

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 3)

v.

WHO

138th Session

Judgment No. 4862

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms M. B. against the World Health Organization (WHO) on 26 April 2022 and corrected on 6 June 2022, WHO's reply of 5 October 2022, the complainant's rejoinder of 16 January 2023, WHO's surrejoinder of 2 May 2023, the complainant's additional submissions of 11 September 2023 and WHO's final comments of 24 November 2023;

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

Having examined the written submissions;

Considering the decision of the President of the Tribunal to disallow the complainant's request for postponement of the adjudication of the case;

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

The complainant contests the decision not to provide her with an investigation report on her sexual harassment complaint at the end of the investigation and before a decision was taken on her harassment complaint.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations (UN) programme on HIV/AIDS administered by WHO. She joined UNAIDS in December 2009.

In early November 2016, the complainant submitted a formal complaint of sexual harassment to UNAIDS Executive Director, the Ethics Office and the Ombudsman, directed against the Deputy Executive Director of Programme (DXD/PRG), Mr L. The complaint was referred to WHO's Office of Internal Oversight Services (WHO/IOS) for preliminary review. In December 2016, WHO/IOS commenced its investigation, issuing an initial report on 27 September 2017, which found no sexual harassment. Having received additional information, WHO/IOS issued an addendum to its report in December 2017, in which it maintained its original conclusion that the complainant's allegations were not substantiated, and repeated its recommendation that the case should be closed. The then Executive Director endorsed that recommendation on 31 January 2018.

On 27 April 2018, UNAIDS informed the complainant of the UN Secretary-General's decision that it was in the organisation's interest to re-open the investigation on her sexual harassment complaint in light of additional allegations reported against Mr L. The decision of 31 January 2018 was therefore suspended until the outcome of the broader investigation. The UN Office of Internal Oversight Services (UN/OIOS) was requested to conduct the investigation. It sent its final report to the WHO Director General on 14 August 2020.

The complainant wrote to UN/OIOS, on 18 August 2020, requesting confirmation that the UN/OIOS report was sent to UNAIDS, the date on which it was sent and to provide her with a copy. UN/OIOS replied straightaway that the report was sent to the WHO Director General pursuant to the terms of a Memorandum of Understanding between UN/OIOS and WHO/IOS. She was therefore asked to follow-up with WHO/IOS, which was copied. That same day, she asked WHO/IOS to provide her with the report, but received no response.

On 8 September 2020, the complainant asked the WHO Director General to provide her immediately with a copy of the report and a decision on her harassment complaint adding that her request should be treated as "a request for a final administrative decision". Having received no reply, she submitted, mid-December 2020, a request for administrative review to WHO contesting the implied refusal to provide

her with a copy of the UN/OIOS report. She was informed that her request would be forwarded to UNAIDS as she was a former UNAIDS staff member.

On 21 December 2020, she submitted an identical request for administrative review to UNAIDS contesting the WHO Director General's failure to reply within the prescribed time limit to her request for review of the implied rejection of her request to be provided with a copy of the UN/OIOS report. On 18 February 2021, UNAIDS Director of the Human Resources Management (HRM) department notified the complainant that in the absence of a decision taken by the UNAIDS Executive Director on her formal complaint of harassment, her request to receive the report was premature. She added that the complainant's request to reactivate the claim she made with the Advisory Committee on Compensation Claims (ACCC) fell outside the scope of the request for review since no decision on her harassment complaint had been made. Her request for moral and exemplary damages was also denied as there was no undue delay in the receipt and review of the report, given the complexity of the issues at stake. She added that this was her decision that could be appealed before the Global Board of Appeal (GBA).

On 22 January 2021, the decision-making authority on the sexual harassment complaint was delegated from WHO back to UNAIDS upon request from the UNAIDS new Executive Director.

The complainant lodged an internal appeal with the GBA in May 2021 contesting the rejection of her request for review and asking to be provided with an unredacted copy of the UN/OIOS report. She also requested *inter alia* to receive a decision on her harassment complaint, to be awarded damages for the failure to provide the report, for the delay in completing the investigation and issuing a decision on her sexual harassment complaint, and for violating the terms of reference of the investigation by allowing UNAIDS to take over the process from WHO, and to adjudicate her ACCC claim on the merits.

In its report of 2 December 2021, the GBA found that the appeal was receivable as it met the requirements of Staff Rule 1230.5. Indeed, the decision of 18 February 2021 indicated that it was the decision to

be appealed. However, the appeal was premature *ratione materiae* as no decision on the harassment complaint had been made when the complainant requested a copy of the UN/OIOS report. The GBA expressed concern over the excessive delay in completing the investigation and in taking a decision on the harassment complaint. However, it noted that a decision on the harassment complaint had finally been made and the complainant had expressed her intention to contest it. Therefore, the matter of compensation for the delay must be considered with all other matters relating to that decision. The GBA found that the claim regarding the ACCC laid outside the scope of the appeal, and that it was unnecessary to order the Administration to produce a copy of the Memorandum of Understanding since it had no bearing on the appeal.

On 25 January 2022, the UNAIDS Executive Director endorsed the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision with all legal effects flowing therefrom, to order the WHO Director General or the UNAIDS Executive Director to promptly provide her with an unredacted copy of the said OIOS report, and to order that claim No. 1552 pending before the WHO ACCC be adjudicated on the merits without further delay. She also seeks an award of moral and exemplary damages in relation to her "egregious mistreatment" and the delay in the completion of the investigation and the making of a decision of her harassment claim. She further claims costs in relation to the filing of her complaint, as well as interest on all amounts awarded to her, at the rate of 5 per cent per annum from 27 April 2018 through the date all such amounts are paid in full. Lastly, she claims such other relief that the Tribunal deems necessary, just and fair.

WHO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and otherwise devoid of merit.

CONSIDERATIONS

1. The complainant requests joinder of the present complaint (her third) with her first, second and fourth complaints. Although the four complaints concern facts and decisions which, in her view, are interconnected, the legal issues raised are partially discrete and the impugned decisions concern different subject matter. Accordingly, the complaints will not be joined.

2. The complainant applies for oral proceedings. The parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. The request for oral proceedings is, therefore, rejected.

3. This complaint concerns the refusal of WHO/UNAIDS to provide the complainant with the 14 August 2020 final report on the investigation completed by the United Nations Office of Internal Oversight Services (UN/OIOS) into a complaint of “sexual harassment and assault” lodged by the complainant against the former UNAIDS Deputy Executive Director, Mr L. After the rejection of her request for administrative review by decision of 18 February 2021, the UNAIDS Executive Director, by decision dated 25 January 2022, accepted the Global Board of Appeal (GBA)’s recommendations, dated 2 December 2021, and dismissed the complainant’s internal appeal. The UNAIDS Executive Director endorsed the recommendation that the appeal was premature *ratione materiae* as “no final decision on the [harassment] complaint had been made at the time [the complainant] requested a copy of the UN/OIOS report”.

4. The complainant advances seven pleas as follows.

- (i) The decision rejecting her request to receive a copy of the investigation report prior to its consideration by the WHO Director General was unlawful.
- (ii) The decision not to provide her with the UN/OIOS investigation report is justiciable and violated her due process rights.

- (iii) By breaching its promise to the complainant that no UNAIDS officials would be involved in either the investigation or the decision-making, the Organization is estopped from claiming that the appeal was premature *ratione materiae*.
- (iv) The excessive delay between the recommencement of the investigation into her complaint and the completion of the investigation report was unlawful.
- (v) By acting contrary to her legitimate expectations that the investigation would be carried out transparently and in good time, the Administration failed to act in the interests of the Organization, perpetrating a misuse of authority.
- (vi) The unreasonable delay in completing the investigation and the unjustified refusal to provide the investigation report amount to a breach of the Organization's duty to act in good faith.
- (vii) The failure of the Organization to treat her harassment complaint promptly and to grant her access to the investigation report was a breach of its duty of care.

Since the complainant's seven pleas are repetitive and overlapping, the Tribunal will examine them as a whole, in a logical order.

5. The Tribunal notes that after the lodging of the complainant's internal appeal against the 18 February 2021 decision, but well before the filing of the present complaint, the Organization adopted, on 31 August 2021, the decision on her sexual harassment complaint. After the filing of the present complaint, the Organization, with the 3 February 2023 decision (appended to the Organization's surrejoinder), has partially allowed the internal appeal lodged by the complainant against the 31 August 2021 decision, and has granted the disclosure of the investigation report, albeit in a redacted version, which is the subject matter of the present complaint. The 3 February 2023 decision is the subject matter of the complainant's fourth complaint. The Tribunal notes that the 3 February 2023 decision has no bearing on the present complaint, and does not render it moot. Indeed, the complainant has requested an unredacted version of the investigation report. Moreover,

the complainant claims moral and exemplary damages. Therefore, the present complaint is not moot.

6. The complainant's claim to be provided with an unredacted version of the investigation report, prior to the issuance of the decision on her harassment complaint, is unfounded. The impugned decision, the GBA recommendations, and the decision on the complainant's request for administrative review lawfully found that her request for the investigation report was premature and, therefore, irreceivable. The complainant demanded to be provided with the investigation report prior to the adoption of the decision on her sexual harassment complaint. The Tribunal notes that there are no UNAIDS staff rules and regulations establishing that the investigation report into a harassment complaint must be provided to the alleged victim of harassment prior to the decision on the harassment complaint.

Even when an investigation is concluded and a decision is adopted, the WHO Policy on Preventing and Addressing Abusive Conduct (effective 1 March 2021 and applicable at the relevant time as the first impugned decision was taken after the promulgation of the Policy) does not impose an absolute obligation to provide a copy of the report, stating, in Section 8.17, as follows:

“The affected individual and the alleged offender will be informed of the outcome of the process following the investigation and both parties will normally receive a copy of the investigation report.”

This rule encompasses the possibility to provide the concerned person with a copy of the investigation report together with the decision, and not before its issuance.

The former WHO Policy on the Prevention of Harassment (effective 7 September 2020) also did not provide for an early disclosure of the investigation report (see Sections 7.16, 7.17, 7.19).

Also, the UN System Model Policy on sexual harassment (to be implemented by each UN Agency) establishes that the alleged victim of harassment has a right to be informed of the outcome of the report on the complaint, but does not compel an organization to disclose the investigation report prior to the issuance of the decision on the

harassment complaint. Paragraph V.7 of said UN System Model Policy read:

“Any formal report of possible sexual harassment should be acknowledged by the [receiving official/investigative entity]. The target/victim/affected individual shall be informed as appropriate of the status of any investigation and outcome of the report. The alleged offender will also be informed of the outcome of the report. The provision of any such information shall respect the regulations and rules on confidentiality as applicable to the alleged offender and to the targets/victims/affected individuals.”

To support her contention that the UNAIDS rules allow for an early disclosure of the investigation report, before the adoption of the decision on the harassment complaint, the complainant relies on Sections 6.4 and 6.5.1 of the UN/OIOS Investigations Manual.

It is appropriate to quote these sections:

“6.4. Confidentiality of OIOS reports

OIOS reports contain confidential and sensitive information about individuals and United Nations operations and activities. Disclosure of such information may be detrimental to the Organization’s proper functioning, the welfare and safety of its staff or third parties, or may violate the Organization’s legal obligations. OIOS reports are therefore considered confidential internal United Nations documents. For these reasons, the release of reports for purposes other than to facilitate the disciplinary process is restricted to specific instances provided for under the OIOS mandate (see Section 6.6). Even then, when the release of reports may breach confidentiality requirements and due process rights of individuals, the [Under-Secretary-General] has the right to modify or even withhold reports. Where appropriate, reports may be redacted in accordance with set procedures designed to protect the identity of United Nations personnel and others, fairness and due process for all parties concerned, as well as to protect against reprisals. Where widespread release of reports, despite their redaction, may compromise legal processes, OIOS can consult the Office of Legal Affairs and the Administrative Law Section, before their release.

The release of reports to Member States does not constitute their publication, and OIOS does not bear any responsibility for any further dissemination of the report.

6.5 Operations Support

6.5.1 Programme Managers

Following completion of investigations, OIOS transmits reports to the Secretary-General or programme managers for consideration and comments on its recommendations. Although there is no restriction on programme managers regarding dissemination of reports, OIOS encourages limited distribution to protect the confidentiality and due process rights of individuals (see Section 6.4).

Programme managers are able to view OIOS recommendations online and provide their responses, including updates on implementation status. OIOS will follow up on recommendations contained in investigation reports until they are fully implemented or no longer actionable. On pre-arranged timeframes, OIOS will evaluate implementation status of recommendations against set criteria. The [Under-Secretary-General] is obliged to report at least twice yearly to the Secretary-General on the implementation of recommendations addressed to programme managers, including those not accepted. When recommendations for appropriate action against staff members are based on misconduct, programme managers may refer the matters to [the Office of Human Resources Management] for disciplinary action.”

The complainant’s reliance on the quoted sections is misconceived. Firstly, the UN/OIOS Investigations Manual is not part of the staff rules and regulations, and it is intended as a practical guide for the investigators, which does not create any substantive rights. The foreword of said Manual expressly specifies the scope of the Manual, intended as a “practical guide” for the investigators. The Manual “[...] does not create any substantive rights. Further, it does not confer, impose or imply any new rights or obligations (other than those contained in United Nations regulations and rules) that would be actionable in a court of law or in administrative proceedings by or against the United Nations or those staff members responsible for conducting the investigations.”

Secondly, neither Section 6.4 nor Section 6.5.1, nor other parts of the Manual (see relevantly Section 6.3.1 concerning the scope and aim of the investigation report) set forth that the investigation report shall be disclosed before the adoption of a decision on a harassment complaint. On the contrary, the Manual is focused on the confidentiality of the investigation report and on the possibility that it may not be

disclosed, even after the adoption of the decision, or that it may be disclosed in a redacted version.

The non-disclosure of the investigation report prior to the adoption of the decision on the harassment complaint does not infringe the principle of due process. According to the Tribunal's case law, staff members, as a rule, have the right to access all evidence upon which a decision affecting their interests is based (see Judgment 4217, consideration 4). This implies that: (i) a decision is adopted; (ii) this decision negatively affects the staff member; (iii) the decision relies on the evidence of which the staff member demands the disclosure. Such requirements do not occur in the present case, as no decision on the harassment complaint had been adopted at the time the disclosure of the report was requested.

On the specific question of the disclosure of investigation reports, the Tribunal has distinguished between:

- (i) cases concerning an administrative decision notified to a staff member which is based on an investigation report; and
- (ii) cases concerning earlier requests for disclosure – that is, requests made shortly after the completion of the report and before the adoption of a decision.

In the first situation, an organization is ordinarily bound to disclose the investigation report together with the decision on the harassment complaint, or at least shortly after, where requested by the concerned party (see Judgments 4743, consideration 11, 4739, considerations 10 and 12, and 4547, consideration 10). On the contrary, in the second situation, unless it is otherwise established in the staff rules and regulations, an organization is not bound to disclose the investigation report before the decision is adopted (see Judgment 3831, consideration 11). The complainant's reliance on Judgment 4217, consideration 4, is misconceived, as in that case the request for disclosure of the investigation report into a harassment complaint was submitted after – and not before – the adoption of the decision, as in the present case.

The Tribunal is aware that its case law has occasionally stated that the alleged victim of harassment must be provided with the investigation report before the issuance of the decision on the harassment complaint (see Judgment 3347, considerations 19 to 21). It may be doubted that this judgment reflects a consistent line of authority, both before and after it was given. However, and in any event, this principle can only be applied on a case-by-case basis, where the specific circumstances of the case so demand. It is not the case here, considering that the alleged author of sexual harassment had retired on 23 February 2018, well before the complainant's request for disclosure of the investigation report. Thus, there was no urgent need, on the part of the complainant, to obtain the investigation report in advance, for the purposes of her harassment complaint, whilst further purposes pursued by the complainant (to use the report as a piece of evidence in her three other pending complaints) are immaterial and outside the scope of the present complaint.

In light of the foregoing, the complainant's first, second and seventh pleas are unfounded, as there was neither a violation of staff rules and regulations, nor an infringement of due process, nor a breach of the Organization's duty of care.

7. The issues concerning the length of the investigation and the complainant's alleged "mistreatment", raised in her fourth, fifth and sixth pleas, are premature, as they should be submitted against the decision on the harassment complaint, and not before its adoption. For the same reason, any questions regarding the decision-making authority competent to carry out the harassment proceedings and to take the decision on the harassment complaint, raised in her third plea, are equally premature.

8. The complainant's claim to be awarded moral and exemplary damages for the "mistreatment" she suffered and for the delay in the process, is premature for the reasons stated in consideration 7 above.

9. Considering the outcome of the present complaint, the “Memorandum of Understanding between UNAIDS and WHO/UN OIOS by which authority was established for investigation and decision-making in relation to [her] sexual assault complaint of 2016”, is immaterial to the case, and, thus, the complainant’s request for its disclosure is rejected.

10. As the complaint fails, the complainant is not entitled to costs for the present proceedings.

11. In light of the foregoing, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal’s Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER