

The Administrative Tribunal,

Considering the complaint filed by Ms E.A. M.-P. against the International Labour Organization (ILO) on 11 January 2006 and corrected on 25 January, the Organization's reply of 18 April, the complainant's rejoinder of 25 May and the ILO's surrejoinder of 28 July 2006;

Considering Article II, paragraph 1, 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 French national born in 1954, joined the International Labour Office, the secretariat of the ILO, in 1981. She holds an appointment without limit of time and is currently in a grade G.5 post.

On 1 June 2000 she was granted special leave without salary for family and health reasons, for the period from 1 September 2000 to 31 July 2002. Her leave was exceptionally extended to 31 July 2003. As it proved difficult to find a suitable post for the complainant, her leave was again extended by mutual agreement until 31 August 2004.

In an e-mail dated 28 April 2004 the complainant announced her intention to return to the Office and requested that arrangements be made to find her a post corresponding to her professional profile. The Office replied on 18 May that it was still proving difficult to find a suitable assignment.

On 22 June the Office proposed that the complainant replace an absent colleague as from 1 August, but she turned this offer down. In an e-mail of 19 July the Administration confirmed her return date as 1 September 2004 but informed her that the Office was still not able to offer her a specific assignment. On 22 July the complainant received a proposal to work as Administrative Assistant for a period of six months starting 15 August. She then informed the Office that because she had fractured her left wrist on 15 July she would be unable to start work again before 15 or 20 September and that she had obtained a medical certificate covering a period of approximately 45 days starting 9 August. On the basis of that information the Office on 24 August postponed her return date to 1 October 2004. As the complainant subsequently submitted further medical certificates, the Office again postponed the date to 1 December 2004.

In accordance with paragraph 11 of Circular No. 352, series 6, concerning special leave without pay, the Office summoned the complainant to undergo a medical examination, which took place on 27 October 2004. The examination showed that the complainant would be fit to resume work from 5 January 2005. She then submitted further medical certificates, the last of which set the date at which she would be fit for work at 22 January. On 4 March the Office proposed that she return to work on 23 April. The complainant agreed but requested one last postponement. She finally resumed work on 3 May 2005.

Meanwhile, on 19 October 2004, the complainant had filed a grievance asking to be granted sick leave as from 1 September 2004. In a letter of 15 November, the Director of the Human Resources Development Department rejected her grievance, informing her that so long as she had not actually resumed her duties her contract remained suspended; she therefore could not be granted sick leave.

On 16 December 2004 the complainant filed a grievance with the Joint Advisory Appeals Board. On 9 June 2005 she also submitted a claim for compensation for moral and material injury. The Board issued its report on 13 September 2005, recommending the rejection of both the grievance and the claim for compensation. In a letter of 10 October 2005, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to follow the Board's recommendation.

B. The complainant contends that according to Article 7.7 of the Staff Regulations continuity of service is not broken by special leave without salary, and that she was therefore entitled to sick leave starting from 1 September 2004 insofar as she had been issued the necessary medical certificate. She maintains that the Office breached the provisions of the Staff Regulations and of Circular No. 352 when, on 24 August 2004, it unilaterally postponed the final date of her return to 1 October. She therefore considers that she cannot be blamed for not appearing at the Office on 1 September.

The complainant asks the Tribunal to set aside the impugned decision. She also requests that the Organization be ordered to reinstate her from 1 September 2004 and to “pay her the sick leave” to which she was entitled from that date, as well as the full salary to which she was entitled at the end of her sick leave. She also claims 15,000 Swiss francs for material damage and 16,000 francs in compensation for moral injury.

C. In its reply the Organization submits that the complainant was not entitled to be reinstated on 1 September 2004. It maintains that, according to the relevant provisions of the Staff Regulations and Circular No. 352, some of the conditions required for her reinstatement were not satisfied: she did not actually resume her duties on 1 September, nor had that date been agreed between her and the Administration, and in any case she was still unfit for work. According to the Organization, an official’s return, especially after a long period of absence as in the present case, is a delicate and sometimes difficult exercise. Referring to Judgment 1074, it argues that, although the Office has an obligation to reinstate the official, that obligation is one of endeavour rather than result, in other words, it has to make every effort to identify a suitable post for the official. As it proved very difficult to find a post exactly matching the complainant’s professional profile, the Office “never agreed” to reinstate her on 1 September 2004. That date therefore did not become final and the Office was at liberty to postpone it until a date had been agreed between the parties, as was the case for the date of 3 May 2005.

The ILO also points out that special leave without salary has the effect of suspending all an official’s statutory entitlements – except the right to be reinstated – and that the provisions of Article 7.7 of the Staff Regulations cannot restore the official’s entitlement to sick leave. It adds that the suspended entitlements are restored only when the official returns to work and that according to paragraph 9 of Circular No. 352 the failure of an official to return to the Office at the expiry of special leave without pay will normally be considered as dereliction of duty. Since the complainant did not report for duty on 1 September, the Office was entitled to postpone the date of her reinstatement.

Lastly, the defendant considers that since the Office has committed no fault for which it may be held liable, the complainant is not entitled to damages. The Organization argues that the latter did not adopt the “diligent and cooperative attitude” which the Office might legitimately have expected of her. It draws attention to the fact that the complainant does not appear to have provided a medical certificate indicating that she was unfit for work in the period prior to 17 September 2004.

D. In her rejoinder the complainant asserts that the Office did confirm that she was to be reinstated on 1 September 2004 and points out that the Joint Advisory Appeals Board shared that view. She adds that she did not return to the Office because the Administration had unilaterally postponed her return date. In her view the defendant failed to make the proper arrangements for her return.

E. In its surrejoinder the ILO maintains its position. It argues that the return date was postponed because the complainant had stated that she would be unable to resume work on 1 September 2004. It considers that every effort was made to find a suitable post for the complainant but that the latter refused to cooperate in any way in order to facilitate her reinstatement.

CONSIDERATIONS

1. The complainant, who joined the ILO in 1981, was granted special leave without salary from 1 September 2000 to 31 July 2002 for family and health reasons. This leave was extended at her request initially until 31 July 2003 and then, by mutual agreement, until 31 August 2004.

When the complainant announced her intention to return to the Office at the end of her special leave, the Administration told her that it was having difficulty finding a suitable post for her but confirmed that her reinstatement was planned for 1 September 2004. On 22 July the complainant was offered an assignment, but she

replied that she was unable to return to work owing to the fact that she had fractured her left wrist on 15 July. On the basis of the information given by the complainant regarding her state of health, the Human Resources Development Department postponed her return date to 1 October, and then to 1 December 2004 after the complainant had produced further medical certificates. After final negotiations, the parties agreed on the date of 3 May 2005, and the complainant did in fact return to work on that date.

2. Meanwhile, on 19 October 2004, the complainant had filed a grievance asking to be placed on sick leave from 1 September 2004. This grievance was rejected on the grounds that the complainant's return date could be considered final only if she had returned to work at the Office and that, so long as she had not actually resumed her duties, she could not be placed on sick leave.

3. On 16 December 2004 the complainant filed a grievance with the Joint Advisory Appeals Board in accordance with Article 13.3.2 of the Staff Regulations, requesting that the date of her return be set at 1 September 2004 and that sick leave be granted to her from that date according to her accumulated entitlements. In its report submitted on 13 September 2005 to the Director-General, the Board recommended rejecting the grievance as being without merit. In a letter of 10 October 2005 the complainant was notified of the Director-General's decision to follow that recommendation. That is the decision impugned before the Tribunal.

4. The complainant asks the Tribunal to set aside the decision of 10 October 2005 and to order the Organization to reinstate her at the initially planned date of 1 September 2004, to "pay her the sick leave" to which she was entitled as from that date and the full salary to which she was entitled at the end of her sick leave, and to pay her compensation for moral and material injury.

In support of her complaint she submits that, according to Article 7.7 of the Staff Regulations, continuity of service is not considered to be broken by periods of special leave without salary and that she was therefore entitled to sick leave from 1 September 2004 given that she had obtained the required medical certificate. Referring to Article 8.6(d) of the Staff Regulations, she asserts that entitlement to sick leave terminates only on the date of termination of an official's appointment.

She states that on the one occasion when the defendant summoned her, namely to a medical examination on 27 October 2004, she complied with its request, and she asserts that it was undoubtedly the Office which unilaterally postponed her return date on 24 August 2004. Her situation cannot therefore reasonably be considered as dereliction of duty; nor can she be blamed for failing to report for duty since it was the Office which, prior to the final date, had postponed the date of her return.

She points out that it is recognised that a serving official who experiences an accident or illness when on annual leave is automatically considered to be on sick leave at the end of the annual leave, and she tries to establish an analogy with the situation of an official experiencing an accident or illness during special leave without salary.

Furthermore, by refusing to grant her sick leave from 1 September 2004 and instead unilaterally postponing the date of her reinstatement, the defendant, in her view, breached the provisions of the Staff Regulations and of Circular No. 352, series 6, of 11 March 1986.

The complainant concludes that the Director-General took an unlawful decision when he accepted the recommendation of the Joint Advisory Appeals Board, which is based on a mistaken interpretation of that circular.

5. The Organization contends that the complaint must be dismissed as devoid of merit. In its view, the complainant was entitled neither to be reinstated retroactively from 1 September 2004, nor to be placed on sick leave from that date, nor to be paid moral or material damages.

6. The texts referred to by the parties read as follows:

· Article 7.7 of the Staff Regulations

"Special leave

(a) Special leave, with full or partial salary or without salary, may be granted by the Director-General to an official for advanced study or research in the interest of the Organization, or for other exceptional or urgent reasons. Special leave without salary shall be granted on application to an official who is mobilized for service in

the armed forces or for national service. For purposes of this article ‘salary’ shall mean salary and allowances.

(b) Periods of special leave without salary of one month or more shall not count as service for the purpose of calculating entitlement under the Staff Regulations to annual leave, sick leave [...]

(c) Notwithstanding the provisions of this article and of article 6.3 (Payment of increments), continuity of service shall not be considered to have been broken by periods of special leave.”

Paragraphs 7, 8, 9 and 11 of Circular No. 352, concerning special leave without pay (LWOP)

“Return from LWOP

7. The planning of an official’s return after a period of LWOP is a particularly important and delicate aspect of the question. The longer the period of LWOP the more difficult it becomes to re-employ the official in the job or unit vacated.

8. In principle, LWOP should terminate on the date foreseen in order that the Office may plan the official’s reassignment accordingly. Whether there has been an extension or not, the official on LWOP of six months or more shall be required to inform [the Administration] in writing of his intentions three months prior to the expiry of the leave. The Office will then inform the official if it agrees or not and confirm the return date in writing. This final date will be binding. Officials on LWOP for less than six months are required to report for duty at the expiry of LWOP.

9. Failure of the official to return to the Office at the expiry of the LWOP will normally be considered as dereliction of duty.

Other conditions

[...]

11. Consistent with the intent of article 11.12 of the Staff Regulations, a medical examination may be required before an official departs on LWOP for one year or more. An official returning from LWOP of one year or more may be asked to see the Medical Service.”

7. The provisions quoted above indicate that an official on special leave without salary forfeits not only his actual salary but also the related allowances; that the period of special leave does not count as service for the purposes of salary increments; and that periods of special leave without salary for one month or more do not count as service for the purpose of calculating entitlement to annual leave, sick leave and various grants, indemnities and allowances.

It may therefore be inferred from those provisions that during the period of special leave without salary the contract of employment is suspended and that the official concerned no longer has the status of a serving official.

8. In the present case, in order to weigh the merits of the complainant’s claims it is necessary to determine, firstly, whether an official on special leave without salary is entitled to sick leave under the Staff Regulations and, secondly, what the complainant’s administrative status was on 1 September 2004.

9. Regarding the first of these questions, one must straight away discard as irrelevant the analogy the complainant tries to establish between special leave without salary and annual leave. In principle, periods of paid annual leave are assimilated to periods of work, which obviously implies that an official on annual leave may if necessary use his or her entitlement to sick leave. This is recognised implicitly in Article 7.5(g), according to which:

“Days upon which an official is sick during annual leave shall not be counted as days of annual leave, provided the official is certified by a duly qualified medical practitioner as having been sick on those days.”

This is not the case, however, if the official is on special leave without salary. During such a period, the official who is not serving does not enjoy entitlements available only to serving officials or to officials who are considered as such. As noted by the Joint Advisory Appeals Board, Article 7.7(c) quoted above, on which the complainant

relies, merely means that a person on special leave without salary maintains his status as an official and is entitled to be reinstated without going through a recruitment procedure, while preserving all acquired rights. The Tribunal considers that the entitlement to sick leave, granted to an official who is unavailable for duty as a result of illness or accident, is one of the entitlements that may be enjoyed only by officials who are either serving or considered to be serving. Just as entitlement to sick leave terminates on the date of termination of an official's appointment, it is suspended during the period when the official is on special leave without salary.

An official on special leave without salary is therefore not entitled to sick leave during that period, unless there is a specific provision to the contrary.

10. The complainant asks to be reinstated on 1 September 2004 and to be granted sick leave from that date, as well as the full salary to which she was entitled at the end of her sick leave.

For these claims to be ruled on, the complainant's administrative status at 1 September 2004 must be determined.

The Tribunal considers that, even if it is accepted that the date of 1 September 2004 was foreseen as the final return date in the meaning of paragraph 8 of Circular No. 352, it nevertheless appears from the submissions that reinstatement could not take place on that date owing to events for which the defendant was not to blame. Indeed, it was the complainant herself who, well before that date, had notified the Organization that she would not be able to return to work on the date initially planned. As a result, reinstatement could not take place on 1 September 2004 and a new date was eventually chosen by mutual agreement.

The complainant is therefore wrong to argue that reinstatement took place on 1 September 2004. At that date she had to be considered as being still on special leave without salary.

11. Since the complainant was on special leave without salary when she fractured her wrist and was unable to return to the Office on 1 September 2004, she could not be granted sick leave from that date. Consequently, her claim to have the impugned decision quashed and her claims for compensation for moral and material injury must be rejected. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet