Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B. Y.

v.

WHO

124th Session **Judgment No. 3870**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. B. Y. against the World Health Organization (WHO) on 23 June 2014 and corrected on 13 August 2014, WHO's reply of 20 January 2015 and the email of 16 March 2015 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 may be summed up as follows:

The complainant alleges that he was promised promotion to grade D-2.

The complainant, who entered the service of WHO in 1989, was appointed to a position at grade D-1 in 1997. He was appointed to the post of Director of the WHO Iraq Programme with effect from 1 September 2003. He was informed by a letter of 22 March 2004 that the administrative process to assign that title to him had been completed and that in all other respects his terms and conditions of employment remained unchanged. In the context of restructuring exercises, he was reassigned to other grade D-1 positions in 2005 and 2009.

After raising the matter of a promise allegedly made to him by the Director-General in September 2003 to promote him to grade D-2, the complainant was called to a meeting on 9 February 2010, in the course of which his attention was drawn to the fact that the letter of 22 March 2004 clearly stated that his new duties did not entail any change in grade. He was told that his current grade was D-1, but that if any evidence emerged showing that a promise had been made, his case could be reopened.

During a second meeting on 16 June 2010, the complainant was handed a copy of an exchange of emails dated 25 September 2006, which showed that the Director-General *ad interim* had approved a proposal to reassign him to a grade D-2 post, but he was told that that was not enough to warrant a change in the Administration's position. After the complainant had again contacted the Administration on 8 October 2010, he was informed by an email of 10 October 2010 that the "final administrative decision" was that his grade was D-1. On 26 November 2010 the complainant submitted an appeal against this decision to the Headquarters Board of Appeal (HBA) in which he requested his promotion to grade D-2 as from 1 September 2003.

The HBA issued its report in March 2014. It considered that the email of 10 October 2010 "merely confirmed" the decision of 22 March 2004, that the complainant had not challenged that decision within the prescribed time limit and that the appeal was time-barred. The HBA therefore recommended that it should be dismissed as irreceivable. By a letter of 8 May 2014, which constitutes the impugned decision, the Director-General informed the complainant, who had been promoted to grade D-2 in July 2012, that she had decided to endorse the recommendation of the HBA and therefore dismissed his appeal.

The complainant seeks the setting aside of this decision and his retroactive promotion to grade D-2 as from 1 September 2003 with all the legal consequences that this entails. He claims interest on the sums allegedly owed to him by WHO. He also requests compensation for moral and professional injury and for delay in the internal appeal proceedings. Lastly, he claims costs.

WHO submits that the complaint is irreceivable because it is time-barred and, subsidiarily, that it is unfounded.

CONSIDERATIONS

1. In accordance with Article VII, paragraph 1, of the Statute of the Tribunal, a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations. The Tribunal's case law has made it clear that, 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 3296, under 10).

2. At the material time, WHO Staff Rules 1230.8.1 and 1230.8.3 read *in parte qua* as follows:

> "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."
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> "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 [...]."

3. The complainant, who had raised the matter of a promise allegedly made to him in September 2003 by the Director-General to promote him to grade D-2, was called to several meetings in the course of 2010. He was ultimately informed by an email of 10 October 2010 of the "final administrative decision" that his grade was D-1. On 26 November 2010 the complainant submitted an appeal against that decision to the HBA in which he requested his promotion to grade D-2 as from 1 September 2003.

4. In its report, the HBA noted inter alia that the complainant had been notified of a decision regarding his appointment to a grade D-1 position by a letter of 22 March 2004, which had been signed by the Manager of the Management Support Unit. In its opinion, this "notification" could be considered to be a final action within the meaning of Staff Rule 1230.8.1. The Board took the view that the contents of the email of 10 October 2010 were the same and that it dealt with the same issue as the letter of 22 March 2004. It inferred from this that the email "merely confirmed" the decision of 22 March 2004 and that the appeal was time-barred because the complainant had not challenged that decision within the prescribed sixty-day time limit.

Although some doubt on this point was certainly permissible, the Tribunal considers that the aforementioned email of 10 October 2010 did in fact constitute a new decision.

According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) and not a purely confirmatory decision, the following conditions are to be met: the new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and it must relate to different issues from the previous one or be based on new grounds (see Judgments 660, 2011, under 18, and 3735, under 4).

It is true that the decision contained in the email of 10 October 2010 confirmed that of 22 March 2004 but, as it was taken after an examination of the complainant's request for the honouring of a promise allegedly given to him, it was implicitly based on new grounds, to wit the rejection of that request. It therefore constituted a new decision. Moreover the Tribunal notes that the email of 10 October 2010 referred to the "final administrative decision", which plainly indicated that it was appealable.

5. The appeal against the decision of 10 October 2010 was filed within the sixty-day time limit laid down in Staff Rule 1230.8.3. Hence the Director-General was wrong to follow the recommendation of the HBA in deeming it time-barred.

6. The impugned decision must therefore be set aside.

Since the HBA has not examined the substance of the complainant's internal appeal, the case must be remitted to the Organization in order that the Global Board of Appeal may, within a time limit which the Tribunal will set at three months as from the public delivery of this judgment, examine the merits of that appeal and, in particular, the question of whether the promise on which the complainant relies was in fact made and, if so, the scope of that promise.

7. The complainant contends that the internal appeal proceedings leading to the impugned decision were abnormally long. The Tribunal can only share this view, since no decision was taken until 8 May 2014 on the internal appeal of 26 November 2010, in other words until almost three and a half years had elapsed. The length of these proceedings was therefore excessive.

8. The unlawful nature of the impugned decision and the excessive length of the proceedings caused the complainant moral injury, which may be fairly redressed by awarding him compensation in the total amount of 5,000 Swiss francs.

9. As the complainant succeeds in part, he is entitled to costs, which the Tribunal will set at 1,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 8 May 2014 is set aside.
2. The case is remitted to the Organization for action as indicated under 6, above.
3. WHO shall pay the complainant 5,000 Swiss francs in compensation for moral injury.
4. It shall also pay him costs in the amount of 1,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 May 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