The Administrative Tribunal,

Considering the complaint filed by Mr J.A. C.-Z. against the World Health Organization (WHO) on 28 March 2007 and corrected on 14 May, WHO's reply of 27 August, the complainant's rejoinder of 26 September and the Organization's surrejoinder of 18 December 2007;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a national of Costa Rica born in 1952, is a former staff member of WHO. Prior to joining WHO, he worked for the Pan American Health Organization (PAHO) from 1 August 1987 to 28 February 2003 on a series of fixed-term appointments. With effect from 1 March 2003 he was appointed to the post of External Relations Officer in WHO's Office at the European Union in Brussels, Belgium, at grade D.1, on a two-year fixed-term contract. Shortly after taking up his new post, he received a copy of a Personnel Action form dated 1 May 2003, in which 1 March 2003 and 1 August 1987 appeared as his dates of entry on duty with WHO and the United Nations, respectively.

By e-mail dated 24 March 2004 addressed to the competent Management Support Unit the complainant asked to be considered for a service appointment on the grounds that, because of his 17 years of continuous service to the Organization, he fulfilled the condition of at least five years' certified satisfactory service on fixed-term appointments in WHO. On 25 May 2005 the Manager of the Unit responded that the complainant was ineligible for a service appointment because his period of service in PAHO was not considered as service in WHO.

In the meantime, by a letter of 21 January 2005, the complainant was informed that his appointment with WHO would be extended for four months to 30 June 2005, the date when the post that he was holding would be abolished. This letter indicated in particular that he would be paid an end-of- service grant, and that for this purpose his service time at both PAHO and WHO would be taken into account. By memorandum of 15 March 2005 the complainant notified the Headquarters Board of Appeal of his intention to file an appeal and he lodged a first appeal on 27 May 2005, challenging inter alia the decision not to extend his appointment beyond 30 June 2005 and the decision to accord him an end-of-service grant. He claimed that he should have been treated as if he held a service appointment. He pointed out that, had he continued to work for PAHO, he would have been entitled to either an extension of his appointment until he reached retirement age (on the assumption that his performance was satisfactory) or a reduction-in-force procedure in the event that his post was abolished. He also pointed out that WHO had taken into account his years of service with PAHO in order to calculate his end-of-service grant while, on the other hand, it had refused to credit these years for the purpose of determining whether he was eligible for a service appointment.

In June 2005 he was informed that his appointment with WHO was extended until 28 February 2007. In October 2005 WHO received a request for the complainant's secondment to the International Atomic Energy Agency (IAEA). By letter dated 26 October 2005 WHO's Director of Human Resources Services (HRS) proposed that the complainant be transferred under the Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances (hereinafter "the Inter- Organization Agreement"). In an annex containing the complainant's administrative details, 1 March 2003 was indicated as his date of entry on duty with WHO. On 7 November 2005 the complainant asked the Director of HRS to change this date to 1 August 1987. On 1 December 2005 the latter responded in writing that 1 March 2003 was the correct date, as had already been stated in the Personnel Action form, of which the complainant had received a copy together with his contract when taking up his duties with WHO.

By letter of 29 December 2005 the complainant's legal counsel informed the Board of Appeal that the complainant had decided to withdraw his appeal filed on 27 May 2005 and that this letter constituted a statement of intention to

appeal against the decision of 1 December 2005. WHO challenged the receivability of this appeal.

The complainant was transferred on the basis of the Inter-Organization Agreement with effect from 16 January 2006 to the IAEA, where he currently holds a director's post.

In its report of 20 October 2006 the Board of Appeal recommended that the complainant's second appeal be dismissed as time-barred on the grounds that the decision stating 1 March 2003 as the date of his entry on duty with WHO was contained in the Personnel Action form of 1 May 2003, which he had not challenged within the applicable time-limit. By letter of 28 December 2006, which is the impugned decision, WHO's Acting Director-General informed the complainant that he had decided to accept the Board's recommendation and to dismiss his appeal as irreceivable.

