

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

F. (No. 2)

v.

WHO

134th Session

Judgment No. 4532

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs E. R. F. against the World Health Organization (WHO) on 8 April 2020, WHO's reply of 17 July, the complainant's rejoinder of 19 August and WHO's surrejoinder of 23 November 2020;

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

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

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

The complainant challenges the decision to separate her from service on 22 November 2018, after having reached the end of the extension period previously granted beyond the mandatory age of retirement of 62 according to the Staff Rules then in force.

Facts relevant to this case can be found in Judgment 4527 on the complainant's first complaint, also delivered in public this day, in which she challenged the decision of the WHO Executive Board to extend the mandatory age of separation (MAS) to 65 as of 1 January 2019, instead of 1 January 2018.

On 23 December 2015 the United Nations (UN) General Assembly decided that "the mandatory age of separation for staff recruited before 1 January 2014 should be raised by the organizations of the United Nations

common system to 65 years, at the latest by 1 January 2018, taking into account the acquired rights of staff’.

On 13 January 2016 the Director, Human Resources Department (HRD), informed all WHO staff of the UN General Assembly’s decision stating that “the implementation date for the increased MAS will require an amendment to WHO Staff Rules, which we will submit to the Executive Board. [...] In the meantime, the MAS for WHO staff recruited prior to 1 January 2014 remains unchanged”.

On 15 April 2016 the Director, HRD, sent another email to all staff stating that: “In January 2017, the Administration will also present the necessary amendments to Staff Rules to increase the mandatory age of separation to 65 for staff recruited before 1 January 2014. [...] It is important to note that these amendments are subject to the approval by the Executive Board and will be effective 1 January 2018.”

At the 140th session of the WHO Executive Board in January 2017, the question was raised as to whether the amendment relating to the extension of the mandatory age of separation to 65 for staff members recruited before 1 January 2014 should enter into force with effect from 1 January 2018, in accordance with the UN General Assembly’s Resolution of December 2015, or at a later date, in view of the financial implications for WHO.

On 1 June 2017, during its 141st session, the Executive Board decided that the amendments to the WHO Staff Regulations and Staff Rules on the implementation of the new MAS at 65 would enter into force as of 1 January 2019. WHO staff were so informed by an email of the Director, HRD, of 22 June 2017.

In August 2017 the complainant, as well as other staff members in a similar situation, requested the review of the decision to raise the MAS to 65 years only on 1 January 2019, instead of 1 January 2018. That request was rejected by a decision of 18 October 2017, ultimately leading to the final decision impugned in the complainant’s first complaint.

On 16 August 2018 the complainant accepted the Director-General’s offer to exceptionally extend her appointment beyond her mandatory age of retirement (30 September 2018) until 22 November 2018.

On 23 October 2018 the complainant was informed that, in accordance with Staff Rule 1020.1, her extension beyond the mandatory age of retirement would come to an end on 22 November 2018.

On 18 December 2018 the complainant requested the review of that decision, which was rejected by a decision of 18 February 2019, on the ground that it was substantially the same as the complainant's previous request for review pertaining to the implementation of the MAS of 65 as of 1 January 2019 and referred to the decision and reasoning of the decision of 18 October 2017.

On 17 May 2019 the complainant filed an appeal with the Global Board of Appeal (GBA) against the decision of 18 February 2019.

In its report of 13 November 2019 the GBA concluded that the complainant's appeal was not receivable in so far as it reiterated the same arguments as her previous appeal leading to her first complaint before the Tribunal. It also found that the decision to separate her on 22 November 2018 had been taken in accordance with applicable rules and procedures and recommended that the Director-General dismiss the appeal in its entirety.

On 9 January 2020 the complainant was informed that the Director-General had decided to follow the GBA's recommendation to dismiss her appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement until she reached the new MAS of 65. In the alternative, she asks the Tribunal to be awarded the sum of no less than 596,028 United States dollars in material damages. She seeks 10,000 Swiss francs in moral damages and 10,000 francs in costs. In her rejoinder, the complainant objects to WHO's requests for joinder.

WHO requests that this complaint be joined with her first complaint, as well as several other similar complaints filed by former staff members challenging the implementation of the MAS of 65, or alternatively, that these complaints be considered at the same session. It argues that the complaint is irreceivable as the complainant attempts to substantively challenge the legality of the implementation of the MAS of 65 in multiple separate proceedings before the Tribunal. It also argues that

the complaint is irreceivable *ratione materiae* as she fails to show any non-observance of her terms of appointment and fails to establish a cause of action. Any claims with respect to the decision to exceptionally extend her appointment are irreceivable for failure to exhaust internal remedies. It asks the Tribunal to dismiss the complaint as unfounded in its entirety. In the event that costs are awarded, WHO requests that the amount of costs be established by the Tribunal and that its payment “be conditional upon the receipt of invoices, proof of payment, and upon the complainant not being eligible for reimbursement from other sources”.

CONSIDERATIONS

1. On 8 April 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 9 January 2020 of the Director-General dismissing her appeal against an earlier decision of 18 February 2019. That earlier decision was to dismiss a request for review by the complainant challenging the decision to separate her from service in November 2018 because she had reached the end of the extension period previously granted beyond the mandatory age of separation.

2. In December 2015 the UN General Assembly decided that the mandatory age of separation for staff of UN common system organizations should be raised to 65 years. This decision was to apply to staff recruited before 1 January 2014. The decision contemplated that the introduction of this mandatory age of separation should take place no later than 1 January 2018.

3. Within WHO, staff were notified by email from the Director, HRD, dated 13 January 2016 that the Staff Rules would be amended to reflect this change and an email to staff of 15 April 2016 noted that the amendments would be effective 1 January 2018. This did not occur. As a result of the processes of deliberation and decision-making within WHO, a decision was made on 1 June 2017 by WHO’s Executive Board that the change to the mandatory age of separation as contemplated by the decision of the UN General Assembly, would be effective 1 January 2019.

The change would therefore not apply to staff who reached the retirement age of 60 or 62 in 2017 or 2018.

4. By letter dated 23 October 2018, the complainant was informed that “[...] in accordance with Staff Rule 1020.1, [her] extension beyond the mandatory age of retirement will come to an end on [22 November 2018]”. The letter, in this respect, correctly reflected the then operative provisions of the Staff Rules. Staff Rule 1020.1 was in peremptory terms declaring that “Staff members shall retire [...]” at one of a number of nominated ages depending on the personal circumstances of the official and subject to a proviso involving a decision of the Director-General to exceptionally extend an appointment. In the present case the complainant’s appointment was extended but only from 30 September 2018 (the date of separation absent an extension) to 22 November 2018.

5. While WHO has continuously contested her right to do so, the complainant pursued the processes of internal review and appeal challenging her separation in November 2018, culminating in a report of the GBA of 13 November 2019 recommending that the appeal be dismissed. It concluded, amongst other things, that the decision to separate the complainant pursuant to Staff Rule 1020.1 “was taken in accordance with the regulatory framework and the separation procedures were followed”. By letter dated 9 January 2020 the complainant was informed that her appeal was dismissed. As noted earlier, this constitutes the impugned decision in these proceedings.

6. The complainant advances what she describes as four substantive legal arguments. The first is that WHO had violated a promise concerning the submission of amendments to the Staff Rules relating to the mandatory age of separation. The second and related argument is that WHO had violated a promise concerning when relevant amendments to the Rules would enter into force. The third is that the perpetuation of the regime embodied in Staff Rule 1020 violated the principle of equality of treatment. The fourth is that the complainant’s separation violated a policy of healthy ageing. There is some ambiguity in the brief about whether this is contended to be a policy of WHO only or the UN more generally.

7. With one qualification, these four arguments have been addressed in another judgment rendered at this session (see Judgment 4527) concerning other proceedings in which the complainant was one of fifteen complainants though the context in which the issues arose in the other proceedings was different. In the present case the lacuna in the complainant's pleas is how any of these arguments (which, in substance, failed in the other proceedings) have a bearing on the lawfulness of the then operative Staff Rules which were applied to the complainant in the letter of separation of 23 October 2018. In the absence of the complainant demonstrating that the Staff Rules which were applied had no legal effect, WHO was entitled, indeed obliged, to apply them.

8. The qualification referred to at the beginning of the previous consideration, concerns the argument on equality of treatment. In the other proceedings, the inequality of treatment was said to arise because of the perpetuation of a regime in which there were differing mandatory ages of retirement based on the length of a staff member's participation in the United Nations Joint Staff Pension Fund. In the present case the complainant, while maintaining the same argument about mandatory ages of retirement based on participation in a pension fund, also argues that the "2018 group of staff forced into early separation" included a significant number of older women professionals which, it seems to be argued, involved some form of discrimination against women. The complainant refers to no case law to support this plea, and the factual foundation of any contention that there was inequality of treatment suffered by women is entirely obscure. What appears to be the point which is being made is that the retirement of women under the pre-existing regime (before the amendments came into effect in January 2019) by operation of Staff Rule 1020 did nothing to advance the interests of women in the sense of increasing their numbers as a proportion of the total workforce of WHO, particularly in senior positions, in the face of a WHO policy to do so. But as the Tribunal recently observed in Judgment 4423, consideration 15, "it is well established in the case law as reiterated in Judgment 4029, consideration 20, that 'the principle of equality requires that persons in the same position in fact and in law must be treated equally'". There is nothing in the material before the

Tribunal which demonstrates women were not treated equally in the application of Staff Rule 1020.

9. It is unnecessary to address WHO's arguments concerning the receivability of this complaint. WHO, in these proceedings, seeks the joinder of this complaint with others where separation of officials took place in broadly the same circumstances or, alternatively, asks that they be considered in the same session. Joinder is opposed by the complainant. These cases have been considered in the same session, the alternative request of WHO. But notwithstanding that the events relied upon in these various complaints are mainly the same and some of the legal argumentation is similar or the same, joinder is inappropriate and each complainant is entitled to the benefit of a judgment addressing their circumstances and their pleas.

10. The complainant has failed to establish that the decision to separate her from service is legally flawed and, accordingly, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