

108th Session

Judgment No. 2895

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 2008;

Considering Judgment 2840 of 8 July 2009, whereby the Tribunal ruled on the receivability of the complaint;

Considering the Organization's reply of 6 August 2009 on the merits, the complainant's second rejoinder of 4 September and WHO's second surrejoinder dated 15 October 2009;

Considering Article II, paragraph 5, 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 Judgments 2839 and 2840, delivered on 8 July 2009, on the complainant's first and second complaints, respectively. In the proceedings which culminated in Judgment 2840 the Organization, having been granted leave from the Tribunal to do so, confined its reply to the issue of receivability. The Tribunal found that the complaint was receivable and ordered WHO to

file its reply on the merits within 30 days of the delivery of the judgment.

B. The complainant's submissions and claims are summarised in Judgment 2840, under B. Her main plea is that WHO terminated her employment while she was on sick leave without ensuring that she undergo a medical examination on separation, thereby breaching WHO Staff Rule 1085.

C. In its reply on the merits the Organization argues that the purpose of the medical examination provided for in Staff Rule 1085 is not, as the complainant alleges, to ensure that a staff member's state of health upon departure is the same as upon arrival, but rather to ensure, in the interest of both parties, the existence of a detailed medical record of a departing staff member's state of health. It indicates that the Administration was in possession of the complainant's full medical record, including the results of the comprehensive medical examination undertaken in August 2005 by the Staff Physician of the European Regional Office (EURO) and medical reports from her treating physician, and that this material was considered to provide sufficient information on her state of health, and thus to fulfil the requirements of Staff Rule 1085, without an additional medical examination being necessary.

WHO submits that the Director of Health and Medical Services acted in good faith and in proper exercise of her responsibilities in assessing whether an additional medical examination should be carried out and whether the requirements of the relevant Staff Rules were satisfied. She also took account of the complainant's interests, in particular the need to protect her health and well-being and not to expose her to any procedure related to her employment with EURO, which, as she had claimed, had put her under severe psychological pressure. The defendant dismisses the complainant's allegations that she was "repeatedly denied" an exit medical examination, noting that she made no such request prior to filing a complaint with the Tribunal. It similarly dismisses her allegations of prejudice and improper motivation of its decision. It rejects her claim for reinstatement until

such time as an exit medical examination is carried out, noting that separation from service is not conditional upon the completion of such examination.

According to the Organization, the decision of the Director of Health and Medical Services to interrupt the complainant's sick leave was fully in line with the Staff Rules and the relevant Manual provisions, which provide that the entitlement to sick leave shall end when a staff member is declared medically fit to resume duties. Indeed, the complainant's sick leave did not come to an end until after she had been certified as medically fit to resume work outside EURO and the information at hand indicated that there was no justification for its continuation. Thus, the complainant's contention that she was wrongfully separated from service is without merit, given that her separation took effect only when her sick leave had come to an end.

The defendant further draws attention to the fact that the WHO Staff Rules foresee the possibility of termination of appointment for reasons of health. It notes that, subsequent to the delivery of Judgment 2840, it invited the complainant to undergo the requested medical examination but its invitation received no response.

D. In her second rejoinder the complainant submits that by incorrectly challenging the receivability of the complaint, the defendant delayed the proceedings by "at least one more year". She explains that the Organization's invitation to undergo the requested medical examination was sent to her previous address and that, when she finally received it, she underwent the said examination, the results of which are now with the WHO Health and Medical Services.

The complainant reiterates that her appointment was terminated while she was still unfit for work and that the termination was therefore contrary to the Staff Rules and improperly motivated. She denies that the Administration had in its possession her full medical record and contends that the Director of Health and Medical Services decided that she was "free of illness" on the basis of a 16-month old examination record, without carrying out an examination herself, which is mandatory pursuant to Staff Rule 1085, and without obtaining

any medical data from a United Nations physician. She emphasises that at no point did her treating physician declare her fit to resume work and she accuses the Director of Health and Medical Services of attempting to persuade him to change his diagnosis. Acknowledging that the WHO Staff Rules foresee the possibility of termination of appointment for reasons of health, she underlines that her case did not fall under that category and that, in any event, the relevant provisions also envisage a number of safeguards for staff members.

The complainant requests, in addition to her initial claims for relief, the quashing of the following: her offer of resignation and its acceptance by the Regional Director for Europe on 19 September 2005; the decision of 23 November 2006 to declare her “free of illness” and the resulting recommendation to terminate her sick leave; the decision to terminate her appointment with effect from 31 December 2006; and, “in accordance with [...] Judgment 2839”, the decision of 5 September 2005 to remove her from her post of Human Resource Officer – she asks that her personnel file be revised to reflect that she served in that post throughout her employment with WHO. She also requests that a performance appraisal be established for 2005, that she be granted “full administrative reinstatement” and, “if found fit for separation”, that her separation be treated as a case of abolition of post in accordance with Staff Rule 1050. She also seeks payment of a special post allowance for the full period she served as Acting Human Resource Manager and an award in exemplary damages “for the destruction [...] of [her] career and [of] future career opportunities”.

E. In its second surrejoinder WHO argues that several of the complainant’s new claims for relief have been considered and ruled upon by the Tribunal in Judgment 2839. In particular, her claims concerning her resignation, the special post allowance, the revision of her personnel file and the establishment of a performance appraisal do not relate to the subject matter of the second complaint and must, therefore, be declared irreceivable. It also argues that the claim for an award of exemplary damages is not warranted or appropriate in the circumstances.

The Organization maintains that the Administration had a full medical record of the complainant's state of health, which was considered to fulfil the requirements of Staff Rule 1085 and which demonstrated that she was no longer incapacitated and that there was therefore no justification for the prolongation of her sick leave. It denies the accusations made against the Director of Health and Medical Services and emphasises that the latter acted in good faith at all times with the sole purpose of obtaining a clear and complete picture of the complainant's state of health. WHO considers that the complainant's explanation of the content of her treating physician's medical reports with regard to her capacity to work is inaccurate, self-serving and not supported by the evidence. It points out that a decision to terminate a staff member's sick leave does not amount to a determination that he or she is free from injury or illness, but merely that he or she is no longer incapacitated for work. It informs the Tribunal that at the time of filing its reply the complainant had not received its invitation – a fact of which it was unaware – and that she has now undergone a medical examination.

CONSIDERATIONS

1. The complainant challenges the decision of 23 November 2006 to forgo the medical examination required prior to a staff member's departure under Staff Rule 1085. In the proceedings leading to Judgment 2840, the Organization sought and obtained leave to limit its reply to the question of receivability. In that judgment the Tribunal concluded that the complaint was receivable and ordered WHO to file its reply on the merits of the case, which it shall now consider.

2. The complainant joined EURO in September 2003 as a Human Resource Officer in the Division of Administration and Finance. In July 2005 her appointment was extended for a period of two years.

3. On 14 September 2005 she was placed on sick leave as a result of suffering a serious stress-related disorder.

On the following day she wrote to the Regional Director for Europe stating that, in light of his proposal to transfer her to another post with effect from 19 September, she wished to inform him of her decision to resign. She also indicated that, upon her return from sick leave, she would elaborate further on this decision. On 19 September the Regional Director accepted her resignation with effect from 15 December 2005.

4. EURO's Acting Human Resource Manager informed the complainant in a letter of 24 November 2005 that the necessary formalities for her separation had been initiated. He also stated:

“That being said, I understand that based on the medical certificate we recently received you may not be able to return to duty before the aforementioned effective date of your resignation. The Director of the Health and Medical Services will therefore consider your medical situation, having regard to Manual [paragraph] II.9.570.4 (extract attached for ease of reference). 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.”

5. Enclosed with the letter an annex entitled “Administrative formalities in connection with separation from service”, stated under the heading “Exit Medical Examination”: “[t]he Director of the Health and Medical Services will consider your medical situation and we will revert to you on this matter”.

6. On 13 December 2005 the complainant was informed that the effective date of her resignation had been deferred due to her ongoing sick leave. On 4 March 2006 her sick leave status was converted to sick leave under insurance cover.

7. On 21 December 2006 EURO's 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 with effect from 1 January 2007 would be sent in due course. He also confirmed that “the administrative formalities [had] been completed”.

8. Under cover of a letter dated 12 January 2007 the Human Resource Manager sent a Personnel Action to the complainant confirming her resignation effective 1 January 2007. He observed that “[m]ost of the necessary formalities related to [her] separation from WHO [had been] finalized in December 2005”. The letter went on to note that, since there had been a change in the complainant’s home address and annual leave, a new clearance certificate was enclosed together with a pension form to be completed and returned. The complainant signed and returned these documents.

9. The Organization states that the annex entitled “Administrative formalities in connection with separation from service” was also enclosed with the letter of 12 January 2007 and that, under the heading “Exit Medical Examination”, it stated: “[t]he Director of the Health and Medical Services has confirmed that in your case an exit medical examination is not necessary”. The complainant denies having received this document and notes that it was not referred to in the letter.

10. On 8 February 2008 the complainant sent an e-mail to the Director of Health and Medical Services in which she made the following request:

“I was never notified about the date of the decision by the Director General of WHO to grant a waiver of [Staff Rule] 1085 in my case. For the completeness of my records, could you kindly inform me accordingly and also if possible share with me the reasons behind this exception to the [Staff Rules].”

The Director of Health and Medical Services responded the same day, advising the complainant to submit her request to EURO’s Administration.

11. On 10 February 2008 the complainant sent a further e-mail to the Director of Health and Medical Services, rephrasing her request as follows:

“My question was and is therefore: when did you as Chief Medical WHO receive the waiver to forego my exit medical clearance?”

12. On 21 February 2008 WHO's Director of Human Resources Services explained that the lack of a reply was due to the fact that the Director of Operational Support and Services and the Director of Health and Medical Services whom he had to consult before replying had been absent from their offices but that a reply would be sent upon their return. On 27 February the complainant reiterated her request for information concerning the exit medical examination.

13. On 6 March 2008 EURO's Director of Administration and Finance responded to the complainant's e-mails of 8 and 10 February 2008 as follows:

"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 Manual were assessed to be fulfilled."

14. On 11 April 2008 in response to an e-mail of the same day from the complainant asking to be informed of her "last comprehensive examination by WHO", EURO's Director of Administration and Finance stated that her last medical examination was performed on 16 August 2005 by the EURO Staff Physician.

15. On 5 May 2008 the complainant filed her second complaint with the Tribunal.

16. As noted above, WHO took the position, as stated in the e-mail of 6 March 2008, that "[i]n light of the detailed medical record

of [the complainant's] state of health in August 2005, prior to [her] resignation, and the medical reports received subsequently from [her] treating physician throughout 2006, the related provisions contained in the Staff Rules and Manual were assessed to be fulfilled”.

17. WHO continues to maintain this position in its pleadings. Additionally, it submits that any further medical examination was unnecessary particularly in view of the possibility that the complainant's health and well-being might be adversely affected by the Organization requiring her to undergo such examination. It states that “[t]his course of action was followed in good faith with the intention of protecting the complainant from the burden and associated stress of unwarranted measures upon her separation from service”.

18. In response to the complainant's assertion that she was “repeatedly denied” an exit medical examination, WHO contends that this is not reflected in the record and, in fact, it found no record of any request by the complainant to undergo such an examination until the filing of her complaint. It also maintains that a review of the record shows that the Director of Health and Medical Services acted in good faith and properly exercised her responsibilities in assessing that the requirements of the relevant Staff Rules had been fulfilled and an additional medical examination was not necessary.

19. Staff Rule 1085 reads:

“A staff member shall be examined immediately prior to his departure by the Staff Physician or by a physician designated by the Organization. If a staff member fails to undergo this medical examination within a reasonable time limit fixed by the Organization, then claims against the Organization arising out of illness or injury which allegedly occurred before the effective date of separation shall not be entertained; furthermore, the effective date of separation shall not be affected.”

20. The wording of the above provision makes it clear that a medical examination is mandatory. It follows from the mandatory nature of the medical examination on separation, coupled with the fact that it engages the interests of both parties and not just those of the

Organization, that WHO could not unilaterally decide that in the circumstances the requirement of Staff Rule 1085 had been fulfilled. Although that rule contemplates the situation where a staff member fails to undergo the exit medical examination, it also sets out the potentially adverse consequence that the lack of such an examination may have for the staff member in question.

21. As to WHO's motivation for "waiving" the required medical examination, namely, the complainant's health and well-being and the desire to protect her from the adverse effects of requiring her to undergo a further examination, the Tribunal notes that this motivation is raised for the first time in the context of its reply to the complaint: it does not appear in any of the extensive documentation filed in this case, including its communications with the complainant, nor in the internal communications between officials.

22. The Organization's assertion that the complainant did not specifically request to have an exit medical examination is correct. However, the exit medical examination requirement is not contingent on a staff member requesting to have the examination; it is a mandatory part of the separation protocol.

23. The Tribunal finds that WHO's unilateral decision to "waive" the exit medical examination constitutes a violation of Staff Rule 1085. It also finds that, although there is no evidence that the decision was motivated by malice, the manner in which the Organization dealt with this issue was an affront to the complainant's dignity.

24. At the time the complaint was filed, the complainant claimed the following relief:

- that WHO be ordered to initiate immediately the procedures for her to undergo the mandatory medical examination;
- that her sick leave interrupted on 31 December 2006 be reinstated and maintained until she is declared fully fit;

- an award of moral damages for the stress and suffering imposed on her through the Organization’s failure to proceed with the exit medical examination; and
- legal costs.

25. In her second rejoinder the complainant also claims relief in relation to her offer of resignation and WHO’s acceptance thereof; the decision to declare her medically fit; the decision to terminate her contract effective 31 December 2006 and the decision to remove her from her post of Human Resource Officer. She also seeks payment of the special post allowance for the full period she served as Acting Human Resource Manager; correction of her personnel file; a performance appraisal for 2005; and exemplary damages for, among other things, the destruction of her career and career opportunities. The Tribunal notes that these additional claims were not contained in the body of the initial complaint and cannot now be entertained.

26. Subsequent to the delivery of Judgment 2840, WHO’s Director of the Department of Human Resources wrote to the complainant on 16 July 2009. The Director advised the complainant that “[w]ithout at this stage addressing the merits of your complaint – as a way to resolve the exit medical issue, I am writing to offer you the opportunity to undergo the requested medical examination”. The Director provided the names of United Nations physicians and informed the complainant that if she wished to undergo the examination she should do so before 30 July 2009. The complainant underwent the said examination and the results were sent to WHO. Accordingly, a consideration of the first request for relief is unnecessary.

27. The Tribunal finds that the complainant’s claim for reinstatement of her sick leave is not appropriate in the circumstances.

28. Although the Tribunal has found that the complainant did not specifically request that an exit medical examination be carried out, she is entitled to moral damages for WHO’s unilateral decision

in violation of Staff Rule 1085 and the affront to her dignity in the amount of 5,000 euros. She is also entitled to costs in the amount of 500 euros. The remaining claims for relief will be dismissed.

DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the amount of 5,000 euros.
2. It shall also pay the complainant costs in the amount of 500 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

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