B. The complainant submits that the Board of Appeal erred in considering that his appeal was time-barred. He argues that although *de jure* he was a PAHO staff member from 1987 to 2003, *de facto* he also served WHO during that whole period. In this respect, he points out that he represented both Organizations in various duty stations at the time and that he has been a participant in the United Nations Joint Staff Pension Fund since 1987 under the same pension number, which identifies WHO as a member organisation of the Fund.

He submits that he was notified of the decision that 1 March 2003 was his date of entry on duty with WHO only when he received a copy of the letter of 26 October 2005 concerning his transfer to the IAEA. Thus, for the purpose of considering the receivability of the appeal, the Director of HRS' reply of 1 December 2005, which rejected the complainant's request to change his administrative details, should be considered as the final decision.

The complainant acknowledges having received the Personnel Action form in May 2003 but argues that its purpose was merely to confirm his reassignment to another duty station. The wording used in the form as well as in WHO's correspondence at the time did not make him fully aware of all the administrative consequences entailed by his move to Brussels. Particularly, it did not make it clear that WHO deemed it to be a new appointment in another organisation.

He contends that it is in the interest of justice and equity that the data contained in a form reflecting a particular personnel action may still be contested by a staff member at the moment their administrative consequences become relevant.

The complainant asks the Tribunal to quash the impugned decision, to declare his appeal receivable and to refer his case back to the Headquarters Board of Appeal for consideration of the merits. He also claims costs.

C. In its reply WHO maintains that the complainant's internal appeal was time-barred, and that his complaint should therefore be dismissed as irreceivable. Relying on Staff Rule 1230.8.3 and the Tribunal's case law, it argues that the complainant ought to have challenged the correctness of his date of entry on duty with WHO within 60 days after receipt of the notification of it in May 2003. It asserts that according to WHO Manual paragraph II.4.150, the Personnel Action form sets out the conditions under which staff members are employed and therefore constitutes notification of final decisions contained therein.

The Organization contends that, not only the Personnel Action form of 1 May 2003, but also that of 14 April 2003 concerning the termination of his appointment with PAHO, WHO's correspondence, WHO's offer of appointment and the notification of acceptance which the complainant signed upon being transferred to WHO, clearly informed him that he was appointed to another organisation; nothing could thus suggest that his move was treated as an internal WHO reassignment. Moreover, the letter of 1 December 2005 does not meet the conditions set forth by the Tribunal to be considered as a new decision.

It also emphasises that the complainant has not demonstrated any present injury, or any likelihood of future injury, since IAEA has already confirmed that, should the complainant's post be abolished in the future, his indemnities would be calculated from 1 August 1987. He therefore has no cause of action.

Subsidiarily, the defendant asserts that PAHO and WHO are two distinct organisations, as already adjudicated by the Tribunal in Judgment 137. In its view, the fact that the United Nations Joint Staff Pension Fund considers PAHO staff members as WHO staff members for the purpose of their participation in the Fund is of no consequence. It maintains that the date of the complainant's entry on duty with WHO was correctly determined to be 1 March 2003.

D. In his rejoinder the complainant reiterates his pleas. He argues that WHO Manual paragraph II.4.150 does not support the view that "each individual information contained in the Personnel Action Form […] constitutes a 'decision'". To consider otherwise, he adds, would lead to a situation whereby a staff member could not request rectification of typographical errors contained in the Personnel Action form after the expiration of the deadline for contesting an administrative decision.

As to the absence of injury, he asserts that, contrary to WHO's contention, paragraph 12 of the Inter-Organization Agreement suggests that, should the IAEA abolish his post and thus terminate his appointment, it would calculate his indemnities as of 1 March 2003, not 1 August 1987. He adds that he has never received any written confirmation from the IAEA that it would proceed otherwise.

Lastly, he submits that Judgment 137 is not relevant and notes that the Tribunal did not examine the merits of that case because at the time PAHO had not recognised its jurisdiction.

