

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A. L.

v.

WHO

134th Session

Judgment No. 4537

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. C. A. L. against the World Health Organization (WHO) on 19 December 2019, WHO's reply of 28 May 2020, the complainant's rejoinder of 30 June and WHO's surrejoinder of 5 October 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 31 July 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 his appointment beyond retirement age.

Facts relevant to this case can be found in Judgment 4527, also delivered in public this day, in which fifteen other complainants 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. The complainant was not among the staff members who subsequently appealed that decision before the Global Board of Appeal (GBA).

At a meeting held on 22 February 2018 the complainant's supervisor discussed the possibility of an exceptional extension of the complainant's appointment beyond retirement age with the Director-General. The Director-General refused the oral request made by the complainant's supervisor and the complainant was so informed on the same day.

On 15 March 2018 the complainant was informed of the end of her appointment on 31 July 2018, being the date on which she would reach the retirement age of 62, in accordance with Staff Rule 1020.1.

On 11 May 2018 the complainant requested the review of the decision to end her appointment on 31 July 2018, alleging also that the decision not to grant her an exceptional extension of her appointment violated her rights.

The complainant's second request for review was rejected by a decision of 15 August 2018, on the grounds that it was substantially the same as her previous request rejected by the decision of 18 October 2017, that she had not filed a request for an exceptional extension of her appointment and, therefore, that she had not exhausted internal remedies and that, even if the oral request by her supervisor and its rejection by the Director-General on 22 February 2018 could be considered as a final decision, her request for review in this regard was time-barred. Lastly, she did not demonstrate any non-observance of her terms of appointment.

On 13 November 2018 the complainant filed an appeal with the Global Board of Appeal (GBA) against the decision of 15 August 2018.

In its report of 1 July 2019 the GBA concluded that the complainant's claims related to the implementation of MAS 65 were irreceivable as time-barred. It also found that the decision to separate her on 31 July 2018 had been taken in accordance with applicable rules and procedures and that her claims related to the extension request were devoid of merit since she had not requested an extension of her appointment. It thus recommended that the Director-General dismiss the appeal in its entirety, which the Director-General did by a decision of 9 September 2019. 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 award her the sum of no less than 574,322 Swiss francs in material damages. She seeks 10,000 francs in moral damages and 15,000 francs in costs. In her rejoinder, the complainant objects to WHO's requests for joinder.

WHO requests that this complaint be joined with 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. WHO argues that the complaint is time-barred as the complainant did not challenge the decision of 18 October 2017 regarding the implementation of MAS 65. It also argues that the complaint is irreceivable *ratione materiae* as she fails to show any non-observance of her terms of her 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 9 December 2019, a complaint was filed with the Tribunal by the complainant, a former official of WHO, impugning a decision of 9 September 2019 of the Director-General dismissing her appeal against an earlier decision of 15 August 2018. That earlier decision was to dismiss a request for review by the complainant challenging the decision to separate her from service on 31 July 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 15 March 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 July 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 July 2018, culminating in a report of the GBA of 1 July 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 procedure was properly followed". By letter dated 9 September 2019 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 brought by fifteen other 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 15 March 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 made orally to the Director-General on 22 February 2018 by the complainant's first-level supervisor, for an extension of the complainant's appointment beyond retirement age, 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. This is the account given by the complainant in her brief which is not persuasively challenged by WHO. On 22 February 2018 the Director-General met the complainant’s first-level supervisor. During the meeting the latter requested the former to extend the complainant’s appointment “based on a number of work-related arguments and especially the fact that for the upcoming Conference of the Parties to the Convention, the complainant was essential in the discussions of the next two years budget and work plans”. The Director-General, according to the complainant’s account, “summarily responded that he decided not to grant any extensions requests and that he would not make any exceptions to that decision”. On this account of what occurred at the meeting and subject to an important procedural requirement discussed shortly, the approach of the Director-General was arbitrary and he did not do what Staff Rule 1020.1.4 requires, namely consider whether it was in the interests of the Organization to extend the complainant’s appointment in the face of reasons advanced by the complainant’s supervisor that it would be. It appears to be an uncontroverted fact, having regard to a summary of the facts in the administrative review decision dated 15 August 2018, that the complainant was informed of the rejection of the oral request for her extension, on the day it occurred.

10. In the administrative review decision of 15 August 2018, the Assistant Director-General, General Management (ADG/GMG) dismissed the complainant’s challenge to the rejection of the extension request for two reasons. The first was that the complainant had not exhausted internal remedies available to her “in conformity with WHO Staff rule 1020.1.4 and the related provisions of the WHO eManual III.10.8 on retirement and early retirement at paragraph 20”. This conclusion is seemingly based on the premise that the request had to be in writing and that she

could have made a written request after the meeting on 22 February 2018. The second reason is that even if the statement of the Director-General at the meeting of 22 February 2018 was a final administrative decision, a request for review of that decision had to be made within 60 days, namely by 23 April 2018. That had not occurred.

11. In its report the GBA concluded that as the complainant had not followed the procedure for requesting an exceptional extension of her appointment as set out in the eManual Section III.10.8 (seemingly by making a request in writing) she had not exhausted the existing administrative channels as required by Staff Rule 1225.1. Ultimately the GBA concluded that the complainant's "claims of unfairness, inequality, bias and bad faith related to the consideration of extension requests are devoid of merit since [she] did not request an extension of her appointment as required by Staff Rule 1020.1.4". In the impugned decision of 9 September 2019, the Director-General indicated he agreed with certain considerations and conclusions of the GBA including the one most recently mentioned.

12. It is desirable first to consider the question of whether a request for extension needs to be in writing. There is no express requirement in the Staff Rules to this effect and none, in particular, in the relevant provision, namely Staff Rule 1020.1.4. However, there is a procedure for requesting an exceptional extension of an appointment set out in Section III.10.8 of the WHO eManual at paragraph 20. It provides: "In all cases, requests for extensions must be submitted to the Director-General through the Director, HRD and requests will not be granted for more than one year at a time." This does not say, expressly, that the request needs to be in writing. However, impliedly it does need to be in writing. The use of the word "submitted" is, in context, a clear pointer to this conclusion. Also, a procedure which requires a request to be made through the Director, HRD, almost certainly needs to be in writing. Virtually inevitably any such request, whether by the staff member concerned or a supervisor on the staff member's behalf, would need to contain the reasons why the circumstances were exceptional and why it was in the interests of the Organization to grant the extension, in order

to persuade the Director-General to do so. Plainly, the Director, HRD, is intended to be something more than a “letter box” to pass on requests to the Director-General. Implicit in this arrangement is that the Director, HRD, can provide some preliminary assessment or commentary to assist the Director-General in making the ultimate decision and, in particular, assessing whether the extension would be in the interests of the Organization. It is difficult to conceive of how this scheme could operate if the request could be made orally. It is highly unlikely that it is contemplated a request can be made orally, considered and then transmitted with the attendant risk that the Director, HRD, might misunderstand or misrepresent even innocently what was being put by the person making the request.

13. This leads to further consideration of what occurred at the meeting of 22 February 2018. The Director-General was not then considering a request in writing as required by the eManual Section III.10.8 paragraph 20. His duty to consider the request as required by Staff Rule 1020.1.4 was not then engaged. Even if her supervisor had been dissuaded from pursuing an extension request on behalf of the complainant (as appears to be the case) because of what the Director-General said, it did not prevent the complainant from making a written application herself (submitted through the Director, HRD) requesting an extension of her appointment and advancing the reasons given by the complainant’s first-level supervisor, and any other reasons she wished to provide. Had she taken this step, the Director-General would have been under a duty to consider the request on its merits and, by reference to Staff Rule 1020.1.4, make a decision whether to meet the request or reject it. This would have been a decision amenable to internal review, appeal and ultimately recourse to the Tribunal. If the Director-General had, in considering that request, taken the position he articulated at the meeting of 22 February 2018 then the grounds for impugning the decision both internally and before the Tribunal would have been of substance. But in the present circumstances, there is no decision on a request to extend the complainant’s appointment reviewable in this Tribunal as there was no request. In the absence of there having been a request, two other of the complainant’s pleas (an alleged promise by the Director-

General to examine extension requests in a particular way and an alleged breach of the principle of equal treatment) are moot.

14. Accordingly, the complainant's pleas on this topic of extension of appointment are unfounded.

15. It is unnecessary to address WHO's arguments concerning the receivability of this complaint.

16. 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.

17. 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