L.

v.

WHO

127th Session **Judgment No. 4096**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. E. L. against the World Health Organization (WHO) on 7 February 2017 and corrected on 17 March, and WHO's reply of 26 June 2017, the complainant having failed to file a rejoinder within the allocated time;

Considering the document provided by WHO on 2 October 2017 at the Tribunal's request, a copy of which was forwarded by the Registrar to the complainant's counsel that same day;

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 challenges the failure to act on his request to update his terms of reference (TORs) and the subsequent failure to take interim measures to protect him from harassment and retaliation by his supervisors.

On 25 February 2014 the complainant, who had joined the WHO Regional Office for the Western Pacific (WPRO) on 1 December 2011, requested the formal updating of his TORs in his electronic Performance Management and Development System form (ePMDS).

On 8 September 2014 the complainant filed a Notification of Intention to Appeal against the implied rejection of his "request", alleging a breach of his terms of appointment. He also alleged personal prejudice and harassment by his supervisors and that he was retaliated against for previous statements he had made as a whistle-blower. In its report of 9 January 2015 the Regional Board of Appeal (RBA) recommended that immediate action be taken to review the complainant's TORs and that his allegations of harassment and his statements as whistle-blower be submitted to the Director of Internal Oversight Services (IOS).

By a letter of 23 February 2015 the Regional Director informed the complainant that he had decided to follow the RBA's recommendations. His post description would therefore be reviewed and validated by a desk audit, and his "case" would be submitted to IOS for consideration in accordance with the Policy on the Prevention of Harassment and the Whistle-blower Protection Policy.

On 20 April 2015 the complainant appealed against the decision of 23 February 2015 before the Headquarters Board of Appeal (HBA). He also challenged the fact that "no action [was] being done to mitigate such stressful situation" and that he was still working under the same supervisors. The complainant asked for a fair and proper evaluation of his performance and for the Administration to take "actions as deemed necessary [...] for whistle-blowers and those harassed".

By a letter of 26 February 2016 the complainant was informed that, as his position was abolished due to a restructuring, he would be separated from service on 31 May 2016.

In its report of 15 September 2016 the HBA recommended that the appeal be dismissed on the ground that it was clearly irreceivable. The HBA found that the initial appeal was not directed against a final action within the meaning of Staff Rule 1230.8.1 and that it was also time-barred. Moreover, with respect to the complainant's TORs, the appeal had become moot as the Regional Director had agreed to undertake a desk audit.

On 9 November 2016 the Director-General decided to accept the HBA's recommendation to dismiss the complainant's appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to order his reinstatement as well as a public apology. He claims 130,000 United States dollars in moral, exemplary and punitive damages, remuneration for the services rendered beyond his TORs and reimbursements for health-related expenses, as well as all other benefits he would have received if his post had been properly classified. In addition, he asks for a decision on his allegations of harassment and statements as whistle-blower.

WHO requests the Tribunal to dismiss the complaint in its entirety as irreceivable. It further argues that the new matters raised in the complaint, in particular the complainant's claim to reinstatement, cannot be said to fall within the scope of the original claims.

CONSIDERATIONS

1. The complainant impugns the Director-General's 9 November 2016 decision to dismiss his appeal before the HBA as irreceivable. In that decision, the Director-General concurred with the 15 September 2016 report of the HBA stating, inter alia, that the irreceivability of the complainant's appeal before the RBA impacted on the appeal before the HBA. She stated: "[b]ased on the [HBA]'s findings as a whole I endorse its conclusions and I dismiss the appeal and all claims for redress. I confirm that the decision of the Regional Director, as outlined in his letter to you dated 23 February 2015 [...], stands."

2. The HBA considered that the complainant's appeal before the RBA was irreceivable as the complainant was not impugning a final action as required under Staff Rule 1230.8.1. The HBA also considered that in order to have formalized his request for review of his TORs, the complainant had to follow the applicable administrative procedures regarding reclassification as indicated in "WHO eManual III.20 Annexes, Annex 2.A – Procedures and delegated classification authority for position classification review". The HBA decided, "for argument's

sake, to hypothetically consider the [complainant]'s ePMDS comments to be a formal request to review his TORs" and noted that in that case any failure by the Administration to respond to such a request would result in an implicit decision of rejection hypothetically appealable under Staff Rule 1230.8.2(2). However, the HBA noted that the complainant's comments were made on an ePMDS form dated 25 February 2014 and therefore considered that, as his appeal to the RBA was filed on 8 September 2014, that appeal "was unequivocally time-barred". The HBA also considered that, as the Regional Director had agreed to undertake a desk audit to review the complainant's TORs, the complainant "had no further cause of action, thus rendering his appeal moot". The HBA concluded that "the appeal was clearly irreceivable" and recommended that the Director-General "dismiss the appeal and all claims for redress in their entirety without consideration of the merits".

3. The complainant filed the present complaint against the Director-General's 9 November 2016 decision on the following grounds: the Director-General erred in denying his appeal based on non-exhaustion of administrative remedies under Staff Rule 1230.8; the Administration should have done more to assist him in using the appropriate procedures and, substantially, he did exhaust internal remedies; harassment, discrimination, bullying, abuse, public humiliation, unfair treatment, threats, and intimidation; unlawful disregard of his duties and responsibilities amounting to constructive dismissal; and abuse of discretion and authority. The complainant also points out that his post was abolished and that he was separated from service with effect from 31 May 2016.

4. The complainant requests the Tribunal to order:

– oral hearings;
– the Administration to make a public apology;
– reinstatement;
– an award of moral, exemplary and punitive damages in the amount of 130,000.00 United States dollars;
– an award of material damages;

– that a decision be taken on his harassment claim;
– that action be taken with regard to the request for protection of whistle-blowers submitted to IOS and the Office of Compliance, Risk Management and Ethics (CRE);
– that a decision be taken with regard to his request for protection from retaliation;
– and sanctions "for all those to be found guilty [...]".

5. As the written submissions are sufficient for the Tribunal to reach a reasoned decision, and the complaint hinges on a question of law, the Tribunal rejects the request for oral hearings.

6. The complainant initially challenged the failure by his supervisors to act on his written request to update his TORs. By a decision of 23 February 2015 the Regional Director, in agreement with the recommendations of the RBA, ordered that the complainant's post description be reviewed and validated by a desk audit and that the complainant's case be submitted to IOS for consideration under the Policy on the Prevention of Harassment and the Whistle-blower Protection Policy.

7. In her final decision of 9 November 2016 the Director-General, taking into account the report of the HBA, noted that the decision of the Regional Director had addressed the concerns raised by the complainant in his appeal before the RBA. She confirmed the decision of the Regional Director that the complainant's post description be reviewed and validated by a desk audit and that the complainant's allegations of harassment be submitted to IOS for consideration.

8. The Tribunal considers that the impugned decision was in favour of the complainant, since it confirmed the Regional Director's order to initiate two procedures as requested by the complainant. Accordingly, the complainant had to await the outcome of those procedures and, if not satisfied, he had to appeal internally, in accordance with the Organization's rules, against the decisions which concluded

those procedures. In light of the above, he did not have a cause of action to challenge the impugned decision.

9. The claims against the decisions concerning the abolition of the complainant's post and his separation from service, which occurred, respectively, in February and May 2016, after the complainant had filed his appeal before the RBA (8 September 2014), are irreceivable as they do not challenge final decisions within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. Accordingly, the requests for reinstatement and for the award of damages must be rejected.

10. The complainant requests that the Tribunal order the Administration to make a public apology. The Tribunal is not competent to make such an order (see, for example, Judgments 2742, consideration 44, and 3597, consideration 10). This request is therefore rejected.

11. As regards the request that a decision be taken on the complainant's harassment claim, the Tribunal notes with concern that when the Organization submitted its reply at the end of June 2017, two years and two months after the complainant had lodged his appeal before the HBA, the harassment proceedings were still ongoing.

12. The complainant's requests for protective measures are beyond the Tribunal's competence. These requests had to be submitted to IOS or to CRE.

13. In light of the above considerations, the complaint must be dismissed in its entirety as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