**T.**

***v.***

**WHO**

**131st Session** **Judgment No. 4378**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. T. against the World Health Organization (WHO) on 5 July 2018 and corrected on 8 August, WHO's reply of 16 November 2018, the complainant's rejoinder of 31 January 2019 and WHO's surrejoinder of 30 April 2019;

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 impugns the decision to close after an initial review and without conducting a formal investigation his harassment complaint against the WHO Internal Oversight Services (IOS).

At the time of the events leading to this complaint, the complainant was assigned as the WHO Country Representative to Thailand. In March 2015 Ms E.B., an Ethiopian national whom the complainant and his wife had engaged as a domestic worker, alleged that she had suffered assault and mistreatment at the hands of her employers and that her salaries had been withheld. She lodged a complaint with the Thai Police accusing the complainant and his wife of human trafficking. The matter was reported in the media. Having carried out an investigation into Ms E.B.'s allegations, the Thai Police informed the WHO Representation in Thailand, by letter of 29 May 2015, that a non-prosecution order would be issued for the complainant and his wife, as neither had performed any

acts in violation of human rights, or the laws of Thailand, and Ms E.B.'s allegations had been found to be unsubstantiated. The non-prosecution order was issued on 23 July 2015 and the Thai Police relevantly informed the WHO Representation in Thailand on 5 August 2015.

Between 11 and 22 April 2015, IOS carried out a field mission to Thailand to investigate allegations of misconduct by the complainant in connection with the employment of Ms E.B. In its Investigation Report, issued on 24 June 2015, IOS found, inter alia, that the complainant had exercised poor judgment by not having adequate documentation regarding the payment of salary to Ms E.B. and the terms and conditions of her employment; had failed to ensure compliance with local laws related to the employment of domestic workers and to take sufficient action to protect WHO's reputation; had abused his authority, misused WHO resources and violated WHO's rules on several occasions, in particular, by using an official WHO vehicle for personal purposes and requesting a WHO driver to run personal errands for him and his family, by including on a shortlist for a WHO position an acquaintance, and by requesting WHO staff to make personal flight and hotel reservations for him, his family and friends.

IOS concluded that through his actions the complainant had contravened the Staff Regulations, the WHO Fraud Prevention Policy, several provisions of the Ethical Principles and Conduct of Staff, the Standards of Conduct for the International Civil Service, and Information Note 28/2011 "Authorization to drive an Official Vehicle". IOS also concluded that, while there was insufficient information to substantiate or refute Ms E.B.'s allegations of mistreatment, its findings were sufficient to warrant an examination by the Administration of the complainant's conduct. IOS recommended that the Regional Director of SEARO and the Director of the Human Resources Department review the Investigation Report with a view to taking appropriate administrative and/or disciplinary action in relation to the "substantiated findings"; that they consider any other action in relation to the "other findings"; and that they also take action to recover from the complainant the amount owed to WHO for having used a WHO official vehicle for personal purposes.

On 13 July 2015 the complainant was informed that he would be charged with misconduct for inadequate handling of the allegations against him and improper use of WHO resources for personal benefit. He was provided with a copy of the Investigation Report and was asked

to provide his response, which he did on 11 August. On 8 October 2015 he was informed that the Director-General had found the charges to be substantiated and had decided to impose upon him the disciplinary sanction of a reduction in grade (from P.6 to P.5). He was also informed that he would be reassigned to the SEARO Regional Office in New Delhi, India. Meanwhile, the complainant was provided, on 1 August 2015, with a copy of the 29 May 2015 letter from the Thai Police confirming that no charges would be pressed against him and his wife. However, his request for other records and unredacted versions of documents relied upon by IOS during the investigation was denied and was only granted on 19 October 2015, after he had filed an appeal with the SEARO Regional Board of Appeal (RBA) against the refusal to provide him with the requested documents.

On 22 December 2015 the complainant submitted a formal complaint of harassment against IOS. The Ethics Program Manager of the Pan American Health Organization (PAHO), who was appointed as an external reviewer to carry out an initial review, considered in his report of 21 September 2016 that, as the harassment complaint was directed against an entire department, it was irreceivable and that, in any event, the IOS's investigation into the allegations against the complainant was a legitimate and proper exercise of its investigative mandate. He recommended that the case be closed without a full investigation against IOS on the ground that there was not sufficient basis to proceed with such investigation. In a letter of 19 December 2016, the Director-General informed the complainant of her decision to close his harassment complaint without taking any further action on the basis that: (i) it was irreceivable and he did not have a cause of action, as there was no provision in the WHO Policy allowing a harassment complaint to be brought against an entire department; and (ii) he had not demonstrated a *prima facie* case of harassment.

Following the rejection of his request for an administrative review of the 19 December 2016 decision, the complainant filed an appeal with the Global Board of Appeal (GBA) on 22 June 2017. In its report of 6 February 2018, the GBA found that, as the external reviewer had properly examined the complainant's harassment complaint against IOS and considered that it did not raise a *prima facie* case of harassment, the decision to close the case without any further action was appropriate. By a letter of 6 April 2018, the Director-General informed the complainant

of his decision to accept the GBA's recommendation and to reject his appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to find that the report of the external reviewer is inaccurate and/or erroneous and that IOS and/or IOS staff members harassed him, and/or that they are guilty of misconduct. Alternatively, he asks the Tribunal to order the Director-General to appoint an external independent and impartial investigator to carry out a new investigation into his allegations of harassment. He claims 20,000 Swiss francs in moral damages and 35,000 Swiss francs for costs.

WHO asks the Tribunal to dismiss the complaint as irreceivable to the extent that it raises matters litigated in separate proceedings and unfounded in the remainder.

## CONSIDERATIONS

1. This is the first of three complaints the complainant has filed with the Tribunal emanating from the IOS's April 2015 formal investigation of allegations of misconduct made against the complainant. The present complaint stems from the complainant's 22 December 2015 formal complaint of harassment against "WHO Internal Oversight Services" (IOS). In the harassment complaint, the complainant identified actions taken by IOS in its formal investigation of allegations of misconduct against him that he claims constituted harassment and abuse of power.

2. The complainant requests the joinder of the present complaint with his other two complaints. As the present complaint, which is directed against the closure of his harassment complaint, raises specific issues, the request is rejected.

3. As the complainant's harassment complaint was directed at IOS, the Director-General appointed an external reviewer to conduct an initial review of the harassment complaint. In his 21 September 2016 report, the external reviewer noted that at paragraph 3.1.1 of the WHO Policy on the Prevention of Harassment (WHO Policy) harassment was defined as "any behaviour by a staff member that is directed at another staff member" and has the effect of offending, humiliating or intimidating that other staff member. The external reviewer also noted that at

paragraph 3.1.4, the WHO Policy stated that "[h]arassment may involve a group and may occur among and between all levels of staff members". The external reviewer found that as there was no basis in the WHO Policy to bring a harassment complaint against an entire department or entity, the complaint of harassment did not have a cause of action and, accordingly, it was irreceivable *ab initio*. Nonetheless, the external reviewer conducted an initial review of the substance of the complaint and found that there was not a sufficient basis in the complaint to proceed with a harassment investigation against IOS. The external reviewer recommended that the complainant's harassment complaint be closed.

4. At this juncture a preliminary observation is necessary regarding the external reviewer's finding that the complainant's harassment complaint was irreceivable.

It is understandable why the complainant's formal harassment complaint was directed against IOS. He was not necessarily informed who from that department was involved in his case. The fact that the complainant's harassment complaint was directed against the entire IOS did not absolve WHO from investigating (see Judgment 3347, consideration 14; see also Judgment 4207, consideration 15), as the complaint could readily be construed as targeting the persons within IOS who had dealt with the complainant's case, even if their identity was known only to the Administration. Furthermore, the Tribunal notes that paragraph 3.1.4 of the WHO Policy provides that "[h]arassment may involve a group". Finally, WHO cannot ignore that the case law of the Tribunal recognizes institutional harassment (see Judgments 3250, 4111, 4243 and 4345) and that it should take this into account when interpreting its own rules. Accordingly, the external reviewer's finding that the complainant's harassment complaint was beyond the scope of the WHO Policy and was, therefore, irreceivable is an error of law. However, this error of law does not have any impact on the outcome of the present complaint, as the external reviewer also conducted an initial review of the substance of the complainant's harassment complaint, as provided in the WHO Policy.

5. On 19 December 2016, the Director-General informed the complainant of her decision to close his harassment complaint without taking any further action for two reasons. First, as there was no provision in the WHO Policy permitting a complaint to be brought against an

entire department or entity, he did not have a cause of action and, therefore, the complaint was irreceivable. Second, having regard to the external reviewer's considerations and conclusions in his report, the Director-General agreed with the external reviewer's recommendation that the complainant's complaint against IOS should be closed, as it did not disclose a *prima facie* case of harassment, and stated that no further action would be taken in relation to the complaint.

6. The complainant submitted a request for an administrative review of the Director-General's decision in which he maintained that: (a) he did not have an obligation to name respondent(s); (b) the external reviewer had an obligation to allow him to complete the complaint, if staff members had to be named; (c) a harassment complaint may be addressed against a department; (d) his right to be heard was violated; (e) the external reviewer incorrectly appreciated the purpose and scope of the initial review; and (f) both the external reviewer's report and the Director-General's 19 December 2016 decision were tainted by errors of law and fact.

7. In the 12 April 2017 administrative review decision, the ADG/GMG observed that pursuant to Staff Rule 1225.1 the purpose of the review was "to determine whether the contested final administrative decision ha[d] resulted in the non-observance of the [complainant's] terms of appointment including all pertinent Staff Regulations and Staff Rules, and to assess whether the matter c[ould] be resolved". The ADG/GMG addressed in detail the complainant's submissions and concluded that he agreed with the external reviewer's report and the Director-General's decision, and that the contested decision did not result in the non-observance of the terms of the complainant's appointment, including the pertinent Staff Regulations and Staff Rules. As well, the ADG/GMG did not discern any basis to alter or set aside the decision.

8. On 22 June 2017, the complainant lodged an internal appeal with the GBA against the administrative review decision. As set out in the GBA report, in his appeal, the complainant submitted that the IOS's investigation of his conduct overlooked exculpatory evidence and the IOS investigator committed gross misconduct. He also submitted that his complaint of harassment was not properly investigated by the external reviewer and it was improperly dismissed on procedural grounds without

fully examining the facts. He also alleged that the IOS's investigation violated his right to be heard, failed to review relevant facts, and entertained *ex parte* communications.

9. In its 6 February 2018 report, the GBA considered that the complainant's appeal was receivable, as provided in the relevant Staff Rules and eManual provisions, and noted that the Administration had not challenged the receivability of the appeal. The GBA also noted that in the administrative review decision, the harassment complaint was found to be irreceivable *ab initio*. The GBA observed that this conclusion did not impact the receivability of the appeal. In its report, the GBA did not address the receivability of the harassment complaint.

10. The GBA went on to consider the scope of the appeal, that is, whether the Director-General reached the proper conclusion not to investigate the complaint of harassment. The GBA set out a chronology of the facts leading up to the appeal and the relevant provisions in the WHO Policy. The GBA divided its analysis of the appeal into three parts: (i) whether the complainant's harassment complaint made out a *prima facie* case of harassment against IOS personnel; (ii) whether the external reviewer properly understood his mandate; and (iii) alleged additional errors in the external review of the complaint.

11. Following a detailed examination of the complainant's submissions, the GBA concluded that the external reviewer properly found that the harassment complaint did not make out a *prima facie* case. As to whether the external reviewer properly understood his mandate, the GBA considered the complainant's submission that the review examined whether the IOS's actions affected the outcome of the investigation when it should have determined whether the complaint made out a *prima facie* case of harassment. The GBA found that, as reflected in his report, the external reviewer properly understood his mandate. The GBA observed that it was appropriate for him to examine whether the actions of IOS may have fallen within the usual performance of its duties in view of paragraph 3.1.6 of the WHO Policy; that the external reviewer did not find any evidence of impropriety during the investigation; and that any errors during the investigation should be dealt with through the appeal process.

The GBA concluded that the external reviewer had fully discharged his mandate by examining the claims of harassment in the complaint and in finding that the investigation "was a legitimate and proper exercise of [the IOS's] investigative mandate in WHO"; and that the complaint "should be closed [as] it d[id] not raise a legitimate cause of action that require[d] any further review or action".

12. As to the alleged errors by the external reviewer, the complainant submitted that the external reviewer erred by failing to provide him with an opportunity to comment on the draft report or the emails he had received from IOS. As well, the external reviewer overlooked his counsel's 1 June 2016 letter, in which his counsel submitted that IOS possessed exculpatory evidence that it omitted from its investigation report, which violated the complainant's right to be heard and supported a finding of harassment.

13. The GBA found that these submissions were without merit. The GBA observed that the WHO Policy did not require the sharing of the initial review report with the complainant before the report was completed. Additionally, the WHO Policy did not require that all the evidence collected during the review had to be shared with the complainant before a decision was taken as to whether an investigation should be launched.

14. Lastly, the GBA considered the 1 June 2016 letter, noted above, in which the complainant's counsel referred to a letter of April 2015 from the Ethiopian Community in Bangkok concerning the complainant's good character and the positive appearance of his domestic worker in the community that was provided to IOS during the investigation. The complainant submitted that IOS concealed the letter by not referring to it in the Investigation Report. As well, the external reviewer erred, according to the complainant, because the letter established that IOS had "positive exculpatory evidence that the allegations proffered against [the complainant] by his former domestic worker were unfounded". The GBA found that there was no merit to these submissions. It observed that the Investigation Report did not conclude that the domestic worker's allegations against the complainant were substantiated. However, the Investigation Report did find that the complainant did not have adequate documentation regarding the terms of her employment and he had not informed himself of Thailand's national laws concerning domestic

employees. Accordingly, the letter was not exculpatory in relation to the final conclusions of the investigation. In these circumstances, it was not necessary for the external reviewer to refer to it in his report.

15. The GBA concluded that the external reviewer properly examined the complainant's harassment complaint against IOS and found that it did not raise a *prima facie* case of harassment. Thus, it was appropriate to close the matter without further action. The GBA recommended that the Director-General dismiss the appeal in its entirety. In his 6 April 2018 decision, the Director-General endorsed the GBA's findings and conclusions, accepted its recommendation and dismissed the appeal. This is the impugned decision.

16. In the present complaint, the complainant advances five submissions that will be dealt with in turn. First, the complainant claims that his harassment complaint was receivable. The Tribunal has already addressed this issue in consideration 4, above. Moreover, the Tribunal notes that, contrary to the complainant's assertion, the GBA, in its report, did not deal with the receivability of the harassment complaint itself.

17. Second, the complainant contends that his claim of harassment contained ample evidence that would have warranted a full investigation by IOS. The complainant argues that the external reviewer's finding that there was no *prima facie* evidence that would warrant a thorough investigation of his harassment complaint is "incorrect" and the Administration's subsequent decision to close the proceedings based solely on a "preliminary enquiry" was unlawful. In his complaint, the complainant identified six actions by IOS that, he asserts, warranted a full investigation and show that IOS, in fact, harassed him. The following are the alleged actions by IOS:

(a) IOS had ample evidence at hand to refute the allegations of mistreatment of the complainant's domestic worker. Instead of accounting for such evidence, IOS devoted, in its Investigation Report, some 23 pages to a lurid and detailed exposition of Ms E.B.'s unfounded allegations and concluded that "the information obtained by IOS [was] insufficient to substantiate or refute maltreatment of [the complainant's] domestic worker" and "sufficient to warrant consideration by Management with respect to [the complainant's] ethical conduct";

(b) IOS concealed the existence of key exculpatory evidence obtained by the Thai Police;

(c) IOS redacted the Thai Police Interview Report, annexed to its Investigation Report, and thereby concealed that in the early phases of its investigation, allegations by Ms E.B. to the Thai Police were untrue. Also, by redacting the Thai Police Interview Report, IOS concealed the existence of a letter from the Ethiopian community testifying that the allegations proffered by the domestic worker against him were untruthful;

(d) IOS omitted to mention and to annex to its Investigation Report the Thai Police report of 29 May 2015. That report informed WHO that, based on the evidence it had gathered, the Thai Police had decided to stop its investigation and to drop all charges against him;

(e) instead of closing the investigation, IOS opened new lines of investigation without properly notifying him;

(f) IOS's investigator exhibited aggressive behaviour, misrepresented the facts and attempted to influence a witness.

18. It is observed that apart from the last allegations in (f), above, these allegations concern irregularities in the misconduct investigation that do not have an obvious effect of offending, humiliating or intimidating within the meaning of the WHO Policy. As to the last allegations in (f), above, the GBA conducted a detailed examination of each allegation and found that the evidence did not support these allegations. The Director-General endorsed the GBA's findings and conclusion in his 6 April 2018 decision. No evidence has been adduced by the complainant before the Tribunal that would undermine the GBA's findings and conclusion.

19. The complainant's third submission concerns the principle that proof of intent on the part of the perpetrator of the alleged harassment is not required to establish harassment. In his pleadings in the present complaint, the complainant asserts that the external reviewer observed in his report that "the central issue [...] [was] whether the investigation [...] was intended to offend" and that "for a finding of harassment to be made, the investigation would need to be motivated by bad faith or malice". The complainant submits that this statement constitutes an error of law. However, although the complainant is correct in arguing that the external reviewer's statement quoted above involved an error of law, in this case,

that error did not undermine the reviewer's conclusion that the complainant had not established a *prima facie* case of harassment, because all of the actions relied upon by the complainant as evidence of harassment involved intentional conduct on the part of the individuals concerned.

20. In his fourth submission, the complainant asserts that harassment is not disproven by the outcome of the external reviewer's investigation. In summary, the complainant submits that although the external reviewer found that some of the IOS's actions were inappropriate, "he failed to determine whether these actions would provide *prima facie* evidence that the IOS's actions constituted harassment". Instead, in his report, the external reviewer stated that he did not consider the "IOS's failure to mention the outcome of the [Thai] police investigation in its report to be a material omission that impact[ed] the result of its investigation". The complainant contends that this statement evidences that the external reviewer applied a wrong standard to his analysis that amounts to an error of law and that the external reviewer's conclusion that his harassment complaint should be closed was thus affected by this error of law. The complainant adds that the GBA's erroneous conclusion that the external reviewer "properly understood his mandate" was also flawed as was the Director-General's 6 April 2018 decision that must be set aside.

21. First, it is observed that the complainant's statement that the "external reviewer found that some of IOS's actions were inappropriate" is not accurate. In his report, the external reviewer stated that "[i]n reviewing the IOS's report, [he] noted that its findings and conclusions relate[d] solely to administrative issues". As the GBA noted in its report, the "[e]xternal [r]eviewer found no evidence of any impropriety on IOS's part during the investigation and that any errors made during the investigation should be handled through the appeal or performance review mechanisms given that IOS was carrying out its duties". Thus, the complainant's submission that the external reviewer failed to determine whether these actions would provide *prima facie* evidence that the IOS's actions constituted harassment is unfounded. It follows that the complainant's assertion that the external reviewer applied a wrong standard to his analysis that amounted to an error of law is unfounded. Additionally, the complainant's assertion that the GBA's conclusion that the external reviewer "properly understood his mandate" was flawed, as was the Director-General's decision, is also unfounded.

22. Lastly, in his fifth submission the complainant submits that his right to be heard was violated. First, the complainant submits that, as he was not provided with an opportunity to comment on the external reviewer's report before the Director-General took her 19 December 2016 decision to close his harassment complaint, his right to be heard was violated. Second, the complainant submits that he was not provided with an opportunity to comment on the *ex parte* communications between the external reviewer and IOS. The complainant points out that the external reviewer and IOS exchanged several emails with each other. Despite his written request to be provided with copies of the emails, the Administration refused to provide them. As a result, he did not have an opportunity to comment on the correspondence before the Director-General took her decision to close his harassment complaint.

23. In its report, the GBA considered the complainant's submissions regarding the violations of his right to be heard and found that the submissions were without merit in particular because, as the GBA observed, "there is no requirement under the Policy for all evidence collected during the [initial] review of a complaint to be shared with a complainant before a decision is taken on whether to launch an investigation".

24. The complainant submits that the GBA's reason is flawed given that the principle of due process and the complainant's right to be heard oblige an organization to provide procedurally and factually relevant communications. In support of his position, the complainant cites Judgment 3264, consideration 15, in which the Tribunal reiterated the well-established case law that "a 'staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him' [...] [and] that 'a decision cannot be based on a material document that has been withheld from the concerned staff member'". The complainant also notes that in Judgment 3137, consideration 6, the Tribunal held that "[a] staff member is entitled to due process before a disciplinary sanction is imposed. In this regard, he or she must be given, at the very least, an opportunity to test the evidence on which the charges are based [...]".

25. The complainant's reliance on Judgments 3264 and 3137 is misplaced. It is recalled that in the present complaint the complainant contests the decision to close his harassment complaint against IOS. In the harassment complaint, the complainant identified actions taken by IOS in its investigation of allegations of misconduct made against him that he claimed amounted to harassment and abuse of power. Thus, in submitting the harassment complaint, the complainant was the reporter of possible misconduct, a potential victim of the harassment and a witness. Given that the complainant, in this case, was not the subject of the investigation process and, therefore, was not in an adversarial situation, as contemplated in Judgments 3264 and 3137, the principle of due process and the right to be heard are not applicable in these circumstances. Accordingly, the complainant's submission that his right to be heard was violated is unfounded.

26. In view of the Tribunal's findings and conclusions, the complaint will be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 January 2021, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

DRAŽEN PETROVIĆ