

C.
v.
WHO

138th Session

Judgment No. 4860

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms G. C. against the World Health Organization (WHO) on 18 September 2021 and corrected on 29 November 2021, WHO's reply of 11 March 2022, the complainant's rejoinder of 19 May 2022 and WHO's surrejoinder of 15 August 2022;

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

Having examined the written submissions;

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

The complainant contests the decision not to renew her fixed-term contract upon expiry.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations (UN) programme on HIV/AIDS administered by WHO. She joined UNAIDS in February 2018 under a two-year fixed-term contract. In her letter of appointment of 19 January 2018, UNAIDS Director of Human Resources Management (HRM) stated that she was offered the appointment following the decision of the UN Secretary-General to appoint her as Deputy Executive Director, Management and Governance at UNAIDS, and that her position was classified at the Assistant Secretary-General level. The Director of HRM added that her contract gave no right to, and carried no expectation of renewal.

Pursuant to the departure of the Executive Director, the complainant served as Executive Director ad interim from 6 May 2019 to 31 October 2019. On 1 November 2019, the new Executive Director formally took office.

Late October 2019, the complainant received an email from WHO indicating that her fixed-term contract would expire on 13 February 2020 and that the formalities related to her performance must be completed as a pre-requisite for a contract extension. A few hours later, WHO Human Resources Department informed her that the aforementioned email was an automated message that should not have applied to her and that it was unfortunate that the team did not notice her level and position before sending. The complainant replied the same day that she did not “mind being extended at this point of time and due to what [UNAIDS] ha[d] ahead”.

On 21 November 2019, the complainant’s assistant requested UNAIDS HRM to follow up with the Executive Director regarding the renewal of the complainant’s contract. HRM indicated that it would do so. The Executive Director orally informed the complainant on 6 December 2019 that the latter would be separated from service on 13 February 2020.

On 10 December 2019, the new UNAIDS Executive Director stated in her opening speech to UNAIDS Programme Coordinating Board that the complainant would leave UNAIDS at the end of her contract in early 2020 without providing any further details. On the same day, she notified the complainant in writing that the UN Secretary-General had endorsed her recommendation not to renew her contract beyond its expiry date. Consequently, she would be separated under Staff Rule 1040.1.1 and the effective date of separation was 13 February 2020. In order to provide her with the statutory three-month notice period, she would be paid the equivalent of one additional month of salary in lieu of notice. UNAIDS Director of HRM wrote to the complainant on 12 December 2019 providing information on the separation procedure. Later that month, the complainant asked the Executive Director to be granted time to “reorient” herself professionally. Following some discussions, she

was placed on special leave with full pay in early January 2020 until the end of her contract.

On 3 February 2020, the complainant requested a review of the non-renewal decision of 10 December 2019. Her request having been rejected, she filed an appeal with the Global Board of Appeal (GBA) on 4 July 2020 alleging inter alia that the non-renewal decision was based on errors of fact, overlooked essential facts and that the reasons on which it was based were neither objective, nor valid. She also alleged abuse of authority, violation of applicable law, failure to act in good faith and failure to abide by its duty of care. She asked to be provided with all correspondence between, on the one hand, the UNAIDS Executive Director, the UNAIDS Executive Office and/or other related parties to the UN Secretary-General, and, on the other hand, the UN Executive Office of the Secretary-General concerning the non-renewal decision arguing that it was unclear if the decision was made by the UNAIDS Executive Director, or the UN Secretary-General. She added that she was not provided with objective and valid reasons.

In its report of 18 May 2021, the GBA rejected the complainant's request for documents as being too broad and not required to review her appeal. It noted that the offer of appointment, that she accepted, was clear as it explicitly provided that her fixed-term contract was for two years and that it gave "no right to, and carry[ed] no expectation of renewal". The non-renewal decision was within the Executive Director's discretionary authority, and the reason given was valid and objective. Indeed, on 6 December 2019, the UNAIDS Executive Director verbally explained to the complainant that her contract was not renewed because of changes to the senior leadership team with some functions being reassigned. According to the GBA, there was no breach of a rule of form or procedure, no error of fact, no essential facts were overlooked, no evidence of bias, prejudice, bad faith or evidence that UNAIDS' conduct amounted to humiliating treatment or a breach of duty of care. The GBA acknowledged the difficult circumstances unfolding at the time the complainant undertook her duties as Executive Director ad interim. In this context, a decision not to renew her contract must have been unexpected and may have come across as unappreciative of

her work. The two issues were nevertheless separate and the decision not to renew her contract did not take away the credit she deserved for managing effectively UNAIDS through a difficult time, as well as for building trust and generating a positive working environment where there had been none. The GBA recommended dismissing the appeal.