E. In its surrejoinder WHO maintains its position. It adds that the complaint, "in which [the complainant] speculates as to what […] IAEA […] *might do* if a *hypothetical* event (the termination of his IAEA appointment) were to occur", is an abuse of the Tribunal's process. It produces a copy of an e-mail of 7 December 2007 in which the Administration of the IAEA confirms that, in the event that the complainant's appointment was terminated, his termination indemnities would be calculated from 1 August 1987, the date when he joined PAHO.

CONSIDERATIONS

1. After a series of fixed-term appointments at PAHO between 1 August 1987 and 28 February 2003, the complainant started on 1 March 2003 a two-year fixed-term appointment (later extended for an additional four months) at WHO's office in Brussels. Two months later the complainant received a copy of a Personnel Action form dated 1 May 2003 in which his dates of entry on duty with WHO and the United Nations were shown as 1 March 2003 and 1 August 1987 respectively.

2. On 26 October 2005 in reply to a request for information from the IAEA in connection with the complainant's proposed transfer to that Agency, WHO's Director of HRS attached a list of "administrative details" about the complainant to his response. In that document, the complainant's United Nations and WHO dates of entry on duty are the same as those in the Personnel Action form.

3. On 7 November 2005 the complainant wrote to the Director of HRS, requesting that the date of entry on duty in the "administrative details" sent to the IAEA be corrected to show his date of entry on duty with WHO as 1 August 1987.

The Director replied on 1 December 2005 that his date of entry on duty with WHO was correct and was the same date as in the Personnel Action form sent to him at the time of his first appointment with WHO.

4. On 29 December 2005 the complainant submitted his statement of intention to appeal the decision regarding the date of his entry on duty with WHO contained in the letter of 1 December 2005.

5. In its report of 20 October 2006, the Headquarters Board of Appeal found that the decision at issue had been taken more than two years earlier and was contained in the Personnel Action form dated 1 May 2003; that the complainant should have challenged the decision at that time; and that the appeal was time- barred, therefore irreceivable, having been submitted outside the time limits prescribed by Staff Rule 1230.8.

6. By a letter of 28 December 2006 the Acting Director-General accepted the findings and recommendation of the Board of Appeal and dismissed the complainant's appeal as irreceivable. The complainant asks the Tribunal to set this decision aside and to remit the matter to the Board for a determination on its merits.

7. WHO submits that the Acting Director-General correctly determined that the complainant's appeal was time-barred and, therefore, irreceivable. It contends that if the complainant wanted to challenge the correctness of the date of his entry on duty with WHO, he should have submitted a statement of his intention to appeal within 60 days of the notification of the decision dated 1 May 2003, as required by Staff Rule 1230.8.3.

8. WHO also submits that the complainant's statement that he did not attach any importance to the administrative details in the Personnel Action form since he believed it simply confirmed his reassignment to another duty station, does not withstand scrutiny. First, this form specifically refers to his appointment as an inter-organisation transfer; his offer of appointment refers to the appointment as being "made by inter-agency transfer from PAHO to WHO"; and the notification of acceptance of appointment signed by the complainant refers to an appointment by "inter-agency transfer". Second, the Organization points out that according to WHO Manual paragraph II.4.150, the Personnel Action form is central to the determination of a staff member's conditions of employment.

9. As to the Director of HRS' reply of 1 December 2005, WHO argues that it is not a decision let alone a new decision. In support of this assertion, it relies on Judgment 2011, where the Tribunal stated, under 18:

"According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and must relate to different issues from the previous one or be based on new grounds (see Judgments 660 […] and 759 […]). It must not be a mere confirmation of the original decision (see Judgment 1304 […]). The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits (see Judgment 586 […]), nor does a reply to requests for reconsideration made after a final decision has been taken (see Judgment 1528 […])."

WHO argues that none of the above conditions is satisfied in the present case.

10. Lastly, WHO takes the position that since the complainant has not demonstrated any present injury or any reasonable presumption of future injury based on his date of entry on duty with WHO, he has no cause of action.

11. Staff Rule 1230.8.1 provides that a staff member may not appeal against a decision until it has become final. Under the Rule, a decision will be considered final when it has been taken by a duly authorised official and written notification of the decision has been received by the staff member. Staff Rule 1230.8.3 requires that a staff member wishing to appeal against a final decision must send a written statement of intention to appeal to the Board of Appeal within 60 days of its notification.

12. WHO does not specifically address the question as to whether the communication of the date of entry on duty with WHO contained in the Personnel Action form of 1 May 2003 constitutes a final decision as contemplated in the Staff Rules. Instead, in countering the complainant's arguments, the Organization starts from the proposition that it is a final decision.

13. It is well established in the Tribunal's case law that "a decision does not require any particular formality and may be constituted by any communication that is reasonably capable of being understood to constitute a decision on the matter" (see Judgment 2629, under 6). As to whether a communication may be reasonably capable of being understood to be a decision, in Judgment 2644, under 8, the Tribunal explained:

"There are occasions when a staff member may treat a communication or other action (for example, a payment to his or her bank account) as embodying a decision with respect to his or her entitlements (see Judgment 2629 […]). However, where, as here, there is no indication that the communication in question constitutes a final decision, there are and may be circumstances that lead a staff member to reasonably conclude that it does not. Particularly is that so if, as in the present case, it concerns a matter that has not been the subject of an express claim or there is nothing to suggest that the matter in question has been considered by a person with authority to make a final decision thereon."

14. WHO Manual paragraph II.4.150 describes the Personnel Action form as follows:

"The Personnel Action (form […]) sets out the terms and conditions under which staff members are employed. A new Personnel Action is prepared for changes in their status or entitlements that take place in the course of their service with WHO. Personnel Actions are signed on behalf of the [Director of HRS] for staff administered by Headquarters and on behalf of the regional director for regional staff […]"

15. From this description, the purpose of the Personnel Action form is to simply record the changes to the terms and conditions of employment upon a change in a staff member's status or entitlements and is not, as asserted by WHO, central to a determination of a staff member's conditions of employment.

16. In the present case, according to the form itself, the "type of action" causing the Personnel Action form to be created was the complainant's "appointment by interorganization transfer". It is a record of a contract already entered into between the staff member and WHO. In this context, and in the absence of any evidence from which it could be inferred that a duly authorised official turned his or her mind to whether the prior PAHO service had any bearing on the complainant's date of entry on duty with WHO at the time the form was completed, the communication of 1 May 2003 that the date of entry on duty with WHO was 1 March 2003 was not the notification of a decision.

17. The Tribunal also observes that sometime later when the complainant asked to be considered for a service appointment, the WHO's Management Support Unit acknowledged that there were "technicalities, policy and possibly legal questions that [had] to be resolved" with regard to whether service in PAHO could be taken into account for a WHO service appointment. From this response, it is clear that even from the Organization's perspective the issue had not been resolved. In these circumstances, the Tribunal concludes that the communication of the date of entry on duty with WHO in the Personnel Action form of 1 May 2003 does not constitute a final decision as contemplated in Staff Rule 1230.8.1.

18. Concerning the letter of 1 December 2005, as it was in response to the complainant's specific request for a correction to his date of entry on duty with WHO, it was a final decision against which an appeal could be taken pursuant to the Staff Rules. The argument that the complainant does not have a cause of action is one properly to be considered by the Board of Appeal.

19. Accordingly, the Acting Director- General's decision of 28 December 2006 that the appeal was irreceivable will be set aside and the matter will be remitted to the Headquarters Board of Appeal. The complainant is entitled to his costs which the Tribunal sets at 2,000 Swiss francs.

DECISION

For the above reasons,

1. The Acting Director-General's decision of 28 December 2006 is set aside and the matter is remitted to the Headquarters Board of Appeal.

2. WHO shall pay the complainant 2,000 Swiss francs in costs.

In witness of this judgment, adopted on 9 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.