

107th Session

Judgment No. 2840

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs K. J. L. against the World Health Organization (WHO) on 5 May 2008 and corrected on 10 June, WHO's reply of 22 September, the complainant's rejoinder of 6 November 2008, the Organization's surrejoinder of 11 February 2009 and its additional comments of 22 April 2009 submitted at the Tribunal's request;

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. Facts relevant to this case are to be found in Judgment 2839, also delivered this day. Suffice it to recall that following the decision of 5 September 2005 to reassign her to the Division of Country Support in the WHO Regional Office for Europe (EURO), the complainant went on sick leave on 14 September and on 15 September she informed the Regional Director for Europe of her decision to resign. By memorandum of 19 September the Regional Director accepted her

resignation and noted that for her remaining time of duty after her sick leave she would assume her new responsibilities.

By letter of 24 November the Acting Human Resource Manager informed the complainant that the necessary formalities for her separation from service, which according to Staff Rule 1010.1 would take effect on 15 December 2005, had been initiated. He acknowledged that in view of her recent medical certificate she might not be able to return to duty before the effective date of resignation and explained that in that case the Director of Health and Medical Services would consider her medical condition in the light of WHO Manual paragraph II.9.570.4. Enclosed with the letter was an annex entitled “Administrative formalities in connection with separation from service” which under the heading “Exit Medical Examination” indicated that the Director of the Health and Medical Services would consider her medical situation and would revert to her on this matter. In a medical report of 29 November 2005 the EURO Regional Staff Physician attested that the complainant was suffering from service-incurred stress disorder and that she was not fit to return to work. She recommended that the complainant’s sick leave should be extended to 15 February 2006, at which point her condition should be reassessed.

By letter dated 13 December 2005 the complainant was informed that the Director of Health and Medical Services had confirmed her extended sick leave and that, accordingly, the effective date of her resignation would be deferred; her appointment would be extended for the duration of her certified sick leave until exhaustion of her entitlements in accordance with Staff Rule 740.1.1 and, if applicable, of any sick leave under insurance cover in accordance with Staff Rule 750.1. By letter of 21 April 2006 she was informed that a further extension of her sick leave had been confirmed and that, as her entitlements under Staff Rule 740.1.1 had expired on 3 March 2006, a request would be made for her to be placed on sick leave under insurance cover with effect from 4 March 2006 in accordance with Staff Rules 750.1 and 750.2. She was also informed that the period of sick leave under insurance cover would continue until she was either declared fit to work or her entitlement thereunder was exhausted.

In a medical report dated 14 November 2006 the complainant's treating physician attested that the complainant's condition was improving but that, owing to the former circumstances surrounding her job, it could not be excluded that her depressive symptoms might reappear if she returned. He noted that it would be possible for her to resume work in a job outside EURO and recommended an extension of her sick leave until 31 January 2007. By letter of 21 December 2006 the complainant was notified that, on the basis of the latest medical reports, her sick leave would come to an end on 31 December 2006, that the administrative formalities had been completed and that in due course she would receive a Personnel Action to reflect her separation from service with effect from 1 January 2007. Under cover of a letter dated 12 January 2007 the Human Resource Manager sent the complainant the aforementioned Personnel Action together with an annex detailing the administrative formalities pertaining to her separation and a number of separation forms.

On 8 and 10 February 2008 the complainant wrote to Dr G. M., the Director of Health and Medical Services. She indicated that her sick leave had been ended and that she had been separated from the Organization without having undergone a medical examination, as required under Staff Rule 1085, and she enquired as to when the Director-General had decided to waive that requirement. An exchange of e-mails ensued between the complainant, Dr G. M. and the Director of Human Resources Services, in which the complainant reiterated her request for information with regard to the medical examination. By e-mail of 6 March 2008 the Director of Administration and Finance replied that, on the basis of the complainant's medical reports, on 23 November 2006 she had been assessed as fit for work and accordingly her separation had taken effect on 1 January 2007 in accordance with Manual paragraph II.7.570.4. He added that, in light of the detailed medical record of her state of health in August 2005 and the medical reports received from her treating physician throughout 2006, the relevant provisions of the Staff Rules and the WHO Manual were considered to be fulfilled. In response to the complainant's request to be informed of the date of her last comprehensive examination by WHO, the Director of Administration and Finance confirmed that her

last medical examination had been performed on 16 August 2005. On 5 May 2008 the complainant lodged a complaint with the Tribunal impugning the “final decision secretly taken by WHO on 23 November 2006 and communicated to [her] [...] on 6 March 2008 to forgo the mandatory exit examination and medical clearance required under Staff Rule 1085”.

B. The complainant contends that the Organization’s decision of 23 November 2006 to separate her from service without ensuring that she undergo a medical examination on separation constituted a breach of Staff Rule 1085. Her appointment was terminated while she was still on sick leave and still receiving treatment from her physician. The last medical examination carried out by WHO had taken place in August 2005, that is 16 months prior to her separation from the Organization.

She asserts that the medical examination on separation is a mandatory procedure applied by all organisations of the United Nations Common System for the purpose of ascertaining that a departing staff member does not suffer from any condition which could potentially cause serious health problems once that staff member has left the organisation. It involves a series of tests and, in order for it to be valid, it must be performed by a physician designated by the respective organisation. By failing to order that a comprehensive medical examination be carried out by a WHO designated physician, the defendant violated its obligation under Staff Rule 1085 to ensure that her state of health on the day her appointment was terminated was the same as on the day she joined the Organization. She reproaches the Administration for conveniently equating the expertise of her treating physician – a specialist in mental health – with that of a general practitioner designated by WHO and for considering the examinations carried out by the former valid for the purposes of Staff Rule 1085.

The complainant requests that WHO be ordered to initiate immediately the procedures for her to undergo the full, mandatory medical examination on separation and that her sick leave be reinstated and maintained until she is declared fully fit. She claims moral damages for the stress and suffering she experienced and for

the long-term health risk to which she was exposed through the Organization's failure to proceed with the medical examination. She also claims costs.

C. In its reply the Organization submits that the complaint is irreceivable. It denies that any decision was "secretly" taken and observes that the e-mail of 6 March 2008 from the Director of Administration and Finance was merely a response to the complainant's queries of 8 and 10 February 2008 concerning the issue of medical examination on separation, and not a final decision subject to appeal or one that set off new time limits for appealing a prior decision. It asserts that the complainant had already been informed by letter of 21 December 2006 that her sick leave would come to an end on 31 December 2006, that she would be separated from service on 1 January 2007 and that all administrative formalities had been completed. Furthermore, she had received confirmation through the letter of 12 January 2007 that an exit medical examination was not necessary. Had she wished to contest the decisions concerning the medical examination or her separation, she ought to have filed an appeal within sixty days of receipt of the letter dated 21 December 2006 or, at the latest, within sixty days of receipt of the letter dated 12 January 2007. She did not do so and therefore the complaint is irreceivable for failure to exhaust the internal means of redress, in accordance with Article VII of the Statute of the Tribunal and Staff Rule 1240.2.

D. In her rejoinder the complainant asserts that the complaint is receivable as it was filed within sixty days of 6 March 2008, the date on which the Organization's final decision was communicated to her. She denies having received confirmation through the letter of 12 January 2007 or through any other communication that an exit medical examination was not necessary or that she could reasonably be expected to interpret the statement in the letter of 21 December 2006 that "the administrative formalities have been completed" to mean that her right to an exit medical examination had been denied. In her opinion, the Administration failed in its obligations towards her in that

it did not clearly communicate or explain its decision. She accuses WHO of seeking to manipulate the proceedings and to misrepresent the facts.

E. In its surrejoinder WHO maintains that the complaint is irreceivable. It reiterates that the e-mail of 6 March 2008 was not a notification of a final decision but merely a reply to the complainant's queries. It rejects her allegations of manipulation and misrepresentation. It notes that she was familiar with WHO appeal procedures, having already filed three internal appeals, and submits that there is therefore no justification for her having entirely bypassed them.

CONSIDERATIONS

1. The complainant challenges a decision taken by the Administration on 23 November 2006 to forgo the mandatory medical examination required prior to a staff member's separation under Staff Rule 1085. She states that the decision was communicated to her on 6 March 2008. The determinative issue in this proceeding centres on the question of receivability.

