, nothing was done by her to ascertain the fate of the extension request submitted, as she says she believed, on her behalf in April 2018. It is to be recalled that she met with the Director-General on 13 September 2018 (two weeks before her impending separation on 30 September 2018) “to discuss the complainant’s concerns regarding her employment age”. What the complainant does not say on her account of this meeting was that she then believed a request for an extension of her appointment had reached him and it was under active consideration bearing in mind that this meeting took place approximately 5 months after she came to know of the memorandum of 11 April 2018, and also bearing in mind that her separation was imminent. Indeed, she does not say that she said anything about the extension request to the Director-General. It can be inferred that the complainant felt sufficiently assured by the Director-General’s statement that he would “examine her situation.”

15. There is no express requirement in the Staff Rules (and, in particular, not in the relevant provision, namely Staff Rule 1020.1.4) that an application for an extension of appointment be made in a specified way. However, there is a procedure for requesting an exceptional extension of an appointment set out in Section III.10.8 of the WHO eManual at

paragraph 20. It provides: “In all cases, requests for extensions must be submitted to the Director-General through the Director, HRD and requests will not be granted for more than one year at a time.” This does not say, expressly, that the request needs to be in writing. However, impliedly it does need to be in writing. The use of the word “submitted” is, in context, a clear pointer to this conclusion. Also, a procedure which requires a request to be made through the Director, HRD, almost certainly needs to be in writing. Virtually inevitably any such request, whether by the staff member concerned or a supervisor on the staff member’s behalf, would need to contain the reasons why the circumstances were exceptional and why it was in the interests of the Organization to grant the extension, in order to persuade the Director-General to do so. Plainly, the Director, HRD is intended to be something more than a “letter box” to pass on requests to the Director-General. Implicit in this arrangement is that the Director, HRD, can provide some preliminary assessment or commentary to assist the Director-General in making the ultimate decision and, in particular, assessing whether the extension would be in the interests of the Organization. It is difficult to conceive of how this scheme could operate if the request could be made orally. It is highly unlikely that it is contemplated a request can be made orally, considered and then transmitted with the attendant risk that the Director, HRD, might misunderstand or misrepresent even innocently what was being put by the person making the request.

16. The complainant was not, at relevant times, prevented from making a written request herself (submitted to the Director, HRD) seeking an extension of her appointment and advancing the reasons given by the complainant’s first-level supervisor and any other reasons she wished to provide. Had she taken this step, the Director-General would have been under a duty to consider the application on its merits and by reference to Staff Rule 1020.1.4 and make a decision whether to meet the request or reject it. This would have been a decision amenable to internal review, appeal and ultimately recourse to the Tribunal. But in the present circumstances, there was no decision on a request to extend the complainant’s appointment reviewable in this Tribunal. There was no extension request. In these circumstances the complainant’s pleas

about a breach of promise as to how such requests would be considered by the Director-General and that the rejection of the request violated the principle of equal treatment or involved an act of retaliation, are moot.

17. It is unnecessary to address WHO's arguments concerning the receivability of this complaint.

18. 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.

19. The complainant has failed to establish that either the decision to separate her from service or the refusal to exceptionally extend her 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