

A. G. (No. 7)

v.

WHO

139th Session

Judgment No. 5002

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms C. A. A. G. against the World Health Organization (WHO) on 3 March 2022, WHO's reply of 12 July 2022, the complainant's rejoinder of 5 September 2022 and WHO's surrejoinder of 5 December 2022;

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

Having examined the written submissions;

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

The complainant challenges the decision to terminate her appointment following her refusal to accept two reassignment proposals.

Facts relevant to this complaint may be found in Judgment 5001, also delivered this day, dealing with the complainant's fourth complaint. Suffice it to recall that, at the material time, the complainant was serving under a fixed-term appointment as Executive Officer, at grade P-4, in the Office of the Deputy Executive Director, Management and Governance, at UNAIDS Headquarters in Geneva, Switzerland. In April 2019, in the context of the 2019 Mobility Exercise, the Executive Director of UNAIDS decided to reassign her to the position of Fast-Track Adviser, also at grade P-4, in Malawi. The complainant objected to this reassignment, arguing that the position of Fast-Track Adviser did not match her skills, experience and educational background. She was

also reluctant to leave Geneva in view of her family circumstances. The complainant raised these concerns with the Administration, but the reassignment decision was maintained and on 15 May 2019 she was handed a letter indicating that she was expected to take up her duties in Malawi on 12 July 2019. She was asked to sign and return a copy of the letter by the following day, confirming her acceptance of the reassignment. However, on 16 May 2019 the complainant was placed on sick leave by her doctor, and at this juncture she did not indicate whether she accepted or refused the reassignment.

The complainant exhausted her entitlement to certified sick leave on 11 November 2019. As she was not yet fit to return to work, she was placed on sick leave under insurance cover (SLIC) with effect from 12 November 2019. Meanwhile, she challenged the reassignment decision, without success, by means of a request for administrative review, followed by an appeal to the Global Board of Appeal (GBA).

On 14 November 2019, the Director, Human Resources Management (HRM), wrote to the complainant's counsel asking him to indicate whether the complainant accepted her reassignment to Malawi, so that the necessary administrative arrangements could be made. The same Director also proposed an alternative reassignment to the P-4 post of Fast-Track Adviser in Eswatini, for which she provided a post description. The complainant's counsel replied on 18 November 2019 that the complainant was deferring her decision on these reassignment proposals until she was fit to return to work.

On 30 October 2020, the complainant informed UNAIDS that her health had improved and that her doctor considered she could resume work, initially on a part-time basis. However, she understood that the only position to which she could return was the position in Malawi to which she had been reassigned. Noting that her complaint challenging the reassignment decision was pending before the Tribunal, she stated that she was unable to accept that reassignment. In her view, the decision to reassign her to Malawi was an act of retaliation for the stance she had taken on allegations of sexual harassment involving a senior official of UNAIDS. Nor could she accept the proposed reassignment

to Eswatini. In these circumstances, she requested “information on [the] next steps”.

Having received confirmation from the Director of WHO’s Staff Health and Wellbeing Department that the complainant was fit to resume full-time work as from 1 November 2020, the Director, HRM, notified the complainant by a letter of 11 November 2020 that the Executive Director had decided to terminate her appointment with effect from 30 November 2020, in accordance with Staff Rule 1072.1, on the grounds that she had refused two reasonable offers of reassignment. In order to regularise the complainant’s administrative situation (she had exhausted her entitlement to SLIC on 30 October 2020), the Executive Director had decided to place her on special leave with full pay (SLWFP) under Staff Rule 650.2 for the period from 1 November 2020 until the effective date of separation (30 November 2020). Furthermore, she would receive three months’ salary in lieu of the notice period provided for in Staff Rule 1072.1.

On 17 December 2020, the complainant submitted a request for administrative review of the decision of 11 November 2020. She challenged not only the termination of her appointment but also the fact that she had been placed on SLWFP and that she had been paid salary in lieu of notice. She contended, in particular, that the termination decision was a further act of retaliation. Her request for administrative review was rejected by a decision of 12 February 2021, and she then lodged an appeal with the GBA. In its report dated 10 November 2021, the GBA found no evidence of retaliation, bias or bad faith, and concluded that the challenged decisions were reasonable and complied with the Staff Regulations and Staff Rules. It therefore recommended that the appeal be dismissed.

By a decision of 22 December 2021, the Executive Director accepted the recommendation of the GBA and dismissed the complainant’s appeal. That is the impugned decision.

The complainant asks the Tribunal to reverse the decision of 11 November 2020 with full retroactive effect. She asks to be reinstated in a position commensurate with her skills, experience, and education, with effect from 1 December 2020, and to be paid all salary, benefits,

pension contributions, entitlements and other emoluments that she would have received had she not been separated from service. Alternatively, she asks to be paid all salary, benefits, pension contributions, entitlements and other emoluments that she would have received had she not been separated from service, for a period of two years commencing on 1 December 2020. She also asks to be paid the value of three months of benefits, pension contributions, health insurance premiums and all other entitlements and emoluments that she would have received had she been allowed to remain in service during her three-month notice period. She claims moral damages of at least 100,000 Swiss francs, costs, and interest at the rate of 5 per cent per annum on all amounts awarded. Lastly, she seeks any other relief deemed necessary, just and fair.

WHO asks the Tribunal to dismiss the complaint as without merit.

CONSIDERATIONS

1. The complainant challenges the impugned decision, dated 22 December 2021, in which the Executive Director of UNAIDS endorsed the Global Board of Appeal (GBA)'s opinion on the decisions which the complainant contested in her internal appeal, as well as its recommendation to dismiss that appeal. The complainant had centrally contested the decision to terminate her appointment under Staff Rule 1072.1 for having refused a reasonable assignment to Malawi under the UNAIDS mobility policy. She also contested the decision to place her on special leave with full pay (SLWFP) until the date when the termination took effect, and to pay her three months' salary in lieu of notice, thereby, according to her, only giving her 18 days' notice instead of the required three months. She submitted that the decision to place her on SLWFP was a disciplinary measure because it was made unilaterally without her consent and without valid reasons and unlawfully thereby constituting an abuse of authority. She also submitted that the decision to terminate her appointment was retaliatory and motivated by bias and bad faith. The GBA concluded that the decisions at issue were reasonable and made in accordance with the Staff Regulations and Staff

Rules. It also concluded that the appeal disclosed no evidence of retaliation, bias or bad faith.

2. The complainant contends, in effect, as a first ground, that the impugned decision wrongly accepted the GBA's conclusion that the termination of her employment met the statutory requirements for termination under Staff Rule 1072.1, which relevantly states that if a staff member refuses to take up a reasonable reassignment the staff member's appointment shall be terminated with three months' notice. She also contends, in effect, as a second ground, that the impugned decision wrongly accepted the GBA's conclusion that the unilateral decision to place her on SLWFP from 1 November 2020 until she separated on 30 November 2020 could not be perceived as a disciplinary sanction and punitive measure. She contends, as a third ground, that paying her salary in lieu of notice without her consent was unlawful and she should have been allowed to remain in service until the date of her separation. She contends, in effect, as a fourth ground, that the impugned decision wrongly accepted the GBA's conclusion that the decision to terminate her employment was not retaliatory.

3. As a precursor to considering these grounds, three procedural matters will be addressed. First, the complainant requests the joinder of this complaint with her fourth complaint in which she centrally challenges the decision to reassign her to Malawi under the UNAIDS mobility policy, which she did not accept, eventually culminating in the termination of her appointment which she challenges in the present complaint. She submits that the impugned decision in her seventh complaint "arose out of the improper reassignment and retaliation that [she] was subjected to, which decision [she] contested separately prior to her separation from service". She requests that these two complaints be joined in the interest of judicial efficiency and economy, as a finding in her favour in the fourth complaint would render the decision to terminate her employment unlawful. WHO states that it does not object to the application for joinder, as it considers that the "circumstances" applicable to the fourth complaint are relevant to the seventh complaint, even though the two cases are distinct in fact and law. However, the

“circumstances” refer to the fact that the two complaints stem from the same continuum of events, which the Tribunal stated in consideration 6 of Judgment 4753 is not a sufficient basis for joining complaints. As this complaint and the complainant’s fourth complaint do not raise the same or similar questions of fact and law, they will not be joined to form the subject of a single judgment, although they will be considered in the same session by the same panel of judges.

4. In the second procedural matter, WHO states that this complaint is receivable only to the extent that it concerns the decision to terminate the complainant’s appointment and the related decisions to place her on SLWFP and to pay her three months’ salary in lieu of notice. It submits that any arguments relating to matters that are the subject of other proceedings should be disregarded as being outside the scope of this complaint. Whilst the Tribunal agrees with WHO that claims concerning these matters are outside the scope of the present complaint, it may consider them as pleas to support the complainant’s allegations that the decision to terminate her appointment was tainted by bias, retaliation and abuse of authority.

5. In the third procedural matter, the complainant ticked the box on the complaint form signifying that she requests an oral hearing pursuant to Article 12, paragraph 1, of the Tribunal’s Rules. The Tribunal observes her statement that she wishes to be called, as well as such other witnesses identified after reviewing WHO’s reply and surrejoinder. She has not named any other witness. The request for an oral hearing is rejected as the issues raised in this complaint can be resolved having regard to the pleas and the documentary evidence which the parties have provided.

6. To support her first ground, the complainant argues, in effect, that the proposed reassignment that she refused to accept was not a reasonable assignment as it involved reassigning her to a post which she was not qualified to fill. She states that she lacked the qualifications, requisite experience, expertise or skills to effectively perform the functions of the post. She however notes that the GBA found that the

reassignment was reasonable and also found that she had not provided evidence to support her allegations of retaliation, bias or bad faith in the reassignment process. She states that she raised these matters in her fourth complaint and she defers to the Tribunal's judgment on the merits of that complaint. As the Tribunal considered and concluded in considerations 6 to 9 of Judgment 5001 that the complainant's reassignment to the post in Malawi was not a disciplinary sanction motivated by bias and retaliation, and in considerations 10 to 12 that her proposed reassignment was justified, these arguments are unfounded.

The complainant's further argument that the GBA also wrongly found that she was not on sick leave when she was notified on 11 November 2020 of the termination of her appointment or when she was separated from service on 30 November 2020, entirely dismissing her physician's explanation, is also unfounded. As the GBA noted, in support of this submission the complainant alleged that her own physician and WHO's external expert had agreed that her capacity to work as of 1 November 2020 was only 50 per cent. The GBA concluded, correctly, that it was the Director of WHO's Staff Health and Wellbeing Department (SHW) who had the authority to determine staff members' fitness for work and it was that Director who had determined that the complainant was 100 per cent fit to return to work on that date. The GBA also correctly noted that she was on SLWFP from 1 to 30 November 2020 so that she was not on sick leave when she was notified on 11 November 2020 that her appointment would be terminated on 30 November 2020. In the foregoing premises, the first ground is unfounded.

7. Regarding the second ground, the GBA noted the complainant's submission that the decision to place her on SLWFP could be perceived as a disciplinary measure because it was done without valid reasons and without her acceptance. It further noted that under Staff Rule 650.2, the Executive Director "may, at his or her initiative, place a staff member on [SLWFP] [...] if he or she considers such leave to be in the interest of the Organization". The GBA also noted that Staff Rule 650.8 states that during SLWFP, the staff member

and the Organization continue to contribute at the full rate to the United Nations Joint Staff Pension Fund, the Staff Health Insurance, and the Accident and Illness Insurance and that Staff Rule 670 discusses the granting of various types of leave, and states that “[t]he personal circumstances of the staff member shall be considered to the extent possible”. The GBA then considered the Administration’s countervailing argument that placing the complainant on SLWFP was reasonable in the circumstances, including because she had been out of the office on sick leave for a year and a half; that at the material time there was no position available for her at UNAIDS Headquarters; that placing her on SLWFP relieved the complainant of the obligation to report for duty, as well as the fact that she continued to receive her full salary and benefits during the period she was on SLWFP and therefore suffered no harm as a result of the decision to place her on SLWFP. The GBA concluded that it saw no issue with the decision to place the complainant on SLWFP pursuant to Staff Rule 650.2 and accepted the reasons the Administration advanced as reasonable. It further stated that while Staff Rule 670 required the Executive Director to consider her personal circumstances, there was no requirement that her consent be given or that the placement on SLWFP should have been in her best interest.

8. The Tribunal determines that the GBA’s reasoning and conclusions on this issue were open to it given the applicable provisions and its analysis, which were correctly endorsed in the impugned decision. This determination is not obviated by the complainant’s submissions to the effect that, although the decision to place a staff member on SLWFP under Staff Rule 650.2 involves an element of discretion, there was no reason in this case not to seek her consent, in particular as her presence at work would not have involved any risk for the Organization, nor would it have impacted on working relationships; that she had just returned from a long period of sick leave and the GBA gave no thought to the arguments she raised, nor to the general principle of an organization’s duty to treat its staff with respect and to uphold their dignity as international civil servants. The second ground is therefore unfounded.

9. Regarding the issue the complainant raises in the third ground, in its report, the GBA noted that Staff Rule 380.1.3 states that “[p]ayment in lieu of notice shall be in the same amount as if the staff member had remained in duty status”. It also noted that paragraph 80 of the WHO e-Manual section III.10.16 states that “[i]f, in accordance with Staff Rule 380.1.3, the Organization pays staff members for all or part of a notice period instead of requiring them to work during this period, that payment is normally calculated on the basis of their salary and the allowances and adjustments to which they were entitled on the last day in service status”, and, further, that “[c]ontributions for Insurance and Pension Fund participation cease on the last day in service status, and no deductions are made for such contributions from the payment in lieu of notice”.

10. The GBA noted the complainant’s arguments, which, in effect, mirror her arguments in this complaint, that she had a statutory right under Staff Rule 1072.1 to three months’ notice, instead of the 18 days she was given; that although Staff Rule 380.1.3 refers to payment in lieu of notice, this is not a substitute for the statutory notice period; that she was paid her salary minus the deductions and the Organization’s contributions for insurance and to the Pension Fund and that the extra three months of insurance coverage and the additional pension contributions would have helped her as she was still under medical care. She also argued that the decision to pay her in lieu of notice was not in her best interest. The GBA concluded, in effect, that it saw no issue with the decision to pay the complainant for three months’ in lieu of notice, which Staff Rule 380.1.3 permitted the Organization to do and its failure to obtain her consent does not invalidate that decision as there is no requirement for this.

11. The Tribunal holds that this conclusion was open to the GBA given the applicable provisions and the circumstances. As WHO correctly explains, payment in lieu of notice is expressly foreseen under Staff Rule 380.1.3, as well as under Staff Regulation 9.3, which states that if the UNAIDS Executive Director terminates the appointment of a staff member she or he shall be given notice and indemnity payment

in accordance with the terms of her or his appointment. These provisions do not envisage consultation with the staff member and it was reasonable to take this measure, given the circumstances, that the complainant had exhausted her sick leave entitlements and had been declared fit to resume full-time work on 1 November 2020 by the WHO Staff Physician, but she had not accepted either of the two proposed reassignments. She had been away from the office on sick leave for over a year and a half and effectively had no position to return to because another staff member had been assigned to her former position since July 2019 in the context of the 2019 Mobility Exercise and exercising her discretion under Staff Rule 650.2, the Executive Director decided that it was in the best interest of UNAIDS to place the complainant on SLWFP until the effective date of her separation from the service, but she continued to receive her full salary and applicable benefits. In the premises, the third ground is also unfounded.

12. Regarding the fourth ground, the GBA had concluded, in effect, that the internal appeal disclosed no evidence that the decision to terminate the complainant's appointment was motivated by retaliation, bias or bad faith. The complainant states that in the proceedings on her fourth complaint, she finally discovered, following an order for disclosure of evidence, that in November 2019, after she had reported her concerns of retaliation to WHO's Office of Compliance, Risk Management and Ethics (WHO/CRE), the Director of that Office had written to the Executive Director of UNAIDS recommending that preventative measures be taken to protect her from retaliation. She asks that this circumstance be taken into account in these proceedings and she should be granted "a corrective remedy" under section 2.2.7, paragraph 29, of the WHO Whistleblowing and Protection against Retaliation Policy and Procedures.

13. The Tribunal however holds that, as WHO correctly submits, in the first place, the complainant's allegations of retaliation did not meet the applicable criteria under the WHO Whistleblowing and Protection against Retaliation Policy and Procedures, which define retaliation as an adverse administrative action recommended or taken

against an individual who has reported suspected wrongdoing or cooperated with an audit or investigation. Indeed, although the complainant eventually participated in an investigation, her allegations of retaliation were not related to her participation in the investigation process, which took place after the alleged retaliatory adverse action. In the second place, the recommendation from the Director of WHO/CRE was based solely on the complainant's assertions. He did not have all the facts, nor did he have any input from UNAIDS. WHO/CRE recommended that the allegations be investigated so that the facts could be established, but the complainant refused. Moreover, notably, in consideration 9 of Judgment 5001 the Tribunal, having considered the information referred to in consideration 12 of this judgment, concluded that the complainant did not provide evidence of sufficient quality or weight to persuade it that the decision to reassign her to Malawi was motivated by bias, bad faith, retaliation, as a hidden disciplinary sanction and/or abuse of authority, as she alleges. Neither has the complainant provided such evidence to permit the Tribunal to conclude that the decision to terminate her appointment was motivated on any of these bases. The fourth ground is therefore unfounded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER