M.

v.

WHO

137th Session **Judgment No. 4764**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. M. against the World Health Organization (WHO) on 22 February 2021 and corrected on 16 March, WHO's reply of 29 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 her 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. She joined UNAIDS in 1998. At the material time, she was UNAIDS Country Director in Ethiopia holding a fixed-term contract at grade D-1.

On 5 March 2018, UNAIDS Director of Human Resources Management (HRM) informed the complainant that the Office of the Executive Director had received correspondence from the Government of Ethiopia regarding her conduct, which raised concerns for UNAIDS' reputation. The Director of HRM asked her to provide some information on specific issues in accordance with Staff Rule 490, which she did

shortly afterwards. On 27 March 2018, the Director of HRM informed the complainant that a management and operational review of the Country Office would be conducted. He added that allegations of misconduct as well as certain concerns regarding the impact on the image and reputation of UNAIDS had arisen since the receipt of the correspondence from the Government of Ethiopia, which he had shared with her on 5 March 2018. Thereafter, she was placed on administrative leave with full pay until 30 April 2018.

UNAIDS Deputy Executive Director, Management and Governance, notified the complainant, on 25 April 2018, that she had requested WHO's Office of Internal Oversight Services (IOS) to investigate allegations of misconduct, abuse of authority and mismanagement against her. Her administrative leave with pay was extended pending a determination of the outcome of the investigation.

The IOS investigation report was communicated to UNAIDS Executive Director on 28 February 2019. IOS concluded that the complainant appeared to have engaged in a broad range of misconduct during her tenure as Country Director. It listed several actions she undertook in breach of internal applicable rules or national laws, including criminal law. IOS therefore recommended that the Executive Director decide on any administrative and/or disciplinary action in relation to the substantiated findings of the investigation, that UNAIDS consider recovering certain amounts from the complainant, deducting some days of leave, completing a full reconciliation of her leave records, and where appropriate, adjusting her leave balance or recovering the equivalent funds.

By a letter of 28 March 2019, the new Director of HRM informed the complainant that, as indicated in the IOS investigation report, she had allegedly engaged in a broad range of improper conduct. She was charged with failing to observe the standards of conduct for staff members, and with violating several rules. As a result, she may be found to have committed misconduct. The Director of HRM invited the complainant to comment on the allegations and recommendations contained in the IOS report, which was attached. The complainant did

so early May 2019, after having been granted, at her request, additional time.

On 28 August 2019, the Director of HRM notified the complainant that the Executive Director ad interim had determined that her actions constituted misconduct and warranted the disciplinary measure of dismissal. The complainant's appointment was terminated effective 27 September 2019, and she remained on administrative leave with full pay until the effective date of termination. The Director of HRM added, in particular, that the indemnity foreseen under Staff Rule 1050.10 and the end-of-service grant would not be granted given that the complainant had been on administrative leave with full pay from 27 March 2018 until the present, and that her misconduct resulted in financial losses for the organization as well as negative implications for its reputation. The Director of HRM added that the Executive Director ad interim had exceptionally authorised her to proceed directly to the WHO Global Board of Appeal (GBA) if she wished to appeal the present decision.

On 10 December 2019, the complainant filed an appeal against the decision to terminate her appointment.

In its report of 24 September 2020, the GBA rejected the complainant's argument that the timeline she was given to reply to the investigation report (eight calendar days) did not take into account her health needs. It noted that, according to paragraphs 130 to 150 of Section III.11.2 of the WHO e-Manual, staff members should be given eight calendar days from the date of receipt of the notification of charges to submit a reply. Additional time may be granted "where a staff member present[ed] valid written justification". The GBA examined the complainant's medical reports and the sick leave certificate she had sent in May 2019, and found that the Administration did not make an error in assessing that her health situation allowed her to reply to the charges. Regarding the complainant's argument that she was denied access to electronic records, it noted that, in May 2019, the Director of HRM had informed her that access to her official UNAIDS account had been clarified with the relevant department and confirmed that no action had been taken to remove access. The GBA had received no information

that the complainant had taken action to access her account after that date and emphasized that she had not identified the information in the electronic system that would have been critical for her case. The GBA, having reviewed the investigation report, was satisfied that the findings rested on verifiable evidence leading to a finding of guilt beyond reasonable doubt. It found no reason to question the disciplinary measure imposed on the complainant in the circumstances of the case and therefore recommended dismissing the appeal.

By a decision of 20 November 2020, UNAIDS Executive Director informed the complainant that she endorsed the GBA's recommendation. This is the impugned decision.

The complainant asks the Tribunal to declare that UNAIDS acted unlawfully in dismissing her. She seeks an award of damages for lost pay, for the loss of pension entitlements and other benefits due upon retirement. She further claims moral damages for damages to her reputation and for mental suffering. Lastly, she seeks costs.

WHO asks the Tribunal to reject the complaint as devoid of merit. It points to differences between the claims for relief in the complaint form and in the brief. Regarding the claim for costs, WHO asks the Tribunal, in the event it makes such an award, to determine a maximum amount upon receipt of invoices. In addition, the complainant should demonstrate that she is not eligible for reimbursement via other sources.

CONSIDERATIONS

1. The complainant was dismissed effective 27 September 2019. She had been advised of the decision to dismiss her by letter of 28 August 2019. She was then UNAIDS Country Director in Ethiopia. Much of the relevant history is set out earlier in this judgment and it is unnecessary to repeat it. Suffice it to note that her conduct had been investigated by the Office of Internal Oversight Services (IOS) resulting in an IOS report dated 28 February 2019. This resulted in her being charged (on 28 March 2019) in disciplinary proceedings which led to the decision to dismiss her. On 10 December 2019, she lodged an appeal with the Global Board of Appeal (GBA) which, in a report dated

24 September 2020, recommended that the appeal be dismissed. This recommendation was accepted by UNAIDS Executive Director in a decision of 20 November 2020. This is the decision impugned in these proceedings.

The complainant appears to have requested in her rejoinder that she be provided with an unredacted version of several documents provided by the organization, in a redacted form, in its reply. The Tribunal is satisfied that the redacted documents provided the complainant with sufficient relevant information and her request is rejected.

2. One matter arising from the complainant's pleas, which can be dealt with immediately, concerns the decision to place her "on administrative leave" in March 2018 which she challenges in her complaint. The legality of the suspension decision was not challenged at the time. Any grievance about that decision should have been raised then (see, for example, Judgment 4461, consideration 5). The GBA concluded, correctly, that the claims in the internal appeal, insofar as they related to the suspension decision, were irreceivable as time-barred. Accordingly, insofar as the legality of the suspension decision is challenged in these proceedings, the challenge is irreceivable because the complainant has not exhausted internal means of redress, a matter the Tribunal can consider *ex officio* (see, for example, Judgment 4597, consideration 8).

3. Apart from the topic just discussed, the complainant's pleas in her brief containing the arguments, are divided into six sections. The first is headed: "[t]he IOS Investigation was not Conducted Fairly". The second is headed: "UNAIDS Failed to Accommodate [the complainant's] Medical Condition". The third is headed: "[the complainant] did not have Access to Electronic Records Necessary for her Defence". The fourth is headed: "[t]he Evidence cannot Support a Finding Against [the complainant] Beyond a Reasonable Doubt". The fifth is headed: "[t]he Penalty Imposed by the Executive Director was Excessive". The sixth and last section concerns remedies.

4. The Tribunal observes that the complainant in her brief directly challenges the GBA's consideration of her appeal under the heading "The World Health Organization Global Board of Appeal Fails to Address [the complainant's] Grounds of Appeal and Upholds her Discharge". In substance, she raises three points. The first point concerns her suspension involving a contention that the defendant organization violated its own Staff Rules. She argues the GBA "did not consider this ground of appeal at all anywhere in its reasons". This argument is untenable. As discussed in consideration 2 above, the GBA concluded, correctly, that her claims concerning the suspension decision were irreceivable.

5. The second point concerns procedural fairness during the IOS investigation and the finalisation of its report. Specifically, the complainant argues that the GBA did not address her submission that her medical condition rendered her unable to respond within the timeframe imposed on her. In her account of the facts in her brief, illness was raised three times by her during the IOS investigation. The first time was in late August 2018. She requested the meeting in which she would be interviewed be deferred for a week. The investigator suggested a longer period and this occurred. The second time was in early November 2018 when she was being asked to review the transcripts of her interviews. She said that because of her illness she could not review the transcripts immediately. She then became embroiled in a dispute about whether she should be given a recording of the interviews on which the transcripts were based. The third time was on 4 December 2018 when, in an email to the investigator, she said that her health remained poor, she was making great effort to review the transcripts, and was making some headway. Each of these matters was expressly referred to by the GBA in its account in its report of the IOS investigation process. In its ultimate conclusion about the IOS investigation process, the GBA considered that the complainant had been provided with an opportunity to test the evidence and submit her views on the charges under investigation and that she opted not to do so.

While the complainant might disagree with this conclusion, it cannot be assumed that the GBA ignored or overlooked what it had earlier said about the complainant raising, from time to time, her state of health with the investigator.

6. The third point concerns procedural fairness before the decision was made to terminate her employment because "[the defendant organization] did not accommodate her medical condition and continue[d] denying her access to electronic records". These matters were addressed by the GBA and any failure to address expressly each and every nuanced argument (for example, that the defendant organization was under a duty to make its own inquiries about the complainant's health) does not sustain a conclusion that the GBA did not give fair and adequate consideration to the case advanced by the complainant.

7. It is convenient to recall, at this stage, the role an internal appeals body and its report and findings play in proceedings such as these. The role of an internal appeals body was recently discussed in Judgment 4674, consideration 5:

> "Before considering any of these various issues, it is desirable to refer to the role of reports or opinions of internal appeal bodies in the Tribunal's consideration of issues raised in a complaint. It has been put in a variety of ways, and comparatively recently in Judgment 4644, consideration 5:
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> '[If the internal appeal body's opinion] is balanced and considered, [...] its findings and conclusions must be given considerable deference (see, for example, Judgments 4488, consideration 7, 4407, consideration 3, and 3858, consideration 8).'
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> Indeed, also comparatively recently, the Tribunal said, in relation to both the opinion of an internal appeals body and an investigative body established by the rules of the organization concerned, in Judgment 4237, consideration 12:
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> 'According to the Tribunal's case law (see, for example, Judgments 3757, under 6, 4024, under 6, 4026, under 5, and 4091, under 17), '"where an internal appeal body has heard evidence and made findings of fact, the Tribunal will only interfere if there is manifest error (see Judgment 3439, consideration 7)"'. Moreover, where there is an investigation by an investigative body in disciplinary proceedings, '"it is not the Tribunal's role to reweigh the evidence collected by an investigative body the members of which, having directly met and heard the persons concerned or implicated, were able

> immediately to assess the reliability of their testimony. For that reason, reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgments 3682, under 8, and 3593, under 12)'" (see Judgment 3757, under 6).'
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> It is true that the Board of Appeal did not hear the witnesses in the present case. It did, however, review a large amount of documentary material, including the records of interviews, and made findings of fact based on this material. The opinion of the Board of Appeal is, on some relevant matters, balanced and considered and has to be given the deference spoken of in the Tribunal's case law."

8. Moreover, in disciplinary cases, the Tribunal will not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see, for example, Judgment 4237, consideration 12, cited above and more recently Judgment 4579, consideration 4).

9. The Tribunal addresses, in turn, the arguments under each of the headings summarised in consideration 3 above. The first heading is that "the IOS investigation was not conducted fairly". There is an overlap between arguments in this section and those under the third heading. The alleged failure to provide the complainant access to electronic records would be legally relevant only insofar as such a failure, if proved, denied the complainant procedural fairness. The substance of the arguments made under this heading and the third heading (as it related to the IOS investigation) was addressed by the GBA under the heading in its report, of "the IOS investigation process" and, in particular, paragraphs 51 to 56. Its analysis was balanced and considered. It is tolerably clear that the GBA was satisfied that the IOS investigation was conducted fairly, and the complainant was afforded procedural fairness. There is nothing in the submissions advanced by the complainant to the Tribunal in these proceedings which would compel a different conclusion.

10. The second heading is that "UNAIDS Failed to Accommodate [the complainant's] Medical Condition". There is also an overlap between arguments in this section and those under the third heading.

The alleged failure to accommodate the complainant's medical condition would be legally relevant only insofar as such a failure, if proved, denied the complainant procedural fairness either during the investigation by IOS or subsequently during the disciplinary proceedings. However, the focus of the argument under this heading in the complainant's pleas, concerns the disciplinary procedure following the IOS report. While mention is made of events preceding the publication of that report, there is no argument of substance concerning the consequences of this alleged failure at this point. Insofar as the argument concerns the disciplinary procedure, this was addressed by the GBA in its report under the heading "[t]he disciplinary process" as was the alleged lack of "IT access". Again, its analysis was balanced and considered. And again, it is tolerably clear that the GBA was satisfied that in the disciplinary process the complainant was afforded procedural fairness. Again, there is nothing in the submissions advanced by the complainant to the Tribunal in these proceedings which would compel a different conclusion.

11. The Tribunal now addresses the arguments under the fourth heading namely, "The Evidence cannot Support a Finding Against [the complainant] Beyond a Reasonable Doubt". There are fourteen subheadings, each addressing the conduct of the complainant in relation to an event or identified circumstances. The submissions under each subheading involve a detailed account of what are viewed by the complainant as relevant facts and also arguments why those facts do not support a conclusion that the conduct has been proved beyond reasonable doubt. They are presented in over 29 pages of the brief.

12. However, there is a fundamental difficultly in the approach of the complainant and how she presents her case which creates an insuperable barrier to the Tribunal analysing let alone accepting this argument that the evidence cannot support a finding against the complainant beyond a reasonable doubt. In her brief the following is said on her behalf by her lawyer:

> "[The complainant] also makes additional submissions related to the allegations against her, which she was previously unable to make due to her medical condition. This Tribunal ought to consider this evidence as it demonstrates that [the complainant]'s claims about due process are not merely procedural in nature."

It is entirely impracticable to review what is said under the fourteen subheadings endeavouring to identify what is new evidence and related submissions and what were the evidence and submissions advanced on her behalf before, relevantly, the GBA and the Executive Director.

13. In relation to the question of whether conduct founding a disciplinary measure has been proved beyond reasonable doubt and what evidence the Tribunal considers, it has said its role is a limited one, as described in Judgment 4362, consideration 7:

> "The role of the Tribunal in a case such as the present is not to assess the evidence itself and determine whether the charge of misconduct has been established beyond reasonable doubt but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion [...]"

Plainly enough that role does not require, indeed contemplate, further evidence to be furnished in the proceedings before the Tribunal. The touchstone for error in this regard concerns the evaluation of the evidence by the relevant decision-maker, namely the evidence before him or her.

14. The fifth heading is "The Penalty Imposed by the Executive Director was Excessive". At the beginning of the submissions the complainant makes a statement which, on one view, might be viewed as a concession that had she been guilty of all the misconduct identified in the IOS report, it was open to UNAIDS to dismiss her:

> "[The complainant] does not suggest that, had a staff member in her position in fact been guilty of the misconduct identified in the IOS report, that staff member could reasonably be dismissed from service."

If it was not intended to be a concession to this effect, it is difficult to understand why the statement was made.

The submissions then address what might happen in the event that the Tribunal were to conclude that some, but not all the allegations against the complainant could be taken as proven beyond reasonable doubt and what might happen in the event that the Tribunal were to conclude that none of the findings of misconduct against her should have been made.

Having regard to the discussion in considerations 9 to 11 above, none of the findings concerning the complainant's conduct should be disturbed. In these circumstances her dismissal was not a disproportionate sanction.

15. In the result, the complainant has not demonstrated a basis for setting aside the impugned decision or the anterior decision to dismiss her. The complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 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