2. On 14 September 2005 the complainant went on sick leave and was subsequently diagnosed as suffering from a stress-related disorder. She wrote to the Regional Director on 15 September to inform him that she had decided to resign. The Regional Director accepted her resignation on 19 September.

3. By letter of 24 November 2005 the Acting Human Resource Manager informed the complainant that the necessary formalities had been initiated to reflect her separation from service, which according to Staff Rule 1010.1 would take effect on 15 December 2005. He also stated:

"I understand that based on the medical certificate we recently received you may not be able to return to duty before the [...] effective date of your resignation. The Director of the Health and Medical Service[s] will

therefore consider your medical situation, having regard to Manual [paragraph] II.9.570.4 [...]. It is understood that, if you were to be declared unfit on separation date by the Director of the Health and Medical Services in accordance with this Manual provision, we would inform you accordingly.”

Enclosed with the letter was an annex entitled “Administrative formalities in connection with separation from service”, which under the heading “Exit Medical Examination” indicated the following: “The Director of the Health and Medical Service[s] will consider your medical situation and we will revert to you on this matter”.

4. The complainant was informed by letter of 13 December 2005 that the effective date of her resignation had been deferred owing to her extended sick leave. With effect from 4 March 2006 her sick leave status was converted to sick leave under insurance coverage.

5. By letter of 21 December 2006 the Human Resource Manager informed the complainant that her sick leave would end on 31 December 2006 and that a Personnel Action to reflect her separation from service effective 1 January 2007 would be sent in due course. He also confirmed that “the administrative formalities ha[d] been completed”. Under cover of a letter of 12 January 2007 he sent her the Personnel Action and confirmed that most of the necessary formalities related to her separation from WHO had been finalised in December 2005. The Organization submits that an annex entitled “Administrative formalities in connection with separation from service” was enclosed with that letter indicating under the heading “Exit Medical Examination” that the Director of the Health and Medical Services had confirmed that in her case “an exit medical examination [was] not necessary”. The complainant denies having received this document and notes that it was not referred to in the letter of 12 January.

6. In an e-mail of 8 February 2008 addressed to Dr G. M., the Director of Health and Medical Services, and copied to the Director of Human Resources Services the complainant stated that she was never notified “about the date of the decision by the Director-General of

WHO to grant a waiver of Staff Rule 1085” in her case and asked Dr G. M. to inform her accordingly and also “if possible” share with her “the reasons behind this exception to the Staff Rules”. Dr G. M. responded that same day advising the complainant to submit her question to the EURO Administration. On 10 February the complainant wrote again to Dr G. M., requesting her to indicate when she had received the waiver to forgo her exit medical clearance.

7. An exchange of e-mails ensued between the complainant, Dr G. M. and the Director of Human Resources Services, in which the complainant reiterated her request for information concerning the exit medical examination.

8. In an e-mail of 6 March 2008 the Director of Administration and Finance provided the complainant with the following response:

“Reference is made to your messages to Dr [G. M.] of 8 and 10 February 2008 concerning medical examinations on separation [...]. In response to your queries, I am now in a position to inform you of the following.

I have been informed that in August 2005, you underwent a comprehensive medical examination by the EURO staff physician. This medical exam was done just before you resigned in September 2005. The date of your separation was subsequently deferred in accordance with Manual [paragraph] II.7.570.4, as a result of the illness supported by medical information provided to the then Director [of Health and Medical Services]. On 23 November 2006, based on your treating physician’s medical reports, you were assessed to be fit again and separation accordingly took effect on 1 January 2007 in accordance with the aforementioned Manual provision. In light of the detailed medical record of your state of health in August 2005, prior to your resignation, and the medical reports received subsequently from your treating physician throughout 2006, the related provisions contained in the Staff Rules and [WHO] Manual were assessed to be fulfilled.”

9. In response to the complainant’s request to be informed of the date of her last comprehensive examination by WHO, the Director of Administration and Finance confirmed that her last medical examination had been performed on 16 August 2005.

10. The complainant submits that as the decision she impugns was not communicated to her until 6 March 2008, the Organization “prevented [her] from contesting its legality through internal recourses until that very same date, 17 months after [she] ceased to be a WHO staff member”. She maintains that, in these circumstances, she had no other option but to submit her complaint directly to the Tribunal, which she did on 5 May 2008, that is within sixty days of the notification of the decision.

11. The Organization disputes the complainant’s assertion that the impugned decision was not communicated to her until 6 March 2008. It submits that as the complainant was told in the letter of 21 December 2006 that her sick leave would come to an end on 31 December 2006, that she would be separated from service on 1 January 2007 and that “the administrative formalities ha[d] been completed” she could have inferred from it that she would not need to undergo a medical examination. Additionally, the annex to the letter of 12 January 2007 confirmed that a medical examination was not required.

12. In response to the complainant’s statement that she did receive the letter of 12 January 2007 but not the annex thereto, the Organization states that the copies of the letter maintained at WHO Headquarters and the Regional Office have the annex attached.

13. The Organization argues that the e-mail of 6 March 2008 was merely a response to the complainant’s enquiries of 8 and 10 February 2008 and not a final decision. It also argues that the complainant has failed to exhaust the internal means of redress.

14. The Tribunal rejects WHO’s reliance on its letter of 21 December 2006 as being a communication of a decision that the complainant would not need to have an exit medical examination. There is no basis upon which it could be inferred from the statement “the administrative formalities have been completed” that the mandatory exit medical examination provided for in the Staff Rules

was being unilaterally waived. Given that an exit medical examination is mandatory and has potentially significant legal consequences for both parties, it would be expected that a deviation from the norm would be specifically communicated.

15. The Tribunal also rejects the Organization's reliance on the annex to its letter of 12 January 2007. All the other enclosures over which there is no dispute are specifically listed as being enclosed, including the Personnel Action that appears to have been added after the letter had been prepared.

16. Therefore, the decision was not communicated to the complainant until 6 March 2008.

17. The question remains whether in these circumstances the complainant was required to or, indeed could, access the internal appeal process; in other words whether the internal appeal process is open to a former staff member.

18. WHO Staff Regulations and Staff Rules governing the internal appeal process only refer to a "staff member" and not to a "former staff member". However, Staff Rule 1240.2, which stipulates the conditions for recourse to the Tribunal, does not refer to a "staff member" but to a "person". It reads:

"An appeal may be made to the Tribunal when the decision contested is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under these Rules, and in particular Rules 1210 to 1230."

This is also consistent with Article II, paragraph 6, of the Statute of the Tribunal, according to which the Tribunal shall be open to an official, even if his employment has ceased.

19. The Tribunal notes that the WHO Staff Regulations and Staff Rules do not contain regulatory provisions similar to those of other international organisations that specifically contemplate access to the internal appeal process by former staff members.

20. As there was no precedent on the question as to whether under the WHO Staff Regulations and Staff Rules the internal appeal process is available to a former staff member in circumstances where a decision has been communicated to an individual after separation from the Organization, the Tribunal gave the Organization an opportunity to make submissions on this question. In response, the Organization took the position that the internal appeal process is available to former staff members in these circumstances and cited the following judgments in support: Judgments 1323, under 4, 1721, under 8 and 9, 1941, 1956 and 1957 all involving complaints against WHO, and Judgment 2111, under 6, involving a complaint against the ILO. However, none of these judgments deal with the issue raised by the present case.

21. On the basis of the above review, the Tribunal finds that under the WHO Staff Regulations and Staff Rules where a decision has not been communicated until after a staff member has separated from service, the former staff member does not have recourse to the internal appeal process. In these circumstances, a former staff member has recourse to the Tribunal (see Judgment 2582 and the case law cited therein).

22. The result is that the complaint is receivable. Prior to filing its reply in this proceeding, the Organization sought and was granted leave to confine its reply to the issue of receivability. The Organization will have thirty days from the delivery of this judgment to file its reply on the merits and the remaining steps in this proceeding shall be taken in accordance with the Tribunal's Rules.

DECISION

For the above reasons,

1. The complaint is receivable.
2. WHO shall file its reply on the merits with the Registrar within thirty days of the delivery of this judgment and the remaining

steps in this proceeding shall be taken in accordance with the Tribunal's Rules.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet