

**114th Session**

**Judgment No. 3168**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J.A. C.-Z. against the World Health Organization (WHO) on 10 September 2010, WHO's reply of 13 January 2011, the complainant's rejoinder of 16 February, the Organization's surrejoinder of 19 May, the complainant's additional submissions of 6 July and WHO's final comments thereon of 18 July 2011;

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 given in Judgment 2739 delivered on 9 July 2008 concerning the complainant's first complaint. It may be recalled that the complainant worked for the United Nations Children's Fund (UNICEF) from 6 January 1986 to 31 July 1987. He then worked for the Pan American Health Organization (PAHO) from 1 August 1987 to 28 February 2003 on a series of fixed-term

appointments; he served in various duty stations in the Americas, including Washington D.C., where PAHO serves as WHO's Regional Office for the Americas. 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 appointment. Shortly after taking up his new post, he received a copy of a Personnel Action form dated 1 May 2003, according to which 1 March 2003 was his date of entry on duty with WHO and 1 August 1987 his date of entry on duty within the United Nations system.

In March 2004 the complainant asked to be considered for a service appointment as, in his view, he fulfilled the criteria set out in Cluster Note 2002/25, which provides that to be eligible for a service appointment a staff member must have at least five years' certified satisfactory service on fixed-term appointments in the Organization by 1 July of the year of consideration. He indicated that he had been a "PAHO/AMRO/WHO staff member" since July 1987 with continuous and satisfactory service with WHO. His request was denied on 25 May 2005 on the ground that his period of service in PAHO could not be taken into consideration for the purpose of calculating his years of service in WHO. In the meantime, by a letter of 21 January 2005, he was informed that his post of limited duration and his appointment, both of which were due to expire on 28 February 2005, would be extended until 30 June in order to provide him with sufficient notice but would not be renewed thereafter. He would therefore be paid an end-of-service grant, which would be calculated on the basis of his years of service with both PAHO and WHO. On 27 May 2005 he filed an appeal with the Headquarters Board of Appeal (HBA) contesting that decision. He was later informed, in June 2005, that his appointment was extended until 28 February 2007.

In October 2005 WHO received a request from the International Atomic Energy Agency (IAEA) concerning the complainant's secondment to the Agency. WHO's Director of Human Resources Services (HRS) replied to the IAEA, by a letter of 26 October, copied to the complainant, proposing that he 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”). He appended the complainant’s administrative details, according to which 1 March 2003 was his date of entry on duty with WHO and 1 August 1987 his date of entry on duty within the United Nations system. On 7 November 2005 the complainant asked the aforementioned Director to change his date of entry on duty with WHO to 1 August 1987 and his date of entry on duty within the United Nations system to 6 January 1986. The Director refused on 1 December 2005, stating that both dates were correct and stressing that 1 March 2003 appeared on the Personnel Action form forwarded to him upon joining WHO. He added that the complainant’s years of service with UNICEF could not be taken into account to determine his date of entry on duty within the United Nations system, as he had resigned from that organisation.

On 29 December 2005 the HBA was notified of the complainant’s decision to withdraw the appeal he had filed on 27 May and to file a new appeal against the decision of 1 December. He contested in particular his date of entry on duty with WHO. He added that he reserved his right to challenge the date of entry on duty within the United Nations system in his statement of appeal. On 16 January 2006 the complainant was transferred to the IAEA under the Inter-Organization Agreement and on 31 January he sent his statement of appeal, which was confined to receivability, as requested by the Executive Secretary of the HBA.

In its report of 20 October 2006 the HBA noted that the Personnel Action form of 1 May 2003, which first indicated that 1 March 2003 was the complainant’s date of entry on duty with WHO, had not been challenged within the applicable time limit. Consequently, it recommended dismissing his appeal as time-barred. By a letter dated 28 December 2006 the Acting Director-General informed the complainant that he had decided to accept the Board’s recommendation and to dismiss his appeal as irreceivable. The complainant challenged that decision in his first complaint, which he filed on 28 March 2007.

During those proceedings, WHO produced an e-mail dated 7 December 2007 by which the IAEA informed the Organization that, in the event of termination of the complainant's appointment and in accordance with the Inter-Organization Agreement, it would take into consideration his date of entry on duty within the United Nations system, i.e. "1 August 1987 when he joined PAHO as indicated in the administrative details provided by WHO", to determine the termination indemnities due to him.

The Tribunal, in Judgment 2739, held that the appeal was receivable. Consequently, it set aside the decision of 28 December 2006 and remitted the matter to the HBA for consideration of the merits. On 15 September 2008 the complainant submitted his statement of appeal to the HBA concerning the merits of the case. He contended that his service at PAHO should be recognised as years of service at WHO. However, since WHO had not accepted 1 August 1987 as his date of entry on service, he had not been eligible for a service appointment; hence, had his post been abolished, he would not have benefited from reassignment as foreseen in Staff Rule 1050.2. According to him, he suffered from an "extremely stressful situation" which had a negative impact on his health and career.

In its report of 22 March 2010 the HBA observed that the terminology used in the different documents relating to the complainant's "move" from PAHO to WHO was rather confusing, as it was variously referred to as an "inter-agency transfer", a "secondment", an "assignment" or a "reassignment". It noted that the IAEA had given a written assurance that it would consider 1 August 1987 as the complainant's date of entry on duty within the United Nations system for any decision concerning his employment. Hence, the Board did not foresee any financial loss for the complainant. It therefore concluded that the complainant had no cause of action as regards the decision to maintain 1 August 1987 as the date of entry on duty within the United Nations system and 1 March 2003 as the date of entry on duty with WHO. Consequently, it recommended that his appeal be dismissed. It nevertheless recommended granting him 2,500 Swiss francs for legal costs as he

was justified in seeking clarification regarding the possible impact on his entitlements.

By a letter of 9 June 2010 the Director-General informed the complainant that she had decided to endorse the HBA's recommendations. Hence, his appeal was dismissed and he was awarded 2,500 francs for legal costs. That is the impugned decision.

B. The complainant disputes the characterisation of his service during the period from 1987 to 2003 and submits that his date of entry on duty with WHO is 1 August 1987, i.e. the date on which he became a PAHO staff member. He maintains that, from 1987 to 2003, although he was *de jure* a PAHO staff member, he was *de facto* also a WHO staff member. Indeed, he served both Organizations, as he worked in Washington D.C. where PAHO was WHO's Regional Office for the Americas. Consequently, he received instructions from both Organizations in accordance with Article 1.10 of PAHO Staff Regulations, which provides that PAHO staff members shall not "seek or accept instructions in regard to the performance of [their] duties from any government or other authority external to the [PAHO] or the World Health Organization". He adds that he contributed to the United Nations Joint Staff Pension Fund (UNJSPF) as a "WHO participant" and that WHO made contributions to the UNJSPF for him while he was working at PAHO, because only WHO is a member of the Fund and not PAHO.

He also contests the date of 1 August 1987 as the date of entry on duty within the United Nations system, since at that time he worked for PAHO, which, in his view, is not part of the system. Given that WHO stated an incorrect date of entry on duty within the United Nations system in the documents relating to his transfer to the IAEA, he fears that, in the event that his appointment is terminated before he reaches retirement age, the IAEA may not consider itself bound by the e-mail of 7 December 2007 and may thus decide to pay him a termination indemnity based on the contested date of entry on duty with WHO, i.e. 1 March 2003, instead of 1 August 1987. As a result, he would suffer a financial loss.

The complainant argues that he was deprived of the possibility of holding a service appointment because WHO did not take into consideration the time he spent working at PAHO, and that he thus had to face job insecurity as he remained employed on fixed-term appointments. He adds that in January 2005 he was informed that his appointment would not be renewed. Although his appointment was ultimately renewed, he found the situation very stressful and developed high blood pressure as a result. Given the lack of certainty as to the renewal of his appointment with WHO, he had to apply for positions outside the Organization and accept an offer of appointment with the IAEA.

In addition, he alleges undue delay in considering the merits of his internal appeal stressing that he filed his intention to appeal with the HBA on 29 December 2005 and that the Director-General did not take her final decision until 9 June 2010. He holds the Organization responsible for the delay insofar as it had preferred to deal with the receivability of his appeal first and because it had requested several extensions of the time limit for replying to his submissions on the merits. He also points out that the Director-General took her final decision two and a half months after having received the HBA's report. Lastly, he indicates that, although the Director-General agreed to pay him 2,500 Swiss francs for his legal costs, he has not yet received any payment in that respect.

The complainant asks the Tribunal to quash the impugned decision and to order the Organization to change his date of entry on duty with WHO to 1 August 1987 and to remove all reference to a date of entry on duty within the United Nations system. He seeks compensation for the "potential material damages" he may suffer if 1 March 2003 is maintained as his date of entry on duty with WHO, as well as moral damages and costs.

C. In its reply WHO submits that the complainant has no cause of action. He has not shown that the determination of the date of his entry on duty, both with WHO and within the United Nations system, caused him prejudice or would cause him prejudice in the future. It

adds that, even if his appointment with the IAEA were terminated, the Agency would pay him a termination indemnity calculated on the basis of the date when he joined PAHO, i.e. 1 August 1987, as indicated in the e-mail of 7 December 2007. It contends that the complainant has not produced evidence that his appointment with the IAEA is likely to be terminated or that the Agency would not pay him the termination indemnity as per the e-mail of 7 December 2007.

The Organization maintains that the contested entry on duty dates are correct. It explains that although PAHO and WHO have close links, they are two separate legal entities. It points out *inter alia* that the Pan American Sanitary Bureau, which later became PAHO, was created in 1902 before WHO was established in 1946, and that PAHO staff members are appointed under that Organization's Staff Regulations and Staff Rules. Therefore, WHO did not recognise the time the complainant spent working at PAHO for the purpose of determining his date of entry on duty with WHO or his eligibility for a service appointment. It asserts that there was no ambiguity as to the type of appointment he was offered with WHO. Indeed, the letter of appointment of 27 March 2003 clearly stated that he was appointed by "inter-agency transfer from PAHO, to WHO", as did the Notification of acceptance of appointment that he signed. The Personnel Action form he received upon joining WHO also indicated that his appointment resulted from an "interorganization transfer". In any event, the complainant's claim for moral damages in respect of the Organization's refusal to grant him a service appointment is time-barred as it was part of the internal appeal he filed on 27 May 2005 and withdrew on 29 December 2005.

As regards the alleged health problems he developed due to job insecurity, the Organization indicates that the complainant was offered a two-year fixed-term appointment upon joining WHO and hence could not have been unaware that he was assigned to a post of limited duration. It stresses that his appointment was extended twice and that he decided on his own initiative to leave the Organization for a position with the IAEA. In any event, the complainant's claim for

moral damages in that respect is now time-barred since he has not exhausted internal means of redress.

WHO denies any undue delay in dealing with the complainant's case, stressing that the Administration had reasonable grounds to contest the receivability of his appeal and that the HBA shared that view. Lastly, it indicates that the amount of 2,500 francs due to the complainant was paid into his bank account on 10 October 2010.

D. In his rejoinder the complainant concedes that PAHO and WHO are two distinct legal entities, but he contends that the distinction became somewhat blurred over the years. In this regard, he points out that, since 2005, WHO staff members who are appointed to a position in PAHO are no longer required to undergo a probationary period upon appointment and are allowed to retain their contractual status. He admits that his health problems, and in particular the fact that he suffered from high blood pressure, did not result directly from the issue regarding his dates of entry on duty, but he maintains that his health problems were caused by WHO's refusal to recognise his years of service with PAHO from 1987 to 2003, which prompted the refusal to grant him a service appointment in 2004 and the non-extension of his appointment in 2005, even though that decision was later reversed.

The complainant reiterates that the delay in taking a final decision on his case was due not only to the fact that the Administration had first challenged the receivability of his appeal but also to the fact that, throughout the proceedings, it requested several extensions of the time limits to file its submissions. Lastly, he confirms that the amount of 2,500 francs was paid to him on 10 October 2010.

E. In its surrejoinder WHO acknowledges that it has a close relationship with PAHO but submits that this does not lead to the conclusion that the complainant was *de facto* a WHO staff member from 1987 to 2003. It adds that to date the complainant is employed by the IAEA and that it is very unlikely that he will be made redundant before retiring (in May 2012); thus, there is no reason to believe that he will suffer any of the financial loss that he fears.

As regards alleged undue delay in the proceedings, it observes that the complainant also requested several extensions of time limits to file his submissions with the HBA.

F. In his additional submissions the complainant indicates that he had good reasons to request extensions of time limits to file his Statement of Appeal and rejoinder with the HBA; he refers in particular to his mother's death and the fact that his counsel had been ill.

G. In its final comments WHO accepts the complainant's explanations for requesting extensions of time limits, but considers it misleading to suggest that his requests for extension were justified whereas those of the Organization were not.

#### CONSIDERATIONS

1. The complainant, a staff member of the IAEA, joined the international civil service in 1986. After a year at UNICEF, he took a post at PAHO in August 1987. In 2003, he moved to WHO.

2. The subject matter of this complaint concerns the characterisation of the complainant's service during the period from 1987 to 2003. As part of the documentation for his transfer to the IAEA, WHO's Director of HRS provided the Agency with administrative information, including the complainant's date of entry on duty with WHO as 1 March 2003 and his date of entry on duty within the United Nations system as 1 August 1987. The complainant wrote to the Director of HRS requesting that the administrative details be amended to reflect his dates of entry on duty within the United Nations system as 6 January 1986 and with WHO as 1 August 1987. In his letter of 1 December 2005, the Director of HRS advised the complainant that the two dates would remain the same as stated in the Personnel Action form of 1 May 2003 which was forwarded to him upon joining the Organization. It is the content of this letter that

ultimately became the subject of an internal appeal. The HBA made two key findings on the appeal:

“that in view of the written assurance given by IAEA that the [date of entry on duty with the United Nations] of 1 August 1987 would be maintained for any future decisions affecting the [complainant’s] employment (such as an abolition of his post), the [complainant] had no cause of action as regards the decision of 1 December 2005 to maintain the [date of entry on duty with the United Nations] as of 1 August 1987 and the [date of entry on duty with WHO] as 1 March 2003.

[...] The Board found insufficient evidence to support the [complainant’s] claim that any potential long-term health problems such as chronic hypertension were the result of having to look for work outside WHO and to leave the Organization.”

3. In the decision of 9 June 2010, which is impugned before the Tribunal, the Director-General agreed with the HBA’s finding that the complainant had not demonstrated a cause of action and dismissed the appeal.

4. At this point it is convenient to set out the content of the assurance from the IAEA referred to by the HBA in its report. It is contained in an e-mail of 7 December 2007 from IAEA to WHO and states:

“In case Mr. C. Z.’s appointment with the IAEA was terminated, the IAEA would base its calculation of termination indemnities on his [date of entry on duty] with the UN, in accordance with the terms of the Inter-Organization Agreement [...] and practice in the UN system. In his case, this would be 1 August 1987 when he joined PAHO as indicated in the administrative details provided by WHO.”

5. The complainant contends that he has suffered a compensable loss because of WHO’s failure to report his correct date of entry on duty with WHO. He also contends that WHO’s non-recognition of his years of service at PAHO has caused him health problems. He points to the “potential damages [...] which he might suffer [...] if his appointment with the [IAEA] were terminated before he reaches retirement age and the Agency would not base its calculation of termination indemnities on [the date] of 1 August 1987”.

He adds that the Inter-Organization Agreement provides with respect to transfers that “service in [a] releasing organization will be counted for all purposes [...] as if it had been made in the receiving organization”. Given that wording, he contends, there is a chance the IAEA would use the 2003 date of entry on duty, as WHO, not PAHO, would be the “releasing organization”. The complainant disputes the relevance of the IAEA assurance. He claims that it rests on the erroneous assumption that PAHO is part of the UN system which, in his view, is not correct and that the assurance would be revoked if the IAEA learns that its assumption is wrong.

6. However, the complainant admits that claims regarding WHO’s refusal to consider him for a service appointment and regarding the decision to discontinue his post are now time-barred and are not properly before the Tribunal.

7. Regarding the complainant’s health problems, the Tribunal notes that they were first documented in January 2005, that is well before the administrative actions at issue in this proceeding. In addition, the complainant has not adduced any evidence that his health issues were exacerbated by these actions.

8. With regard to the complainant’s claim of potential future loss, this claim rests on two contingencies both of which would have to occur for the complainant to sustain a loss. First, the IAEA would have to terminate his employment prior to his scheduled retirement date, and then, notwithstanding its written assurances to the contrary, it would have to use 2003 rather than 1987 to calculate his separation indemnities. There is simply no evidentiary basis upon which it could be found that either of those eventualities was plausible or “more likely than not”. The claim of future loss does not rise above the level of mere speculation.

9. As the complainant has failed to demonstrate that the contested administrative actions have caused him any injury to his health, financially or otherwise, or that it is liable to cause him injury,

the complainant does not have a cause of action (see Judgment 2630, under 5, and the case law therein).

10. The complainant also claims damages for the unreasonable delay in the internal appeal process. He points out that he filed his internal appeal on 29 December 2005 and the Director-General issued her decision on 9 June 2010. Part of the delay owes itself to the fact that the Administration, in accordance with WHO Staff Rules, chose to deal separately with the receivability of his appeal resulting in a bifurcated process that has yielded two complaints to the Tribunal. However, he maintains that much of the delay stemmed from the Administration's repeated requests for extensions of time for filing its reply on the merits of the appeal and the two and a half months between the issuance of the HBA's report and of the Director-General's final decision.

11. The following is a brief chronology of the proceedings. The complainant initiated the internal appeal on 29 December 2005. Pursuant to its Rules of Procedure, the HBA elected to deal with the question of receivability first and recommended that the appeal be dismissed as irreceivable. Ultimately, this led to a complaint being filed with the Tribunal and in Judgment 2739 it was ruled that the complainant's appeal should have been considered and that the matter be remitted to the HBA. On 30 July 2008 the Secretary of the HBA asked the complainant for a new statement of appeal addressing the merits of his claim. The complainant requested two extensions of the ten-day time limit and submitted his statement of appeal on 16 September 2008.

12. In the ensuing months, the Administration requested, and was granted, several extensions of the time limit for filing a reply, citing, respectively: "overlapping deadlines", "heavy workload and absences of colleagues", "departure of the staff member dealing with th[e] appeal", and "staff absence", and ultimately filed its reply on 13 February 2009. The complainant then requested and was granted two extensions of the time limit to file his rejoinder, the first for personal reasons and the second for medical reasons. He filed his

rejoinder to the HBA on 1 April 2009 and the Administration filed its surrejoinder in mid-June. The HBA commenced its deliberations at the end of January 2010 and forwarded its recommendation to the Director-General on 22 March 2010. The Director-General rendered her decision on 9 June 2010.

13. It is firm Tribunal case law that a staff member is entitled to an efficient internal means of redress and to expect a decision on an internal appeal to be taken within a reasonable time (see Judgments 2904, under 14 and 15, 2851, under 10, and 2116, under 11). It can be seen from the above summary of the internal appeal process that there were a number of requests for extensions of time by both parties and in some instances consented to by the opposing party. While the departure of a staff member responsible for an appeal is beyond the control of the Administration, the latter does bear the responsibility of providing adequate staffing in keeping with its obligation to provide an efficient means of internal redress. There is an indication of some delay in the period between August 2008 and June 2009 occasioned by staffing issues; however, the significant delay is between June 2009 and 22 March 2010 when the HBA submitted its report to the Director-General. In the absence of any explanation for the delay in a case that was not particularly complex, this delay is unreasonable. However, this is not a case that warranted an expedited process nor did its outcome have a degree of urgency that can be seen in other cases. In these circumstances, there will be an award of moral damages for the delay in the amount of 500 euros and 500 euros in costs in view of the complainant's limited success in this proceeding.

#### DECISION

For the above reasons,

1. WHO shall pay the complainant 500 euros in moral damages.
2. It shall also pay him 500 euros in costs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet