

H.
v.
WHO

137th Session

Judgment No. 4762

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. H. against the World Health Organization (WHO) on 2 March 2021, WHO's reply of 7 June 2021, the complainant's rejoinder of 20 August 2021 and WHO's surrejoinder of 22 November 2021;

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 contests the decision to dismiss him for misconduct.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO. He joined UNAIDS in 2007 under a fixed-term contract and was appointed Country Director at the Zimbabwe Country Office, at grade P-5, as of July 2017. The duration of his assignment was for three years.

On 10 March 2018, an employee of the Country Office submitted a harassment complaint against the complainant. She detailed the actions she considered to amount to harassment, including bullying, threats, sexism, manipulation, abuse of authority, and wrongful accusations. She also alleged harassment on the part of another member of the team.

Two days later, on 12 March 2018, a Wellness and Capacity Building team composed of UNAIDS Headquarters staff (including UNAIDS Director of Human Resources Management) visited the Zimbabwe Country Office. The team noted, in particular, that several staffing changes had occurred prior to the complainant's arrival and that, according to the latter, the staff morale was very low and the team was "dysfunctional".

On 25 April 2018, the complainant was informed that UNAIDS Deputy Executive Director, Management and Governance, had requested WHO's Office of Internal Oversight Services (IOS) to conduct an investigation into allegations of misconduct, abuse of authority and mismanagement on his part. The complainant was also informed that he was placed on administrative leave with full pay with immediate effect pending a determination of the outcome of the IOS investigation.

On 27 March 2019, the UNAIDS Director of Human Resources Management informed the complainant that the WHO IOS investigation report was delivered to the UNAIDS Executive Director on or about 19 March 2019, and would be provided to the Global Advisory Committee on future actions in harassment complaints (GAC) for review. She added that the complainant remained on administrative leave with full pay pending a determination of the outcome of the investigation.

In its report of 2 August 2019, the GAC held that the allegations against the complainant were well founded and that his conduct amounted to harassment. Accordingly, there were sufficient grounds to initiate disciplinary proceedings against him. The GAC also held that the explanations the complainant provided when interviewed did not justify his behaviour. While the "state of the office" at the time he was appointed was not optimal, it provided no justification to mistreat the staff under his supervision. The GAC recommended that the complainant's management skills be assessed, that he undergo coaching on managing staff and training on gender and harassment issues, and that he did not manage staff until he had successfully completed the recommended measures.

On 29 October 2019, the UNAIDS Director of Human Resources Management notified the complainant that the UNAIDS Executive Director ad interim had reviewed the reports established by both the IOS and the GAC on the charges of misconduct raised against him, and his reply to the charges. The Executive Director ad interim considered that the complainant's actions constituted harassment and that, in light of their severity, warranted the disciplinary measure of dismissal. She added that the complainant would remain on administrative leave with full pay until the effective date of termination on 29 November 2019 and would be paid part of the termination indemnity, but no end-of-service grant.

On 27 January 2020, the complainant lodged an appeal against the decision of 29 October 2019 to terminate his appointment. He submitted his appeal directly to the Global Board of Appeal (GBA) as the administrative decision he contested was exempt of prior administrative review, in accordance with Staff Rule 1225.

In its report of 30 September 2020, the GBA recommended that the matter of the disciplinary measure be remitted back to the Executive Director for a new decision and that the complainant be granted 20,000 United States dollars in moral damages, and costs. It found that the decision of 29 October 2019 did not indicate the reasons which led the Executive Director ad interim to determine that the complainant's actions were of such severity that the disciplinary measure of dismissal was warranted. According to the GBA, the absence of reasoning deprived the complainant of the opportunity to understand the reasons underlying his dismissal which had consequences on his ability to inform his appeal and delayed the adjudication of his case. The GBA recalled that its role was not to reweigh the evidence that was before the investigatory body, but to consider if there was a manifest error. It noted that there was no recommendation in either the investigation report or in the GAC's report on the disciplinary measure to take against the complainant. The GAC merely recommended that he did not manage staff until he could demonstrate that he had successfully undergone relevant training and that his overall management skills had been assessed. The GBA therefore concluded that the GAC had not considered that the sanction

of dismissal was likely. Lastly, the GBA held that the complainant's claims relating to UNAIDS's alleged failure to investigate his own complaint of harassment and the alleged leak of confidential information to the press were irreceivable, as they did not relate to issues decided in the contested decision.

By a letter of 14 December 2020, the UNAIDS Executive Director notified the complainant that she accepted the GBA's conclusion that the claims relating to the alleged failure to investigate the complainant's own complaint of harassment and the alleged leak of confidential information to the press were irreceivable as they did not relate to the contested decision. She however disagreed with the GBA's finding that the Executive Director ad interim had departed from the recommendations of the IOS, and of the GAC. She also disagreed with the GBA's recommendation to remit the case to her since the Executive Director ad interim had accurately exercised her authority, and the sanction imposed was proportionate, duly reasoned, and adequate. The Executive Director added that the complainant's ability to plead his case was not negatively impacted and that the adjudication of his case was not delayed. The Executive Director therefore upheld the contested decision in its entirety and enclosed the GBA report. This is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order that the charges against him be dropped, and that he be reinstated. Alternatively, he asks the Tribunal to order that he be granted two years full salary and benefits. In addition, he seeks an award of moral damages and costs.

WHO asks the Tribunal to reject the complaint as irreceivable regarding the claims made in relation to the alleged failure to investigate the harassment complaint filed by the complainant and the alleged leak of confidential information to the press. The complaint is otherwise devoid of merit. It adds that the claim for costs should be dismissed but, if costs are awarded it should be conditional upon receipt of invoices and proof of payment.

CONSIDERATIONS

1. The complainant was at relevant times a member of staff of UNAIDS, the Country Director of UNAIDS Country Office (UCO) in Zimbabwe, until his dismissal by letter dated 29 October 2019 for misconduct involving harassment. The decision was taken by the Executive Director ad interim. This decision had been preceded by a report of the Office of Internal Oversight Services (IOS) dated 19 March 2019 which investigated the complainant's conduct and a report of the Global Advisory Committee on future actions in harassment complaints (GAC) dated 2 August 2019 which reviewed the complainant's conduct and the IOS report. The genesis of the investigation of the complainant's conduct was a letter of complaint dated 10 March 2018 from Ms B.

2. The complainant lodged an appeal with the Global Board of Appeal (GBA) against the decision to dismiss him. The GBA issued a report on 30 September 2020. Notwithstanding its recommendation that, inter alia, the appeal be allowed in part, the Executive Director decided in a letter dated 14 December 2020, in substance, to dismiss the appeal by determining that the complainant's conduct constituted harassment "and decided to uphold the decision of the [Executive Director ad interim] in its entirety".

3. At least one of the arguments of the complainant concerning the reasoning of the Executive Director in the impugned decision is founded and is decisive. In order to explain why this is so, it is necessary to focus on the reasons of the GBA and the subsequent rejection of its recommendation by the Executive Director in the impugned decision. The relevant background may be briefly summarised. The complainant commenced his role as Country Director on 4 July 2017 though he had taken steps to manage the office some months earlier. In the investigation by the IOS, the complainant said that he found the Office to be dysfunctional and one of the most difficult environments encountered over the course of his international career. In substance, this was accepted by the IOS.

4. Under the heading “RECOMMENDATIONS” at the beginning of its report, the GBA said “[t]he [GBA] recommends that the matter of the disciplinary measure be remitted back to the Executive Director for a new decision”. The GBA noted that neither the investigation report nor the GAC report made a recommendation regarding the disciplinary action to take against the complainant. It also noted that the GAC recommended the complainant should not supervise staff until he had undergone further relevant coaching and training. The GBA then said:

“43. [...] It appeared clear to the [GBA] that in making such a recommendation, the GAC did not consider that dismissal was likely in the circumstances but understood that the [complainant]’s management style required serious correction.”

The GBA went on to say:

“44. [...] The Impugned Decision [of the Executive Director (ad interim) of 29 October 2019] mentions that the [complainant]’s actions were of such severity that they warranted the disciplinary measure of dismissal but does not provide the reasons which led the Executive Director [ad interim] to make such determination.

45. Indeed, there is no analysis of mitigating or aggravating circumstances that could or should have had an impact [o]n the Impugned Decision. One of IOS’s findings was that the impugned conduct took place in a difficult working environment (*IOS found that remedying this situation would have presented a significant challenge for even the most seasoned manager*). The GAC also highlighted this fact, stating that ‘[...] *the Committee is concerned by the statements from all UCO staff indicating that the UCO was dysfunctional prior to the arrival of the [complainant]*’. The Panel considered that UNAIDS had an institutional responsibility to support the [complainant] in his management of the UCO/Zimbabwe, as the situation of the office was known and it was clear that it would represent a challenge for the new Director. It is in this context that the Panel questioned whether the difficult situation experienced by the staff of the UCO Zimbabwe can be entirely attributable to the [complainant]’s conduct and whether the misconduct for which he was found guilty, while serious and concerning, was of such severity that it warranted dismissal or was fully incompatible with the performance of his duties. It is not possible to make this assessment without reasoning.”

5. Under the heading “CONCLUSIONS” in the final paragraph of its report, the GBA said:

“49. In light of the above, the Panel concluded that [the] Impugned Decision did not provide the reasons which led the Executive Director [ad interim] to determine that the [complainant]’s actions were of such severity that warranted the disciplinary measure of dismissal and recommended that the matter be remitted back to the Executive Director for a new decision. [...]”

6. Before considering the impugned decision of the Executive Director of 14 December 2020, mention should be made of the initial dismissal letter of 29 October 2019 on behalf of the Executive Director ad interim. After rejecting what had been asserted by the complainant as procedural deficiencies, the letter listed six aspects of the conduct of the complainant which led to the ultimate conclusion: “[o]n this basis, the Executive Director, [ad interim] has determined that your actions constitute harassment and in light of their severity warrant the disciplinary measure of dismissal”. Nowhere in this letter is there mention of mitigating circumstances of the type discussed by the GBA in the passages quoted above.

7. The Executive Director, in her letter of 14 December 2020 (the impugned decision), made some introductory observations (including, as she perceived it, a potential conflict of interest concerning one of the panel members) and then identified findings or conclusions of the GBA with which she agrees which in the main are findings or conclusions favourable to the Organization. The letter then stated, and substantially focusing on the adequacy of the reasons of the Executive Director ad interim in the letter of 29 October 2019:

“I consider that the [Executive Director ad interim] clearly and in detail outlined her reasoning of the impugned decision, demonstrably taking into consideration all relevant factors, including the severity of your actions, on the basis of the investigative findings to which she referred, the recommendations of the GAC, and your reply to the charges. These considerations were also reiterated and expanded upon in the pleadings before the [GBA], which allowed you to prepare your response accordingly. I cannot therefore agree with the [GBA] that your ability to plead your case before the Board was in any way negatively impacted [...]”

While the Executive Director asserted the Executive Director ad interim “[took] into consideration all relevant factors” she did not state, and could not, that this included the mitigating circumstances identified by

the GBA. To the same effect and with the same deficiency, was the passage which followed:

“Noting the Board’s recommendation to remit the case to me for a new decision and having carefully reviewed the case in its entirety, I consider that the then [Executive Director ad interim] accurately exercised her authority, that the sanction imposed was proportionate, duly reasoned and adequate in the circumstances and that the impugned decision was without flaw.”

The closest the Executive Director came to addressing the mitigating circumstances raised by the GBA was when she stated:

“Moreover, I do not consider that the overall state of the UCO at the time, or your explanations provided to WHO IOS in this respect, were in any way suitable to justify your behavior towards [Ms B.]”

What was meant by the word “suitable” is entirely unclear and the entire sentence is essentially unintelligible. However, even if not, the expression “overall state of the UCO at the time” leaves unaddressed the quite specific points that were made by the GBA in the passages quoted above.

8. It is well settled in the Tribunal’s case law that the executive head of an international organisation, while at liberty to disagree with, and reject, recommendations made by an internal appeal body, must explain why and the basis for the disagreement and rejection (see, for example, Judgment 4598, consideration 12). The Executive Director has not done so in the present case and her decision should be quashed and the matter remitted to WHO/UNAIDS for a fresh decision to be taken.

9. The relief the complainant seeks in his brief, in addition to the quashing of the impugned decision includes that the charges against him be dropped and he be reinstated or granted two years full salary and benefits. Since the case is remitted to WHO/UNAIDS, the Tribunal cannot order that the charges be dropped, nor would it order that the complainant be reinstated. As to what, in effect, is a claim for material damages, that relief presupposes the complainant will not be dismissed in any further decision by the Executive Director. While any such

decision will need to be fully motivated and regard had to the conclusions of the GBA who clearly did not favour dismissal, the outcome of dismissal cannot be entirely discounted. The complainant also seeks moral damages for the length it has taken for the initial harassment claim of Ms B. to be investigated and resolved by a final decision of the Executive Director, a period of almost two and half years. The moral injury asserted by the complainant is simply described as unnecessary anguish, stress and reputational damage. While it can be assumed his dismissal might have had this effect, it is not self-evidently so in relation to the time complained of by him. The complainant bears the burden of proving moral injury and a causal relationship between that and the event complained of but has not done so in this case (see, for example, Judgment 4644, consideration 7).

10. In the result, the impugned decision should be set aside and the matter remitted to WHO/UNAIDS for further consideration as discussed in consideration 8 unless the matter is settled in the meantime. The complainant is entitled to his costs which the Tribunal assesses in the sum of 10,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision of 14 December 2020 is set aside.
2. The matter is remitted to WHO/UNAIDS in order for the Executive Director to make a further decision on the complainant's internal appeal.
3. WHO shall pay the complainant 10,000 United States dollars as costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER