

NINETY-SECOND SESSION

In re Ball

Judgment No. 2106

The Administrative Tribunal,

Considering the complaint filed by Mr Andrew Lee Ball against the World Health Organization (WHO) on 24 November 2000 and corrected on 5 March 2001, the WHO's reply of 5 June, the complainant's rejoinder of 12 September, and the Organization's surrejoinder of 26 October 2001;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant was born in 1957 and is of Australian nationality. In 1991 he joined the WHO at grade P.3 as a short-term professional in the Programme on Substance Abuse (PSA), which in December 1998 became the Substance Abuse Department (SAB). From 1 April 1995, the complainant was given a fixed-term contract as a medical officer at grade P.4.

Management changes took place within the PSA as from 1996. An Acting Programme Manager took over on 5 May 1998 until October 1998 when a new Programme Manager took up her duties. In late October a one-page "*aide-mémoire*" was left on a shared printer and subsequently leaked to persons outside the PSA. Believing that the complainant was involved, the Programme Manager, his first-level supervisor, sent him a memorandum dated 9 November 1998 in which she asked him to place his signature against one of two statements, indicating whether or not he had been responsible for conveying the information outside the department. He signed against the "no" option and in a memorandum of even date denied involvement. By a memorandum of 4 June 1999 his supervisor issued the complainant with a written warning as she believed he had acted contrary to her instructions by circulating copies of a draft training manual he had previously been responsible for developing.

In mid-1999 his supervisor and former supervisor both completed the complainant's appraisal report for the period from 1 April 1998 to 31 March 1999. His former supervisor's evaluation covered the period up to 30 November 1998. The report contained unfavourable comments and included a recommendation that his within-grade salary increase be withheld for twelve months. In November 1999, at his own request, the complainant was transferred to the Department of Child and Adolescent Health and Development.

On 2 December 1999 the complainant appealed to the Headquarters Board of Appeal against the contents of his 1998-99 appraisal report and the decision to withhold his step increase. In its report of 16 June 2000 the Board found that the performance report had not been drawn up in accordance with Staff Rule 530. The Board recommended cancelling the report but since it would not be feasible to ask his supervisors to produce another one it recommended offering the complainant one of three alternatives. It also recommended quashing the decision to withhold the step, and removing the memorandum of 9 November 1998 from all relevant files.

By a letter of 18 August 2000, which the complainant impugns, the Director-General told the complainant that his step would be retroactively restored and he would receive the corresponding amount of salary due. She agreed that the memorandum of 9 November 1998 would be removed from his personal file, but said she would stay a decision with regard to his appraisal report. The Working Group on Harassment would first examine his allegations of harassment and provide her with a report and a recommendation. When that had been done she would decide on appropriate action with regard to the appraisal.

The complainant filed his complaint with the Tribunal on 24 November 2000. He was informed in a letter of 4 June 2001 that, as announced in cluster notes 2001/9 and 2001/13, a Grievance Panel had been established and would

deal with his case.

B. The complainant contends that the Organization failed to treat him with dignity and respect and offended against the Staff Rules and Regulations by issuing a "false and defamatory performance evaluation". He presses the pleas put forward in his internal appeal and wants the relief he sought therein to be granted in full.

First, he alleges personal prejudice on the part of two supervisors and two other officials in the Department. He says he suffered "multiple instances" of psychological harassment and misconduct, which the Organization did nothing to prevent, thereby failing in its duty of care towards him.

Secondly, he submits that his 1998-99 appraisal report overlooked essential facts and cited inaccurate ones. Neither supervisor gave concrete examples of his alleged unsatisfactory performance. The report had no "proper basis" and ultimately caused him to lose his within-grade increase, and affected his chances of promotion. The contents of the report constitute further evidence of "malice ... and discrimination" against him.

Thirdly, he argues that the discriminatory actions of his supervisors were "directly aimed" at preventing him from obtaining a transfer, and caused him moral and professional injury.

He wants the Tribunal to order the quashing of the 1998-99 appraisal report and order the WHO to provide an "unbiased and unprejudiced" evaluation of his performance over the same period. He wants to be allowed to work on any issues commensurate with his experience and expertise, even those involving substance abuse. He further seeks: apologies from his supervisors and an admission from the WHO that his supervisors' actions amounted to psychological harassment and to "misconduct" under Staff Rule 110.8; the reclassification of his current post to grade P.5, or promotion to that grade as from 25 November 1997 and an amount representing the loss of salary incurred through not having his post reclassified at that time; the removal from the files of the memorandum he was asked to sign on 9 November 1998; the destruction of the written warning dated 4 June 1999; moral damages for "defamation" and for stress experienced as a result of the harassment; an investigation into his supervisor's "interference" with his applications for two posts; interest on sums found due from 1 December 1999; 25,000 United States dollars in costs; and such other relief as the Tribunal deems necessary.

Lastly, he requests the Tribunal to call for the presentation by the Organization of correspondence or documents, in whatever form, that would shed further light on the subject matter of his grievances.

C. The Organization replies that it was the decision to withhold the step increase that triggered the complainant's internal appeal. Since his step increase has been retroactively restored he shows no cause of action with respect to that decision.

The Organization argues that his allegations of harassment were being investigated within the framework of an established procedure. Delays were encountered in appointing a panel and at the time of filing the reply the Director-General had not yet received the Grievance Panel's advice. As she has so far not taken a final decision on the harassment issue, that aspect of the complaint remains irreceivable, as does any claim to moral damages arising therefrom. Upon receipt of the Panel's report the Director-General will also take a decision on the 1998-99 appraisal report. Meanwhile, that aspect of his complaint is irreceivable too.

The same applies to his request for the destruction of the warning of 4 June 1999. The Grievance Panel will consider whether the issuance of that memorandum constituted an act of harassment. The Acting Director of Human Resources Services told the complainant in a letter of 7 February 2001 that no action could be taken regarding that warning until the Grievance Panel had examined his case. The Director also told the complainant that the memorandum of 9 November had been removed from his file and destroyed; the complainant has therefore obtained satisfaction on that point and no longer shows any cause of action. On the matter of his claim to the reclassification of his current post there is an established procedure that he can follow. His claim for the reclassification of the post he formerly occupied in PSA was considered to be outside the scope of his internal appeal, and so it too is irreceivable.

On the merits, the Organization says that even though the complainant disagrees with comments made by his two supervisors in the challenged report, the comments were substantiated. Both supervisors provided specific examples of areas where improvement was needed. He had the full benefit of due process with respect to his appraisal. He was well informed of his supervisors' concerns, and had had an opportunity to discuss them.

It rebuts that his supervisor interfered with his candidature for two posts. The complainant did not apply for one of them; as for the other, he was informed of his non-selection in late 1999 but did not appeal against that decision.

D. In his rejoinder the complainant says that it is unreasonable for the Organization to argue that there has been no final decision on the harassment issue. The failure of the Grievance Panel and the Director-General to come to a final decision must be deemed a constructive denial of his request for relief, thereby rendering his claim of harassment receivable. The delay was encroaching on his ability to present his case fully to the Tribunal. He takes note of the Organization's failure to provide the documentation he requested in his complaint.

He denies having obtained satisfaction with regard to the memorandum of 9 November 1998. His former supervisor in the SAB Department revealed in a statement submitted to the Grievance Panel on 6 August 2001 that she still had a copy.

E. In its surrejoinder the Organization presses its pleas. At the date of filing its surrejoinder the Director-General had not yet taken a decision on the allegations of harassment or the maintaining of the appraisal report. The Grievance Panel's work is nonetheless under way, and a report will be forthcoming. It denies there has been a "constructive denial" of the complainant's claim of harassment or the related request for relief. It has taken longer than initially envisaged to settle the matter but this is through no ill will on the part of the Organization.

The WHO attaches a copy of the rebuttals which were produced by those the complainant accuses of harassment and submitted to the Grievance Panel. It concedes that in her rebuttal his former supervisor states that she still has a copy of the signed memorandum of 9 November 1998, but points out that the copy which was placed on the complainant's confidential personnel file was removed and destroyed. Other documents cannot be removed until the Panel has completed its work.

CONSIDERATIONS

1. This complaint originated from an unfavourable annual appraisal report. The report covered the period from 1 April 1998 to 31 March 1999 and was drawn up by the complainant's first level supervisor, Dr J., and contained comments made by his former supervisor, Dr A. It resulted in a decision to withhold the complainant's within-grade salary increase, as recommended in the report.

2. The complainant appealed to the Headquarters Board of Appeal against the appraisal report and the decision to withhold his step increase. He claimed that for years he had been subjected to harassment in the form of "mobbing". In its report dated 16 June 2000 the Board found fault with the appraisal on procedural grounds. It noted that the relevant provisions, namely Staff Rule 530, and the instructions given on the form had not been complied with, particularly as the complainant's supervisors did not discuss their comments with him before including them in his appraisal report. Dr A. had retired in November 1998 so no discussions were possible with him. Dr J. had followed Dr A. in recommending the withholding of the salary increase, but without verifying his statements or obtaining supporting evidence. There was no evidence that the content of the report was discussed either between Dr J. and the complainant or between the complainant and his second-level supervisor. The Board noted that while a supervisor has the right to "give a poor appraisal", there must be prior discussion and clear supportive evidence. Also, a second-level supervisor has a duty to investigate any such appraisal by a first-level supervisor, and there was no indication that this was done.

3. The Board took up matters relating to the content of the report. It noted that the complainant's previous appraisals cast no doubt on his professional competence in his field of expertise. It examined the complainant's allegations relating to harassment and in particular it noted that certain main issues, as well as numerous smaller incidents described by the complainant and not refuted by the Administration, combined to create a "hostile working environment" which justified the complainant's "perception of harassment".

4. The Board concluded that the complainant's appraisal had not been developed in accordance with Staff Rule 530 and was therefore invalid. It considered that the perception of harassment on the part of the complainant was justified. It underlined that this perception should have been taken seriously but the Organization failed to do so over a long period of time.

5. The Board principally recommended that the contested appraisal be quashed and that the complainant should be

given the choice between: (a) the withdrawal of the appraisal; (b) its withdrawal plus the insertion of an explanatory note in his file; or (c) a new report with all negative comments removed. It recommended restoring his within-grade salary increase retrospectively; removing the contested memorandum dated 9 November 1998 from all files; and paying him 7,500 United States dollars as compensation for stress.

6. By a letter of 18 August 2000 the Director-General decided that:

(i) The complainant's step should be restored retroactively on the ground that it was "not clear that the shortcomings referred to in the appraisal outweighed the conclusions about the quality of [his] work".

(ii) The memorandum of 9 November 1998 was to be removed from his personnel file.

(iii) The Working Group on Harassment would examine the allegations of harassment and provide her with a report, including a recommendation, following which she would decide on the appropriate action relating to the Board of Appeal's recommendations concerning the appraisal written by his supervisors and the proposed award to the complainant of 7,500 dollars. She would then issue a final decision.

That is the decision impugned.

7. It is first to be noted that many of the complainant's claims for relief do not arise out of the internal appeal and are therefore irreceivable for failure to exhaust the internal means of redress. That goes for the claims in which he seeks the reclassification of his post to P.5 (or, alternatively, promotion); the destruction of the memorandum dated 4 June 1999; an investigation into Dr J.'s interference with his candidature for two particular posts; interest on any sums found due from 1 December 1999; and apologies from his supervisors. The Tribunal will take up matters regarding only the legality of the appraisal, damages, and whether the complainant was subjected to harassment as alleged.

8. In his first argument the complainant criticises the Organization for its failure to prevent the psychological harassment he experienced and which created a work environment that was emotionally and professionally harmful to him.

9. His second argument is that the 1998-99 performance appraisal must be quashed because it did not conform to the Organization's evaluation procedure. He was not afforded an opportunity to discuss matters with his supervisors. The complainant invites the Tribunal to adopt the conclusion of the Board of Appeal that the appraisal was not conducted in line with Rule 530 and should therefore be considered invalid.

10. His third argument is that the discriminatory actions of his supervisors obstructed his efforts to obtain a transfer and caused him harm. But this argument is irrelevant as it is outside the parameters of the complaint.

11. The complainant also requests the production of documents relating to his allegation of harassment and administrative action taken by Dr J.

12. The Organization asserts that it was the decision to withhold the complainant's within-grade salary increase that triggered his internal appeal, but since that decision was overturned and his step increase was retroactively restored, the complainant no longer has a cause of action. It states that it is taking the harassment allegations seriously and that the Director-General has appointed a Grievance Panel to investigate the matter and draw up a report. She has not yet received the report and no decision on the merits has been taken. Since there is no final decision his claims based on harassment are irreceivable.

13. It further argues that the Director-General has also deferred taking a decision about the performance appraisal report pending receipt of the Grievance Panel's report, and, meanwhile, since no final decision has been taken, the claims related to his appraisal are also irreceivable.

14. The Tribunal considers that not only the withholding of the within-grade salary increase but also the actual performance appraisal report itself were challenged by the complainant and appealed to the Board of Appeal. Therefore it is not true that once the step increase was restored the complainant's cause of action disappeared. There still remains the issue of the appraisal report itself.

15. The allegations of harassment are being looked into. The Organization says delays were encountered in

appointing a panel to carry out this investigation. The Director-General decided in August 2000 to refer the complainant's claims of harassment to an investigative panel, and it now appears from the Organization's surrejoinder dated 26 October 2001 that the Grievance Panel has commenced its work.

16. The issue of harassment and its impact on the negative aspects of the appraisal report as well as the validity of the report still remain to be dealt with as does the claim for compensation. When a final decision is made on these matters the complainant will have a right to appeal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet