A.

v.

WHO

139th Session **Judgment No. 5003**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. A. against the World Health Organization (WHO) on 2 February 2022 and corrected on 1 March 2022, WHO's reply of 27 April 2023, the complainant's rejoinder of 22 May 2023, corrected on 9 June 2023, and WHO's surrejoinder of 11 September 2023;

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 dismiss him with notice.

The complainant, a Nigerian national, joined the Organization in August 2013 to serve as Technical Officer, at grade P-3, in the WHO Country Office for Tanzania. In June 2018, he was promoted to the P-4 position of Project Manager in Libya. In May 2019, he was promoted to the P-5 position of Team Lead in the WHO Emergency Programme in the Country Office for Syria.

On 24 June 2019, Ms Z. – who was the complainant's supervisee – filed a complaint of sexual harassment with the Office of Internal Oversight Services (IOS) against the complainant, which she also sent, inter alia, to Ms H., who was, at the material time, the complainant's supervisor. She complained of inappropriate comments, inappropriate

levels of intimacy in communications and unwanted touching in the form of handshakes and hugs. She also alleged that the complainant was abusing his authority and blackmailing her. In support of her allegations, she provided documents and named four witnesses.

IOS carried out an investigation and interviewed Ms Z. and several witnesses regarding seven alleged incidents of sexual harassment. Meanwhile, on 30 June 2019, the complainant was placed on administrative leave with full pay, pending completion of the investigation. He was eventually interviewed by IOS on 22 November 2019.

On 6 November 2020, IOS issued its report and communicated it to the Regional Director of the Regional Office for the Eastern Mediterranean (EMRO). It found that the complainant exhibited a conduct of an unwanted sexual nature that could reasonably offend Ms Z. on several occasions and concluded that there was sufficient evidence to support the conclusion that he may have sexually harassed Ms Z. through his actions, which were particularly offensive considering his position. It thus considered that the complainant had contravened the applicable provisions of WHO's Policy on the Prevention of Harassment and recommended to the Regional Director to forward its report to the Global Advisory Committee on Harassment (GAC) for its views and decide on the appropriate course of action.

On 8 November 2020, the IOS report was transmitted to the GAC, which sent its recommendations to the Regional Director on 22 December 2020. The GAC's panel unanimously concurred with IOS findings that the alleged incidents constituted a case of sexual harassment and recommended that disciplinary proceedings be initiated against the complainant in accordance with WHO's Staff Regulations and Staff Rules.

By a letter dated 29 December 2020, the Regional Human Resources Manager notified the complainant that he had been charged with misconduct by failing to observe the standards of conduct for an international civil servant set out in Article 1 of WHO Staff Regulations and Staff Rule 110.8 and by contravening Sections 3.2.1 and 3.2.2 of WHO's Policy on the Prevention of Harassment. The complainant was

invited to provide his comments on 5 January 2021. He accepted four allegations and contested the other ones, accusing Ms Z. of having fabricated the allegations.

By a letter of 8 March 2021, the complainant was informed of the decision of the Regional Director, EMRO, to dismiss him with one month's notice based on his conclusion that he had committed sexual harassment.

On 9 April 2021, the complainant appealed against the dismissal decision.

On 25 October 2021, the Global Board of Appeal (GBA) issued its report in which it concluded that the complainant's behaviour met the definition of sexual harassment and that the IOS investigation and the disciplinary process were conducted in line with the regulatory framework and in accordance with the rules of fairness and due process. It found no grounds to question the finding of misconduct and the proportionality of the disciplinary sanction imposed upon the complainant. As a final reflection, it made a statement that the Organization should be more proactive in its training on harassment and invited WHO to include instructions on harassment during induction training on duty stations. The GBA recommended rejecting the appeal in its entirety as unfounded.

By a decision dated 5 November 2021, the complainant was informed that the Director-General endorsed the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the decision of 8 March 2021, and to order his reinstatement to his last position "without loss of earnings, salaries, allowances, prerequisites of office, seniority, privileges, pensionable rights and right to promotion, without any break in service and as if [he] was never dismissed" in another duty station. He also requests that he be "restore[d]" to grade P-5, step 4, corresponding to the "annual stepwise promotion due to [him] every 01 May and since 2019 when [he] was sent on administrative leave without further promotion". He seeks payment for material and moral damages, corresponding respectively to all salaries and allowances he would have received from 9 April 2021

and a total amount of 70,000 United States dollars for "mental and emotional" injuries, as well as "stationeries cost[s] of [...] 10,000 [dollars] while prosecuting this case". He also requests that his record be withdrawn from the United Nations Clear Check screening database, where it was placed by a memorandum of 13 August 2021 from the Administration. Finally, should the Tribunal consider that misconduct was established, he invites the Tribunal to consider that a reduction in grade would be a more proportionate sanction than dismissal.

WHO notes that any allegations raised by the complainant which were not analysed internally by the GBA and decided upon by the Director-General in the impugned decision are clearly beyond the scope of the present complaint and, hence, irreceivable and irrelevant. That is notably the case for the complainant's claim on the withdrawal of his record from the United Nations Clear Check screening database. It asks the Tribunal to dismiss the complaint in its entirety.

In his rejoinder, the complainant substantively increases the amount of material and moral damages which he seeks and the amount of costs.

CONSIDERATIONS

1. The complainant applies for oral proceedings and lists witnesses. The Tribunal observes that the parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request is rejected.

2. The following discussion proceeds against the background already set out in the facts described above. Firstly, the Tribunal will address the receivability issues raised by WHO, which are twofold. On the one hand, the Organization contends that any allegations which the complainant has not raised internally should be considered irreceivable. This contention is unfounded. The Tribunal's case law has established that the claims of a complainant must not exceed in scope the claims submitted during the internal appeal process; it has however recognized that a complainant is not precluded from advancing new pleas before the

Tribunal even if those pleas were not placed before the relevant internal appeal body (see, for example, Judgments 4901, consideration 4, 4547, consideration 11, 4522, consideration 3, and 3686, consideration 22). On the other hand, the Organization contends that the complainant has filed with the Tribunal a new claim, concerning the decision to place his record in the United Nations Clear Check screening database, and that this new claim is irreceivable, considering that a separate internal appeal is still pending on this decision. This contention is also unfounded. Although, as stated above, new claims before the Tribunal, are, as a rule, irreceivable, the case law allows exceptions to this rule, with regard to ancillary claims, such as claims for costs incurred during the proceedings before the Tribunal (see Judgments 4020, consideration 4, 3945, consideration 5, 3421, consideration 2, 2457, consideration 4, and 475, consideration 1), claims for damages resulting directly from the internal appeal proceedings themselves, for example for the delay in the internal appeal process (see Judgment 4074, consideration 17), and possibly claims for moral damages (see Judgments 4020, consideration 4, and 3080, consideration 25). In the present case, the claim about the placement of the complainant's record in the United Nations Clear Check screening database concerns a decision which is a direct consequence of the disciplinary decision, and which is not impugned for its own flaws, but only because it is an ancillary decision directly linked with the main decision. On the material before the Tribunal, it appears, on balance, that the placement decision was not a distinct discretionary decision. In the circumstances of the case, the claim against the placement of the disciplinary decision in the United Nations Clear Check screening database is an ancillary claim, the outcome of which will be determined by the outcome of the main claims. It is obvious that, if the disciplinary decision were to be set aside, the placement of the complainant's record in that database should also be withdrawn, as a direct effect of the setting aside of the disciplinary decision. Thus, the complainant is entitled to claim such withdrawal in the same complaint filed against the disciplinary decision.

3. In his first plea, the complainant alleges a procedural error. He contends that, before the commencement of the disciplinary proceedings against him, the harassment complaint filed by Ms Z. should have been addressed by means of the informal resolution procedure. This plea is unfounded.

Pursuant to Section 5.2 of WHO's Policy on the Prevention of Harassment, effective 7 September 2010:

> "Where instances of harassment have allegedly occurred, staff members are normally expected to use informal means to try and resolve the situation promptly in a non-threatening and non-contentious manner. However, it is acknowledged that such an approach may not be appropriate in certain cases due to particular circumstances. Where informal resolution is not considered feasible or appropriate for sound reasons, or has otherwise been unsuccessful, staff members may proceed to file a formal complaint."

It can be inferred from this provision that the informal procedure for solving issues of harassment, albeit recommended, is not strictly mandatory. There might be situations where, for sound reasons, the informal procedure is not feasible. The Tribunal is satisfied that, in the present case, having regard to the nature of the allegations, the informal procedure was not appropriate and that the lack of a previous informal procedure did not amount to a procedural error. This plea is rejected.

4. Before addressing the complainant's further pleas, it is appropriate to recall that, in its 6 November 2020 report, the Office of Internal Oversight Services (IOS) concluded as follows:

> "82. IOS found that the following incidents potentially constituted unwanted or unwelcome actions during the period May to June 2019:
>
> (a) [the complainant] drew the attention of Ms [Z.] to his open fly front zipper;
>
> (b) [the complainant] repeatedly tried to hug Ms [Z.] despite her pushing him away;
>
> (c) [the complainant] sent to Ms [Z.] messages suggesting a degree of intimacy which Ms [Z.] did not feel comfortable with;
>
> (d) [the complainant] shook hands with Ms [Z.] (and other females) in a manner that made her feel uncomfortable;
>
> (e) [the complainant] made remarks to Ms [Z.] in relation to the physical attributes of her buttocks;

(f) [the complainant] asked Ms [Z.] to help him find a girlfriend or wife as beautiful as her, while staring at her; and

(g) [the complainant] discussed Ms [Z.]'s love life with a degree of intimacy that is not usual for a supervisor.

[...]

84. In view of the above findings, IOS concludes that there is sufficient evidence to support the conclusion that [the complainant] may have sexually harassed Ms [Z.] through his actions, which were particularly offensive considering the position of [the complainant] at [the WHO Country Office for] Syria.

85. In view of the above, IOS considers that [the complainant] may be considered as having contravened Sections 3.2.1 and 3.2.2 of WHO['s] Policy on the prevention of harassment.

[...]

86. IOS recommends that, as per the paragraph 7.17 of the Policy on Prevention of Harassment, the Director Regional forward this investigation report to the Global Advisory Committee (GAC) for its views and, after reviewing the above findings and conclusions, decide on the appropriate course of action."

In the 29 December 2020 letter of charges, based on the above findings of IOS, the complainant was charged with the following counts:

"1. Failure to observe the standards of conduct for an international civil servant set out in Article 1 of the Staff Regulations and Staff Rule 110.8.

2. [The complainant] contravened Sections 3.2.1 and 3.2.2 of WHO's Policy on the Prevention of Harassment."

In his interview with IOS and in his comments on the letter of charges, the complainant admitted the following episodes, but denied that they amounted to sexual harassment:

(a) his shaking hands with Ms Z.: he denied having shaken hands in an inappropriate or impolite way;

(b) his text message suggesting to Ms Z. to have a pregnancy test: he alleges that he sent this message because Ms Z. was repeatedly absent from work;

(c) his request to Ms Z. to help him to find a second wife "as beautiful as [her]"; and

(d) small talk with Ms Z. concerning her marital status.

The complainant denied the three other episodes listed above, namely to have repeatedly tried to hug Ms Z., to have drawn her attention to his open fly front zipper, and to have made inappropriate comments about her buttocks.

5. In his second, third, fourth, and fifth pleas, which are interconnected and overlapping and will, thus, be addressed as a whole, the complainant contends, in brief, that his supervisor, Ms H.:

(a) was in a personal cordial relationship with Ms Z. and the key witness, Mr W.;

(b) was biased against him;

(c) due to her cordial relationship with Ms Z. and the key witness, deliberately eschewed the informal resolution option to the complainant's disadvantage and to the advantage of Ms Z., and, thus, acted in bad faith against the complainant; and

(d) committed abuse of authority against the complainant by giving him assignments from her new duty station (in the WHO Country Office for Libya) while the complainant was still on administrative leave (from the WHO Country Office for Syria).

The complainant adds that the alleged victim of harassment, Ms Z., and the only direct witness, Mr W., had reasons for being biased against him, and he listed witnesses to prove this circumstance, who were not heard by the investigator. He also lists two witnesses before the Tribunal, Mr Ha. and Ms T., and requests the Tribunal to hear them.

It is appropriate, at the outset, to clarify that Ms H., the complainant's supervisor, was one of the officers who received the harassment complaint by Ms Z., which was also directly addressed by Ms Z. to IOS. Ms H., when interviewed by IOS, stated that she had assessed that there was no possibility of mediation, and, thus, forwarded the said complaint to IOS for further action.

The complainant's fourth argument, summarized above, alleging an abuse of authority by Ms H., is outside the scope of the present complaint, as it refers to episodes which allegedly occurred whilst he

was on administrative leave, and which are not connected with the disciplinary proceedings.

The complainant's third argument, summarized above, reiterates, in essence, his first plea, that the informal procedure should have preceded the disciplinary action. The Tribunal has already answered to this plea in consideration 3 above.

As to the complainant's first and second arguments, the Tribunal recalls its well-settled case law that bias and prejudice must be proven and the complainant bears the burden of proof. In order to support his allegation, the complainant must demonstrate that there was malice, ill-will, improper motive, fraud or similar dishonest purpose (see, for example, Judgments 4505, consideration 9, and 3902, consideration 11). Similarly, the complainant bears the burden of proof in establishing any bias or inequitable treatment (see Judgment 4097, consideration 14). In the present case, after considering Ms H.'s role in the process and reviewing her interview with IOS, the Tribunal finds that there are no elements supporting the complainant's allegation that Ms H. was biased or prejudiced against him. In any event, Ms H. played no decision-making role in the investigation, the disciplinary action, or in the impugned decision, and the complainant has not established that she might have otherwise influenced the outcome of the process to his detriment.

The complainant further contends that Ms Z. and the only direct witness, Mr W., were biased against him; he alleges several episodes and lists witnesses. The Tribunal notes that the complainant listed ten witnesses with IOS during his interview on 22 November 2019 and in his 24 November 2019 email addressed to IOS providing additional information. Seven out of the ten witnesses were not interviewed by IOS. The complainant reiterated his list of witnesses in his 5 January 2021 comments on the letter of charges, however, his witnesses were not interviewed during the disciplinary proceedings. Nor were they interviewed by the Global Board of Appeal (GBA). The complainant reiterates before the Tribunal his request to hear witnesses, albeit limiting it to two witnesses. Firm and constant precedents of the Tribunal have it that, before adopting a disciplinary measure, an international

organisation must give the staff member concerned the opportunity to defend herself or himself in adversarial proceedings (see, for example, Judgment 3875, consideration 3). Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if she or he so wishes, to produce evidence to the contrary. The right to make a defence is necessarily a right to defend oneself before an adverse decision is made, whether by a disciplinary body or the deciding authority (see Judgments 4832, consideration 28, 4343, consideration 13, and 2496, consideration 7). Before disciplinary proceedings are undertaken, the investigator has the duty to ascertain all relevant facts and the accused person must be given the benefit of the doubt (see, for example, Judgments 4697, consideration 22, 4491, consideration 19, and 4011, consideration 9). This implies that the investigator has to assess not only evidence against the accused person, but also exculpatory evidence (see Judgments 4456, considerations 9 and 17, and 4362, consideration 12), and, before this, must allow the accused person to provide exculpatory evidence. In the present case, the complainant's request to hear witnesses was not even dismissed with a reason, it was ignored completely. The GBA, in turn, misconceived its role as, in its 25 October 2021 recommendations, it refused to reweigh the evidence and to assess the facts. It stated:

> "According to [...] Judgment 3593, consideration 12, it is not the role of an appellate body to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. Owing deference to the investigative body, the appellate body should only interfere in the case of manifest error. The Panel was satisfied that the IOS [r]eport discussed, under each incident, all the evidence received and found, including the [complainant]'s answers to the investigator's questions. The Panel was of the view that an on-site visit by IOS might have been advisable."

The Tribunal's precedent quoted by the GBA concerns the role of the Tribunal, not the role of the internal appeal bodies. On the contrary, with regard to the role of the internal appeal bodies, the Tribunal has consistently held that an appeal body is wrong, when defining its own competence, to rely on the Tribunal's case law concerning its limited power of review. Internal appeal bodies are not administrative courts

whose sole responsibility in principle is to review the lawfulness of decisions which are challenged (see, for example, Judgments 3161, consideration 5, and 3077, consideration 3). Indeed, ordinarily, the task of the internal appeal bodies is to determine whether the decision under appeal is the correct decision or whether, based on the facts, some other decision should be made (see Judgment 3161, consideration 6). The power of internal appeal bodies extends to the overall re-examination of all matters submitted to them and is not subject to the same restrictions that might apply to the judicial review by the Tribunal. The only exception to this is if the rules governing the review body provide for such restrictions (see Judgment 3318, consideration 5). The internal appeal bodies play a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from their composition, their extensive knowledge of the functioning of the organisation, and the broad investigative powers granted to them. By conducting hearings and investigative measures, they gather the evidence and testimonies that are necessary to establish the facts, as well as the data needed for an informed assessment thereof (see Judgment 3423, consideration 12).

It is true that, pursuant to WHO e-Manual, section III.12.4.530, the hearing of witnesses is at the discretion of the GBA, but the GBA must give reasons for its refusal to grant the hearing of witnesses, whilst in the present case the complainant's request was merely ignored with no grounds at all.

The failure, during the entire process of investigating and evaluating the position of the complainant, to consider hearing the witnesses listed by the complainant is, in the Tribunal's view, a serious flaw in the process, as some of the charges against the complainant are based only on the report and on the interview of the alleged victim, and one of the charges (namely the one referring to unwelcome hugging) is based on the interview of Mr W. In conclusion, the pleas are well founded to the extent that the complainant's request to hear witnesses was not considered. It cannot be established, at this stage, what would have been the outcome of the disciplinary proceedings if the witnesses listed by the complainant had been interviewed, namely, it cannot be established whether the findings would have warranted, in any event,

the most severe sanction or a less severe sanction. Moreover, the Tribunal, in cases where it found that some of the charges were not proven "beyond reasonable doubt" due to the failure to consider exculpatory evidence, annulled the disciplinary decision in its entirety (see Judgments 4456, considerations 9, 16 and 17, 4453, consideration 15, and 4362, considerations 17 and 18). In such a situation, the impugned decision and the disciplinary decision will be set aside.

6. The breach of due process considered above warrants by itself the annulment of the impugned decision, without there being any need to address the complainant's sixth and eighth pleas alleging that the charges were not proven "beyond reasonable doubt".

7. In his seventh plea, the complainant alleges an inordinate delay in the internal appeal process. This plea is unfounded. The harassment complaint was filed by Ms Z. on 24 June 2019, the disciplinary proceedings started with the 29 December 2020 letter and the disciplinary decision by the Regional Director, EMRO, was adopted on 8 March 2021. The applicable rules do not establish a time limit for the conclusion of the disciplinary proceedings, and, thus, the length of the procedure does not imply, by itself, a legal flaw in the process. Having regard to the complexity of the case, the duration of the disciplinary proceedings was not inordinate. As to the internal appeal process, it lasted approximately seven months (from 9 April to 5 November 2021), and this duration was not excessive.

8. In his ninth plea, the complainant contends that the disciplinary sanction of dismissal with notice is disproportionate. There is no need to address this plea, as the impugned decision and the disciplinary decision will be set aside in light of the breach of due process, as stated in considerations 5 and 6 above.

9. In his tenth plea, the complainant alleges that his case has been used to make new recommendations for handling future harassment cases. This plea is unfounded. There is no evidence that the complainant's case has been pursued, as he alleges, to make an example.

10. In conclusion, in light of considerations 5 and 6 above, the impugned decision and the disciplinary decision will be set aside. As a direct consequence of the annulment of these decisions, the Organization shall withdraw the placement of the complainant's record from the United Nations Clear Check screening database. As to the complainant's claim for reinstatement, in the normal course, the Tribunal should order reinstatement and resumption of the disciplinary proceedings. However, this is not appropriate in the present case, in light of the following. At the time when the Organization took disciplinary action, the complainant held a one-year fixed-term contract at the P-5 position, due to expire on 30 April 2020, and he had no right to renewal. Due to the effluxion of time and considering that the complainant did not hold an indeterminate appointment, it is inappropriate to order his reinstatement and the resumption of the disciplinary proceedings. The Tribunal further notes that the complainant was placed on administrative leave with full pay, until his dismissal was effective, as from 9 April 2021, that is, a date which fell after the due expiry of his fixed-term contract of only one year. In the particular circumstances of this case, there is no ground for the award of material damages in terms of loss of salaries. The complainant is only entitled to the restoration of his P-5 level until 30 April 2020. As for moral damages, the Tribunal will take into account that the complainant admitted some of the misbehaviour he was charged with, namely the text message concerning the pregnancy test, the small talk concerning Ms Z.'s marital status, and his request for the search of a second wife for him. This misbehaviour amounts at least to inappropriate conduct which would likely have warranted, in any event, a disciplinary sanction. Even if it is not the role of the Tribunal to establish whether this misbehaviour should have warranted a sanction and which kind of sanction, they are taken into account for the purpose of assessing whether and to what extent the complainant suffered a moral injury (see Judgment 4362, consideration 18). In such circumstances, the complainant is entitled to moral damages only for the breach of due process, and the Tribunal finds it just to award the sum of 25,000 United States dollars.

11. The complainant has not been legally represented but is nonetheless entitled to costs for these proceedings, in the amount of 1,000 euros or its equivalent in United States dollars.

DECISION

For the above reasons,

1. The impugned decision and the disciplinary decision are set aside.
2. WHO shall withdraw the placement of the complainant's record from the United Nations Clear Check screening database.
3. WHO shall pay the complainant moral damages in the sum of 25,000 United States dollars.
4. WHO shall pay the complainant costs of the present proceedings, in the sum of 1,000 euros or its equivalent in United States dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 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 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER