

*Registry's translation,
the French text alone
being authoritative.*

116th Session

Judgment No. 3296

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. O. against the World Health Organization (WHO) on 21 April 2011 and corrected on 20 May, WHO's reply of 23 August, the complainant's rejoinder of 6 October as corrected on 10 October 2011, WHO's surrejoinder of 10 January 2012, the complainant's further submissions of 31 January and WHO's final observations thereon of 28 March 2012;

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 neither party has applied;

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

A. The complainant is a former WHO officer who retired on 30 June 2007. He worked from 31 August 1991 to 31 December 1995, on the basis of a temporary contract which was regularly renewed, as Library Assistant at WHO's Regional Office for Africa. On 1 April 1996 he was appointed to a post at grade BZ.05. On 1 April 1997 he was transferred within the Publication and Language Services Unit to

a post at grade BZ.4, which was reclassified at grade BZ.05 on 1 January 2001. On 10 November 2004 he was given a service appointment as of 1 July 2003. On 1 December 2006 he was informed that he had been appointed with immediate effect to a post of Assistant (Documents) at grade BZ.07.

As the complainant considered that he had “exhausted the ordinary internal means of redress”, on 13 April 2007 he submitted an “appeal [...] seeking compensation and the reconstruction of [his] career” to the Chairman of the Regional Board of Appeal. He contended that he had been performing the duties of the post of Assistant (Documents) – for which he had already applied in June 1995 – since the retirement of its incumbent, but that he had received extra pay only for the period between 1 July 2004 and 1 April 2005. He also accused the Head of the Publication and Language Services Unit of misuse of authority, harassment, of having treated him in a humiliating manner and of having displayed “indifference” after one of his colleagues had physically assaulted him in September 2004. He asked to be appointed retroactively to the above-mentioned post and he claimed damages.

In its report of 21 April 2008 the Regional Board of Appeal recommended that the appeal be dismissed on the grounds that it was irreceivable, since the complainant was not challenging an administrative decision taken within the 60-day period preceding the filing of his statement of intention to appeal. The Regional Director informed the complainant by a letter of 31 October 2008 that he had decided to approve the Board’s recommendation.

In December 2008 the complainant challenged the Regional Director’s decision in proceedings before the Headquarters Board of Appeal (HBA). He explained that it was not until 20 February 2007, when he received a form dated 17 January 2007 entitled “Personnel Action”, that he realised that his appointment to the post of Assistant (Documents) was not retroactive and that he would not therefore receive any extra pay for having performed the duties of that post between 2 April 2005 and 30 November 2006. He submitted that his appeal of 13 April 2007 was receivable, since he had filed it within

60 days of the receipt of that form. He also enlarged upon the pleas which he had entered before the Regional Board of Appeal. He requested the reconstruction of his career since 1995 and the payment of 73 million African Financial Community (CFA) francs in compensation for the various injuries which he considered he had suffered – in particular he accused WHO of “having made [him] ill” – and nominal damages in the amount of one franc for the failure to apply the WHO Staff Regulations and Manual.

Following an exchange of correspondence between the parties, the Headquarters Board of Appeal decided, in accordance with paragraph 3.2 of the formal process for the investigation of harassment allegations, to hold the appeal in abeyance and to refer the aspect regarding the alleged harassment of the complainant to the Grievance Panel. However, the Co-chairs of the Panel considered themselves unable to examine a grievance from a staff member of a regional office.

In its undated report, which was forwarded to the Director-General on 8 November 2010, the Board stated that it was “difficult” to determine whether the memorandum of 1 December 2006 or the form of 17 January 2007 constituted the “final decision” for the purposes of deciding whether the appeal of 13 April 2007 was receivable. As there was some uncertainty, it considered that the appeal was receivable. It disregarded the questions of the complainant’s state of health and his allegation of assault, since in its opinion they did not fall within its jurisdiction. On the merits, the Board found that the complainant had performed the duties of Assistant (Documents) since 1 July 2004 and considered that “it was unfair of the Administration to ignore the work [that he had done] after 1 April 2005”. It emphasised that the complainant had been left “hovering between doubt, fear and hope” and that he had never received any clear answers to his numerous requests to have his position regularised. The Board therefore recommended that he should be paid damages in the amount of 6,000 United States dollars and financial compensation equivalent to half of the difference in salary

between grades BZ.07 and BZ.05 for the period from 1 April 2005 to 1 December 2006.

The Director-General informed the complainant by a letter of 25 January 2011 that, in her opinion, the form of 17 January 2007 did not constitute a new final decision reopening the time limit for an appeal. She therefore maintained that the appeal of 13 April 2007 was irreceivable and, for that reason, the complainant's request for the reconstruction of his career was likewise irreceivable. She further informed him that, in her view, the allegation of harassment was also irreceivable, since no complaint had been filed within the time limits specified in the cluster note setting out the official process for the investigation of harassment allegations. Furthermore, she considered that the Headquarters Board of Appeal was right to conclude that the complainant's claims relating to his state of health and to the physical assault which he had allegedly suffered did not fall within its jurisdiction. Lastly, she stated that the Board's recommendation that the complainant should receive financial compensation for the work he had done since 1 April 2005 seemed to have been guided by a "concern for fairness". For this reason, before closing the file, but without prejudice to her previous conclusions, she advised the complainant that she had decided to grant him, as an exceptional measure, extra pay equivalent to the difference in salary between grades BZ.07 and BZ.05 for the period from 1 April 2005 to 30 November 2006. She added that this sum would bear interest of 8 per cent per annum as from 30 November 2006. That is the impugned decision.

B. The complainant submits that the appeal which he filed on 13 April 2007 with the Regional Board of Appeal was receivable, because it was directed against the form of 17 January 2007 which he had received on 20 February 2007. In his view, this form contained more information than the memorandum of 1 December 2006, which did not reflect his terms of employment or the changes resulting from his appointment to the post of Assistant (Documents).

Citing numerous examples, he accuses the Administration of WHO's Regional Office for Africa of having used "stratagems" in order to delay his appointment to the aforementioned post. In particular, he contends that, although several competitions were held, they never led to any appointments being made, despite the fact that he always headed the shortlist of candidates and the post in question remained vacant for more than six years, during which time he had to undertake the duties pertaining to that post, whereas in accordance with Staff Rule 320.4 he ought not to have had to undertake them for more than 12 months. He adds that according to that Rule he should have received extra pay in May 2001, at the beginning of the fourth consecutive month of service in the post of Assistant (Documents). He submits that given his ability, experience and satisfactory service record, he ought to have been appointed directly to that post.

In addition, the complainant alleges that he was harassed by the Head of the Publication and Language Services Unit whom he blames for creating "an offensive working atmosphere" and who, he says, threatened him orally and in writing. He also asserts that he was the victim of discrimination and numerous unjust acts during his career at WHO and states, for example, that his transfer in 1997 to a post at a lower grade than that which he had previously held caused him injury. He explains that, after being physically assaulted on 3 September 2004, he filed a statement of intention to appeal with the Regional Board of Appeal on 20 December 2004, to which he never received any reply, which, in his opinion, is evidence of the lack of respect and consideration displayed towards him. Lastly, he submits that he is suffering from a work-related disease.

In addition to the retroactive reconstruction of his career, the complainant claims 35 million CFA francs, corresponding to the emoluments he would have received if he had been appointed earlier to the post of Assistant (Documents), 15 million francs in compensation for the injury which he suffered on account of the fact that for 20 months he performed the duties of the aforementioned post without extra pay, 5 million francs in compensation for harassment, 10 million francs in compensation for physical assault, 10 million

francs in compensation for the work-related disease from which he alleges he is suffering, 15 million francs in punitive damages and nominal damages in the amount of one franc for the failure to apply the WHO Staff Regulations and Manual.

C. In its reply WHO contends that the complaint is irreceivable, because the complainant's appeal of 13 April 2007 was filed out of time. As it considers that he is in fact challenging his appointment to the post of Assistant (Documents), it argues that he did not submit his appeal to the Regional Board of Appeal within the 60-day time limit laid down in Staff Rule 1230.8.3, which began to run on 1 December 2006, when he received notification of his appointment to that post. WHO adds that the form received by the complainant on 20 February 2007 did not constitute a new final decision within the meaning of Staff Rule 1230.8.1, which would have reopened the time limits for lodging an appeal, since its purpose was merely to confirm the complainant's appointment.

In addition, it submits that, to the extent that the complainant's claims go beyond those which he made during the internal appeal procedure, they are irreceivable.

WHO contends that the complainant's allegation that the Head of the Publication and Language Services Unit harassed him is irreceivable, since he made it for the first time in his appeal of 13 April 2007, which was itself irreceivable. It points out that, after the alleged assault in September 2004, the complainant did not file a complaint within the time limit prescribed by paragraph 2.1 of the official process for the investigation of harassment allegations. It adds that the complainant's plea that he is suffering from a work-related disease is also irreceivable, as it is unconnected with his appointment to the post of Assistant (Documents) and he mentioned it for the first time in the proceedings before the Headquarters Board of Appeal. Lastly, WHO submits that the complainant's financial claims are irreceivable to the extent that they exceed those submitted in the proceedings before the Board.

On the merits, WHO emphasises that, in accordance with Staff Regulation 4.3, as far as is practicable, the recruitment of staff members is made on a competitive basis. The complainant could not therefore be appointed to the post of Assistant (Documents) without a competition.

D. In his rejoinder the complainant endeavours to show that his complaint is receivable. On the merits he reiterates all his submissions. He also submits that no reasons were given for the decision to transfer him to a post at a lower grade in 1997.

E. In its surrejoinder WHO maintains its position. It explains that the complainant's transfer in 1997 took place in the context of an extension of his probationary period on account of unsatisfactory service.

F. In his further submissions, the complainant asks the Tribunal to disregard three documents which WHO has annexed to its surrejoinder on the grounds that, in his opinion, one of them is a forgery and the other two have been produced in breach of the adversarial principle.

G. In its final observations WHO rejects the allegation that one of the documents annexed to its surrejoinder is a forgery. It comments that the complainant could not be unaware of the existence of one of the two other documents because he is its author.

CONSIDERATIONS

1. The complainant joined WHO on 31 August 1991 on a temporary appointment as Library Assistant at the WHO Regional Office for Africa (AFRO).

On 1 April 1996 he obtained a fixed-term appointment as an Administrative Clerk (post 3.1885) at grade BZ.05.01.

On 1 April 1997 he was transferred to the post of Clerk-Stenographer (3.3131).

On 1 July 2004 his contract was converted into a service appointment.

After successfully participating in a selection procedure, he was appointed on 1 December 2006 to post 3.2390 and promoted to grade BZ.07.01 with effect from that date.

On 20 February 2007 he received a Personnel Action form (the "PA") confirming his assignment to post 3.2390 and his promotion to grade BZ.07.01 as of 1 December 2006. The complainant retired on 30 June 2007 on reaching the mandatory age of retirement.

2. On 13 April 2007 the complainant notified his intention to appeal.

In his statement of 14 May 2007, addressed to the Chairman of the AFRO Regional Board of Appeal, he contended that he had performed the duties of post 3.2390, ad interim, since January 2000, but that he had received no financial compensation for doing so until July 2004, and that he had continued to perform the same duties ad interim, without being directly appointed to the post in question, from 1 April 2005 until his appointment on 1 December 2006. He said that he had learnt that his new contract was not retroactive only on receiving the "PA" on 20 February 2007. For that reason, he asked for extra pay for the periods between January 2000 and 1 July 2004 and between 1 April 2005 and 1 December 2006, since he had received a special post allowance for the period between 1 July 2004 and 1 April 2005.

He maintained that he had been the victim of unfair treatment, misuse of authority, discrimination, intolerance and harassment by the WHO Administration and he emphasised that his post been advertised five times before he had been finally appointed on 1 December 2006.

3. In its report of 22 April 2008, the Regional Board of Appeal found that the complainant's appeal was time-barred, as his statement of intention to appeal had been filed out of time. On 31 October 2008

the Regional Director endorsed the report and decided to dismiss the appeal on those grounds.

4. On 12 December 2008 the complainant lodged an appeal with the Headquarters Board of Appeal (HBA) under Staff Rule 1230.1. He complained of his supervisor's personal prejudice against him, incomplete consideration of the facts, failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules and breach of the terms of his contract. He also accused WHO of having made him ill and alleged that he had been physically assaulted.

5. In its report to the Director-General, the HBA noted that, as "the complainant's submissions contained repeated allegations of harassment", in accordance with the process for investigating that particular matter, the file "had been forwarded to the Headquarters Grievance Panel and held in abeyance", but that the Director-General, for the reasons set forth in her letter of 19 August 2010, had requested the Board's Chairman to complete the examination of the appeal. Lastly, the HBA considered that the complainant's state of health and the physical assault of which he alleged he had been the victim did not fall within its jurisdiction.

With regard to the receivability of the appeal, the HBA "considered that it was difficult to determine the date of the final decision". "[S]ince there was some uncertainty, but wishing to examine the merits of the appeal in order to render a fair and just opinion on the case and issue a sound recommendation enabling the Director-General to resolve the case [...] [the Board] deemed the appeal receivable on the basis of the 'PA' of 20 February 2007." It recommended "the payment to the complainant of financial compensation equivalent to half of the difference between the complainant's salary in grade BZ.05 and the salary of post No. 3.2390 at grade BZ.07 backdated to the period between 1 April 2005 and 1 December 2006 with the related benefits, and the payment of damages in the amount of USD 6,000".

As for the remaining claims, after “regretting the fact that the complainant had not submitted a formal appeal in order to challenge the failure to take action on a request for the reclassification of his post submitted in December 2004”, and “finding that the complainant had not appealed against the decision of 3 May 2005, although he had been informed in writing that [...] payment of [the special post allowance] would end on 1 April 2005”, the HBA “considered that these measures could no longer form the subject of a legally receivable appeal”.

6. The Director-General advised the complainant by a letter of 25 January 2011, which constitutes the impugned decision, that she would not follow the Board’s reasoning with regard to the receivability of the appeal which he had submitted to the Regional Board of Appeal on 13 April 2007, on the grounds that the “PA” was not a new final decision within the meaning of Staff Rule 1230.8.1 and that it did not open a new time limit for filing an appeal with the Regional Board of Appeal. With regard to the request for reclassification and the discontinuation of the special post allowance to which the HBA had referred, she endorsed the latter’s conclusion that these measures had not been challenged within the prescribed time limits and she accepted the Board’s recommendation that these measures should be deemed time-barred. Lastly, she agreed with the HBA that the complainant’s allegations concerning his state of health and physical assault did not fall within its jurisdiction.

Nevertheless, the Director-General, “guided by a concern for fairness”, authorised as an exceptional measure under Staff Rule 320.4 the payment to the complainant of extra pay for the extended period during which he had performed ad interim the duties of post 3.2390, equal to the difference between the salary of post 3.2390 at grade BZ.07 and the complainant’s salary at grade BZ.05, for the period between 1 April 2005 and 30 November 2006, together with interest of 8 per cent per annum calculated from 30 November 2006 to the date of payment.

7. The complainant asks the Tribunal to “order the retroactive reconstruction of [his] career [...] for the loss in earnings in terms of salary and allowances, which injury he suffered during the years in which he was unfairly given a job title and placed in a grade below those of the [...] professional duties of a documentation assistant [...] lecturer with the requisite qualifications, ability and experience, which he would have obtained if the Administration had not deliberately and unjustly taken improper steps to block post 3.2390, involving professional duties, the post to which the Administration assigned Mr [A. I. O.], a less qualified librarian at grade P3.10, whom the complainant replaced after his retirement on 31 January 2000 up until 30 June 2007”. He also requests sums of money on various grounds.

8. WHO submits that the complaint is irreceivable, since the internal appeal did not meet the conditions laid down in the relevant provisions of the Staff Rules; as a result, the various claims and allegations contained in the complaint must likewise be deemed irreceivable.

It adds that in the proceedings before the Tribunal the complainant has submitted new claims which were absent from his submissions at the internal appeal stage.

9. The relevant provisions of the Staff Rules read as follows:

– Staff Rule 1230.1

“1230.1 Subject to the provisions of Rule 1230.8, a staff member may appeal against any administrative action or decision affecting his appointment status on the grounds that the action or decision complained of resulted from one or more of the following factors:

1230.1.1 personal prejudice [...];

1230.1.2 incomplete consideration of the facts;

1230.1.3 failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules, or the terms of his contract;

1230.1.4 improper application of [...] post classification standards.”

– Staff Rule 1230.8

“1230.8.1 No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action.

[...]

1230.8.3 A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case.

[...]”

10. Article VII, paragraph 1, of the Statute of the Tribunal specifies that:

“A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.”

In accordance with the Tribunal's case law, to satisfy this requirement the complainant must not only follow the prescribed internal procedure for appeal, but must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure (see, for example, Judgment 1469).

11. In the instant case, the complainant filed an appeal with the Regional Board of Appeal in order to seek compensation and the reconstruction of his career following his appointment to post 3.2390 and his promotion to grade BZ.07.01 on 1 December 2006. He said that he had “exhausted the ordinary internal means of redress”.

12. The question is whether, when he lodged his internal appeal on 13 April 2007, the complainant had complied with the requirements of the pertinent, above-mentioned provisions, in

particular those related to the time limit of 60 calendar days after receipt of the notification of the disputed final action.

13. On 1 December 2006 the complainant had received a memorandum notifying him of his appointment to post 3.2390 and his promotion to grade BZ.07.01 with effect as of that date, followed on 20 February 2007 by the “PA”, which the HBA regarded as an action which could be challenged in proceedings before the Regional Board of Appeal.

The Tribunal must therefore determine which of these documents, the memorandum of 1 December 2006 or the “PA” of 20 February 2007, could be regarded as the notification of a final action within the meaning of Staff Rule 1230.8.1.

14. A comparison of the two documents shows that they contain the same information, i.e. the complainant’s appointment to post 3.2390 and promotion to grade BZ.07.01 as of 1 December 2006. Precedent has it that “[a] decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits” (see Judgment 2818, under 9).

It is plain, in view of the foregoing, that contrary to the finding of the HBA, the “PA” of 20 February 2007 could not be regarded as a new final action within the meaning of Staff Rule 1230.8.1.

Moreover, in Judgment 2739, under 15, the Tribunal already found that “the purpose of the [“PA”] form is to simply record the changes to the terms and conditions of employment upon a change in a staff member’s status or entitlements and is not [...] central to a determination of a staff member’s conditions of employment”.

15. The only action which would have been open to appeal before the Regional Board of Appeal was therefore the memorandum of 1 December 2006. The appeal filed with the Regional Board of Appeal on 13 April 2007 was therefore submitted after the prescribed time limit of 60 days and was consequently irreceivable.

16. Since the complainant's internal appeal was time-barred, it follows that his complaint must be declared irreceivable for failure to exhaust internal remedies.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2013, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Claude Rouiller
Seydou Ba
Patrick Frydman
Catherine Comtet