On 21 June 2021, the UNAIDS Executive Director endorsed the GBA's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to reinstate her as of 13 February 2020 and pay her all salary, benefits, pension contributions, emoluments and other entitlements she would have received had she not been illegally separated from service. She also seeks the extension of her contract for two years, and reimbursement of all her medical expenses related to UNAIDS unlawful treatment. She further seeks an award of "actual, consequential, material, moral and exemplary damages", and reimbursement of the full costs she incurred in pursuing her claims against UNAIDS. She claims an award of interest at the rate of 5 per cent per annum from 13 February 2020 until the date of full payment on all awarded sums. Lastly, she asks to be granted any such other relief as the Tribunal deems necessary and appropriate.

The Organization asks the Tribunal to reject the claims relating to reimbursement of her medical expenses and the claim for material, moral and exemplary damages insofar as it is based on her health and medical treatment as irreceivable for failure to exhaust internal means of redress, time-barred or beyond the scope of the present complaint. It also asks the Tribunal to reject the complaint as otherwise unfounded.

CONSIDERATIONS

1. The complainant was appointed as Deputy Executive Director, Management and Governance, a very senior member of staff of UNAIDS from 18 February 2018 until she separated from the organisation on 13 February 2020. She had been employed under a two-year fixed-term contract which was not renewed. Central to this complaint is the complainant's challenge to the lawfulness of the non-

renewal decision. The general background is sufficiently set out in the preceding account of the facts. However, it should be noted at the outset that her grievances were considered in the internal appeal by the Global Board of Appeal (GBA) which issued a detailed opinion dated 18 May 2021 recommending the dismissal of her appeal. This recommendation was accepted by the Executive Director of UNAIDS in the impugned decision of 21 June 2021.

2. The complainant has requested oral proceedings. However, in view of the ample and sufficiently clear written submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and will not, therefore, grant this request.

3. In her brief, the complainant advances the grounds of her challenge under five general headings. The first general heading is “[p]rocedural irregularities”, which contains three subheadings. The first subheading is “[d]ecision taken without authority”, the second subheading is “[n]o time-limitation of [the] Complainant’s appointment” and the third subheading is “[b]elated notification of non-renewal”. The second general heading is “[m]aterial irregularities” and again there are several subheadings. The first subheading is “[v]iolation of the Complainant’s right to be given valid reasons” which, in turn, contains three subheadings, namely “[t]he alleged lack of the required ‘skillset’”, “[t]he alleged need to [change] the dynamics and build a new leadership team” and lastly “[t]he alleged need to restructure and reassign some functions”. The second subheading is “[p]rejudice and bias”. The third general heading is “[u]nlawful relief of functions and placement on special leave with pay” and the fourth general heading is “[b]reaches of the duty of care”. The fifth and final general heading is “[d]amages” though the brief goes on to address a procedural matter, namely the production of documents.

4. The first issue raised by the complainant in her pleas under the first general heading of “[p]rocedural irregularities”, is whether the “decision [was] taken without authority”. The gravamen of this plea is that the evidence points to the decision not to renew her contract having

been taken by the Secretary-General of the United Nations and not by the Executive Director of UNAIDS. It was common ground that the person with authority to make that decision was the Executive Director. The defendant organisation does not dispute that discussions took place between the Secretary-General and the Executive Director about the future employment of the complainant in New York on or about 16 November 2019. On the complainant's account of the facts, she spoke to the Executive Director on 6 December 2019 who "suddenly informed [her] that she would be separated from service at the expiry of her appointment on 13 February 2020". There was no issue that a conversation to this effect took place.

5. Four days later, on 10 December 2019, the Executive Director wrote to the complainant in, relevantly, the following terms:

"As I advised you on Friday 6 December 2019, I have recommended to the United Nations Secretary-General not to renew your appointment beyond its expiration date, i.e. 13 February 2020, to which he has agreed. Consequently, you will be separated under Staff Rule 1040.1 and the effective date of your separation will be 13 February 2020."

6. Plainly this is an important document constituting formal advice to a senior member of the organisation that a decision had been made not to renew her contract with the legal effect she would separate from service shortly thereafter. It is true that the Executive Director had only recently taken up the position. However, even so, it could have been expected that she would have paid particular attention to the language used in this letter. For present purposes, it contained two significant elements. The first element was that she had made a recommendation to another person about what course of conduct should be followed. The use of the language of "recommendation" could imply suggesting or proposing to the other person that the other person make a decision aided or assisted by the recommendation. The second element was recording that the other person "ha[d] agreed", that is to say had agreed with the recommendation. "Agreeing" with the recommendation could, in the context of this letter, mean one of two things. Either the Secretary-General had made the decision by accepting or acting on the recommendation or, alternatively, the Secretary-

General was indicating his approval with the course of action being proposed which would have involved the decision actually being made by the Executive Director. When this exchange, which doubtless took place, between the Secretary-General and the Executive Director occurred is not known. But it is more likely than not, it occurred before Friday 6 December 2019 because it had underpinned, from the Executive Director's perspective, what she told the complainant.

7. If, on balance, the evidence warranted a conclusion that the decision not to renew had been made by the Secretary-General, it would have been made without authority, as the complainant contends. She seeks the production of documents in these proceedings (also requested in the internal appeal, but a request declined by the GBA) which may well cast light on who actually made the decision in December 2019. But ultimately any irregularity in this respect, has been remedied by the decision on the review the complainant sought in February 2020. The decision in the review dated 6 April 2020 was plainly made by the Executive Director. In the review decision she speaks of "my decision not to renew your appointment" which is supportive of the conclusion she made the decision in December 2019, though one cannot entirely dismiss the possibility that this is a self-serving statement. Of more fundamental importance is that in the review decision the Executive Director "upheld" the decision not to renew the complainant's appointment. That is to say, she made, or made again, a decision not to renew.

8. Judgment 4531 is relevant. In that case, a decision was made to reject a request by the complainant to extend her employment beyond normal retirement age. The initial decision to reject the request was not made by the executive head of the organisation who was the repository of the power to make the decision. However, the decision in a review, requested by the complainant, was to the same effect and was made by the executive head. As the Tribunal observed in consideration 11:

“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.”

Thus, in this matter, the decision of the Executive Director in the review remedied such flaws as may have existed in the initial decision, with the result that there was a decision not to extend by the person in authority to make that decision, namely the Executive Director. Accordingly, the plea that the decision not to renew the complainant’s appointment was not authorised is unfounded and should be rejected.

9. The topic raised by the second subheading under the first general heading is that there was “[n]o time-limitation of [the] Complainant’s appointment”. On its face, this plea is untenable though appears to be a prelude to later pleas. It is put in terms that the appointment letter does not exclude the renewal of the complainant’s appointment after its initial two years. That is doubtless true. But equally true is that the letter makes quite clear that the appointment was a fixed-term one for a period of two years and additionally that “[s]uch an appointment gives no right to, and carries no expectation of renewal”. It was open to UNAIDS to proceed on the basis, as it did, that there might be no renewal but obviously on the footing that if warranted, the contract could be renewed. This plea is unfounded and should be rejected.

10. The topic raised by the third subheading under the first general heading is “[b]elated notification of non-renewal”. It is true the complainant should have been notified of the non-renewal decision in mid-November 2019 and was not notified until mid-December 2019. However, she was paid one additional month’s salary in lieu of notice as provided for in Staff Rule 380.1.3. Accordingly, no legal consequences arise in this case from the failure to notify in a timely way and certainly there is no evidence of any moral injury suffered by the complainant as a result of this failure which might warrant an award of moral damages.

11. Under this subheading there was also a plea that the complainant had a legitimate expectation that her contract would be renewed and that its renewal was a formality. The short answer to this argument is to be found in the Tribunal's case law. In Judgment 3448, consideration 7, the Tribunal said:

“A person who is employed on a fixed-term contract does not have a right or a legitimate expectation to a contract extension. Accordingly, the Tribunal will not interfere with a decision not to extend such a contract unless the decision was made without authority, or in breach of a rule of procedure, or was based on a mistake of fact or of law, or overlooked some essential fact or amounted to an abuse of authority.”

The plea of a violation of a legitimate expectation is unfounded and should be rejected.

12. As noted earlier, under the second general heading of “[m]aterial irregularities” in the brief, there are several subheadings. The first subheading is “[v]iolation of the Complainant's right to be given valid reasons” which, in turn, contains three sub subheadings, namely “[t]he alleged lack of the required ‘skillset’”, “[t]he alleged need to [change] the dynamics and build a new leadership team” and lastly “[t]he alleged need to restructure and reassign some functions”. These three last-mentioned topics were referred to in the reasons given by the Executive Director in the review but are contested by the complainant.

13. Three preliminary points should be made, derived from the Tribunal's case law. The first is that reasons should be given for a decision not to extend a fixed-term contract. The second and related point is that the reason not to extend must be a valid one (see Judgment 2991, consideration 13). The third point concerns the limited role of the Tribunal in reviewing the reasons. As the Tribunal said in Judgment 4495, consideration 15:

“The obligation to give reasons for a non-renewal have been variously described as providing ‘valid reasons’ (see Judgment 3769, consideration 7), and not ‘arbitrary or irrational’ reasons (see Judgment 1128, consideration 2). While the reasons given in this case may be contestable, they were not of a character to sustain a conclusion they were, for example, not valid or

arbitrary or irrational. As the Tribunal observed in Judgment 3586, consideration 6: ‘the Tribunal’s scope of review in a case such as this is limited. Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization’s freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, [consideration] 11). The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, [consideration] 6, 2861, [consideration] 83, and 2850, [consideration] 6).’”

14. The just cited case bears similarities to the present. The executive head who made the decision not to renew or extend had only recently taken up the post and the decision not to renew or extend was influenced by his vision for the organisation, though this is contested in these proceedings. Additionally, the complainant in that case, as the complainant in this case does also, sought to challenge the reasons by demonstrating they were wrong or illusory. But as the Tribunal said in consideration 10: “[...] this line of argument and analysis effectively invites the Tribunal to enter the territory which it has eschewed, namely substituting its own assessment for that of the organisation”.

15. In the present case, and importantly, the GBA reviewed the reasons given and concluded that it “was satisfied that the reasons provided for the [Executive Director]’s decision constituted valid and objective grounds”. As recently explained in Judgment 4764, consideration 7, its conclusions should be given considerable deference by the Tribunal. The Tribunal is not satisfied that the complainant, in her pleas, has established that the reasons given were not valid reasons in the way discussed in the case law. This observation is subject to the question of alleged prejudice and bias, which is now addressed.

16. The complainant contends the decision not to renew her contract was infected by prejudice and bias. This is tantamount to an allegation of bad faith which must be proved and cannot be assumed (see Judgment 4505, consideration 9). In addition to the matters raised concerning the validity of the decision she points substantially to events during the tenure of the previous Executive Director. There is no obvious relevance at all of those events and the subsequent decision by the new Executive Director not to renew the complainant's contract. One matter referred to involving decision making of the new Executive Director was the direct appointment of a new chief of staff without competition unlike her appointment which had followed a selection process. He was a Swedish national, as is the complainant. At the time, Sweden had ceased being a donor to UNAIDS as it had been, in a significant way, in the past. Her thesis was that the non-renewal decision concerning her was to "make space for the political appointment of another Swedish national [which would] [...] enhance [Sweden's] willingness to provide UNAIDS funding in the future". This proposition is entirely speculative.

17. The next matter to be addressed concerns what is said to have been an unlawful relief of functions and placement on special leave with pay. Even if unlawful, which may be doubted, it is difficult to see what damage was occasioned by the decision. It was made to accommodate a request by the complainant, and it was agreed to by the complainant. No question of moral injury, and thus moral damages, can arise.

18. The last issue which should be addressed is an allegation that the organisation had breached its duty of care. The focus of this contention was the time and way in which the non-renewal of the complainant's contract was decided and announced. The complainant's pleas on this topic are without substance. The Tribunal accepts the organisation's contentions that the tone and timing of all communications in relation to the non-renewal were reasonable, respectful and appropriate and, in any event, were matters within the discretion of the Executive Director.

19. The complainant has not established any unlawfulness attending the decision not to renew her contract and the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER