**R.-C. (No. 3)**

***v.***

**WHO**

**134th Session** **Judgment No. 4533**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs C. R.-C. against the World Health Organization (WHO) on 16 April 2020, WHO's reply of 31 July, the complainant's rejoinder of 23 September 2020 and WHO's surrejoinder of 7 January 2021;

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 31 December 2018, being the date on which she reached her retirement age according to the Staff Rules then in force, as well as the decision not to approve an exceptional extension of her appointment beyond retirement age.

Facts relevant to this case can be found in Judgment 4527 on the complainant's second 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 second complaint.

On 23 July 2018 the complainant's first-level supervisor prepared a draft memorandum requesting that her appointment be exceptionally extended for one year. The memorandum was never finalized or transmitted to the Director-General as, following consultations with the Deputy Director-General, Corporate Operations, her supervisor decided not to pursue the request further and the complainant was so informed.

On 26 October 2018 the complainant was informed of the end of her appointment on 31 December 2018, being the date on which she would reach her retirement age of 62, in accordance with Staff Rule 1020.1.

On 21 December 2018 the complainant requested the review of that decision and also alleged that she had not received an exceptional extension of her appointment beyond retirement age in violation of her rights.

The complainant's request for review was rejected by a decision of 18 February 2019, on the ground that it was substantially the same as the complainant's previous request pertaining to the implementation of the MAS of 65 as of 1 January 2019. The decision referred to the decision of 18 October 2017 rejecting her first request for review on the ground that it did not allege any non-observance of the terms of her appointment. As to the complainant's claim that she had not received an exceptional extension of her appointment beyond retirement age in violation of her rights, it noted that she had not made any such request under Staff Rule 1020.1.4. The complainant had been informed orally by her supervisor that the proposed extension request was not supported. As she did not pursue the matter further before submitting her request for review, she had failed to exhaust internal remedies in that regard.

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 19 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 second complaint before the Tribunal. It found that the decision to separate her on 31 December 2018 had been taken in accordance with applicable rules and procedures and that her claims relating to the consideration of an extension request were devoid of merit since she had not requested an extension of her

appointment as required by Staff Rule 1020.1.4. Consequently, the GBA recommended that the Director-General dismiss the appeal in its entirety.

On 17 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 439,538 Swiss francs in material damages. She seeks 30,000 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 second, as well as with several other similar complaints filed by former staff members challenging the implementation of MAS 65, or alternatively, that these complaints be considered at the same session. WHO argues that the complaint is irreceivable as the complainant attempts to substantively challenge the legality of the implementation of MAS 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. With respect to the decision not to grant her an exceptional extension of her appointment, WHO argues that it is 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 16 April 2020, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 17 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 December 2018 because she had reached the mandatory age of separation and the rejection of her claim relating to a request for an exceptional extension of her appointment beyond retirement age.

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 26 October 2018, the complainant was informed that "[...] in accordance with Staff Rule 1020.1, [her] appointment with the Organization will come to an end on [31 December 2018] which marks the date on which [she] will reach the retirement age as specified in Staff Rule 1020". 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 a staff member's appointment beyond retirement age.

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 December 2018, culminating in a report of the GBA of 19 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". Insofar as the appeal challenged the consideration of an extension request of the complainant's appointment, the GBA concluded that the complainant had not made such a request and thus her "claims [...] were devoid of merit". By letter dated 17 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 five 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 WHO unlawfully handled the complainant's extension request. The fifth 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. Four of these five arguments (but not the fourth concerning the extension request) 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 four 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 26 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. As noted earlier, the applicable rule was in peremptory terms.

8. However, there remains to be considered the plea of the complainant that a request was made for an extension of her appointment beyond retirement age but was not considered in the way required by the Staff Rules and the relevant provisions of the WHO eManual. The proviso referred to at the conclusion of consideration 4 is found in Staff Rule 1020.1.4 which relevantly provides: "In exceptional circumstances the Director-General may, in the interests of the Organization, extend a staff member's appointment beyond retirement age [...]". This provision contains certain qualifications which are not presently relevant.

9. The request for an extension arose in the following way. By a draft and unsigned memorandum dated 23 July 2018 addressed to the Director-General, the complainant's first-level supervisor sought the extension of the complainant's contract by a year and set out the reasons for the extension. The complainant's first-level supervisor was told by the Deputy Director-General, Corporate Operations, that there were no exceptional circumstances or sufficient justification to pursue the request on behalf of the complainant and that the memorandum was not supported and would not be further pursued.

10. The complainant's account in her brief of what she knew had happened to the memorandum of 23 July 2018 was that "[she] was subsequently not kept informed of whether the extension request made by her [supervisor] was processed by the Administration. In fact, she was not even provided with a signed copy of the above-mentioned memorandum. Following several requests made by the Complainant regarding the status of the above-mentioned extension request, the director of her department ultimately showed her a post-it leaflet allegedly containing the Director-General's rejection of said request". In the GBA's account of the facts presumably derived from the submissions of the complainant, the post-it leaflet contained a reply from the Deputy Director-General. This is also the version of the facts

recounted in the administrative review decision of 18 February 2019 which includes, in quotation marks, what was said by the complainant in her request for administrative review, namely "you were shown a note *'containing the Deputy Director-General's reply to [your] supervisor's request'*".

11. In its reply WHO says: "As further indicated by the complainant, Director-General's Office (DGO) expressed disapproval of the request and the matter was not pursued further by the Director DCO a.i., or by the complainant's direct supervisor who initiated the memorandum". No such indication appears in the complainant's brief. Nonetheless, this plea may possibly constitute an admission that the memorandum of 23 July 2018 was sent to and received by the Director-General's Office and it did not simply remain a document internal to Corporate Operations. However, in its report, the GBA twice says "The memorandum will never be finalized and transmitted to the Director-General". This is said once in the GBA's summary of the facts and a second time in its chronology of the facts. What this statement means is obscure, though it might be taken to be a statement that the request was not, as a matter of fact, transmitted to the Director-General.

12. The preponderance of the evidence favours a conclusion that the unsigned request for an extension prepared by the complainant's first-level supervisor was never submitted to the Director-General. Indeed, the evidence does establish that the complainant was informed that her first-level supervisor's request was not submitted to the Director-General. Put slightly differently, the complainant has failed to prove, as she must (see, for example, Judgment 4381, consideration 31), that the request for an extension was submitted to the Director-General which is foundational to her legal argument that the Director-General failed to address the request on its merits as he was legally obliged to do. The complainant's plea that the consideration of request for extension was legally flawed, is unfounded.

13. 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. The latter has occurred. Joinder is opposed by the complainant. 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.

14. The complainant has failed to establish that either the decision to separate her from service or the refusal to exceptionally extend her appointment are 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