

B.
v.
UNESCO

130th Session

Judgment No. 4285

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 September 2018 and corrected on 15 October 2018, UNESCO's reply of 28 February 2019, the complainant's rejoinder of 24 May and UNESCO's surrejoinder of 30 August 2019;

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

Having examined the written submissions;

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

The complainant contests what she considers to be UNESCO's failure to respect her right to sick leave and medical privacy.

The complainant is a UNESCO staff member serving at the International Centre for Theoretical Physics (ICTP) in Trieste, Italy. On 25 September 2006 the ICTP Medical Service received a medical certificate from the complainant's physician prescribing a period of rest from 22 to 27 September. It subsequently received a leave slip, filed by the complainant, requesting Certified Sick Leave from 21 to 27 September (half days on 21 and 22 September, and full days from 25 to 27 September). On 3 October 2006 the ICTP Medical Service attempted unsuccessfully to contact the complainant's physician by fax and telephone to seek clarification on the complainant's request for sick leave. The ICTP Medical Service relevantly informed the

ICTP Director of Administration on 4 October 2006. On 23 November 2006 the Chief Medical Officer wrote to the complainant to request a report drawn up by her physician with any useful information regarding her health condition.

In a note of 26 January 2007 to the Director of ICTP, entitled “Violation of Staff Rights and Medical Privacy”, the complainant objected to the ICTP Medical Officer’s action in contacting her physician without previously consulting UNESCO’s Chief Medical Officer. Arguing that it constituted a violation of her medical privacy, an abuse of power and medical harassment, she asked the Director to take the necessary steps to immediately put an end to it, to ensure that the ICTP Medical Officer complied with the applicable rules and to repair the prejudice she had suffered. On 28 May 2007 the complainant wrote to the Director of ICTP requesting a reply to her note of 26 January 2007.

On 27 August 2007 she wrote to the Director-General contesting the decision not to reply to her note of 26 January 2007. Referring to actions going as far back as 2001, she reiterated the arguments and requests made in her 26 January note. On 10 December 2007 she submitted a notice of appeal against “an implied decision of a non-reply in relation to violation of Staff Rights and Medical Privacy”. She submitted a detailed appeal on 31 October 2014.

Having held a hearing, the Appeals Board issued its opinion and recommendation on 20 October 2017. The Appeals Board noted that the complainant had not, prior to her protest of 27 August 2007, formally contested the events that had occurred from 2001 to 2006. It also noted that there was a serious work-related conflict between the complainant and the ICTP Medical Officer and recommended that the complainant be transferred from the ICTP to UNESCO’s Headquarters, where she would be closely monitored by the Chief Medical Officer or, alternatively, that she be granted an agreed mutual separation package. The Appeals Board also recommended the reimbursement of the complainant’s medical bills, the award of moral damages and costs, and the reimbursement of the accommodation and travel expenses of her trip to attend the Appeals Board’s hearing.

In her final decision dated 15 June 2018, the Director-General considered that the appeal was irreceivable, as the complainant had not submitted her protest within the applicable time limit. On the merits, the Director-General considered that the ICTP Medical Officer had the authority to contact the complainant's physician. The Director-General rejected the Appeals Board's recommendations, except for the recommendations to grant the complainant an agreed mutual separation package and to reimburse her accommodation and travel expenses up to a maximum ceiling. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to award her appropriate moral and exemplary damages for the prejudice she has sustained over the years due to UNESCO's breach of its duty of care towards her. She also asks that her absences from work since August 2007 be considered as resulting from a service-incurred illness/injury, that she be re-credited with all sick leave days taken during those absences, and that she be compensated for all the losses she incurred as a result of such service-incurred illness. She claims reimbursement of the accommodation and travel expenses of her trip to attend the Appeals Board's hearing and she also claims costs. She seeks interest on all amounts awarded by the Tribunal and such other relief as the Tribunal deems necessary, just and fair.

UNESCO asks the Tribunal to dismiss the complaint as time-barred and thus irreceivable and, subsidiarily, as devoid of merit.

CONSIDERATIONS

1. The determinative issue in the present complaint centres on the receivability of the complainant's internal appeal. The key issue is whether the complainant filed a protest within two months from the date of receipt of the contested decision as required in paragraph 7(a) of the Statutes of the Appeals Board. The genesis of the internal appeal was an incident that occurred concerning the complainant's sick leave from 21 to 27 September 2006. On 25 September 2006, the ICTP Medical Service received a medical certificate from the complainant's physician prescribing a period of rest from 22 to 27 September. On 29 September, the complainant filed a leave slip for Certified Sick Leave requesting half a day for 21 and 22 September and three full days from 25 to 27 September. The ICTP Medical Service received

the complainant's leave slip on 3 October 2006 and tried without success to contact the complainant's physician to clarify the inconsistency between the physician's certificate and the leave slip.

2. On 26 January 2007, the complainant sent a note to the ICTP Director, copied to the ICTP Medical Officer, UNESCO's Chief Medical Officer and the Director of the Bureau of Human Resources Management (HRM) about the "Violation of [her] Staff Rights and Medical Privacy". In the note, the complainant set out the incident that occurred regarding her September sick leave and the ICTP Medical Service's attempt to contact her physician. The complainant took the position that this was a violation of her medical privacy under Staff Rule 106.1(e) and a 13 July 2000 Memorandum that, in relevant part, stated "the Medical Officer of the [ICTP] should consult the Chief Medical Officer of UNESCO in order that the latter [is] able to follow each medical case". In conclusion, the complainant asked the ICTP Director to take the necessary steps to put an immediate end to the medical harassment by the ICTP Medical Officer; to ensure that in the future the ICTP Medical Officer strictly complies with the cited staff rule and Memorandum; to repair the prejudice she had suffered. On 28 May 2007, the complainant sent a memorandum to the ICTP Director requesting a reply to her note of 26 January.

3. On 27 August 2007, the complainant wrote to the Director-General of UNESCO. The subject of the letter states "Contestation to violation of Staff Rights and Medical Privacy. Claim under Paragraph 7(a) of the Statutes of the Appeals Board". The letter states that the complainant wishes to contest the decision not to reply to her note of 26 January 2007 submitted to the Director of ICTP "in relation to [her] [r]ights to sick leave and medical privacy [...] violated on 2 October 2006 and on other occasions since [her] years' service with the Organization".

4. On 10 December 2007, the complainant filed a notice of appeal against "an implied decision of a non-reply in relation to violation of Staff Rights and Medical Privacy". The complainant stated in the notice of appeal that pursuant to paragraph 7(a) of the Statutes of the Appeals Board, she had submitted a protest to the Director-General on 27 August 2007 for which she had not received a reply within two

months as provided for in paragraph 7(b) and, accordingly, she submitted the notice of appeal against “the implied rejection of [her] request”, as provided for in paragraph 7(c) of the Statutes of the Appeals Board.

5. On 20 October 2017, the Appeals Board issued its opinion and recommendation. It is observed that the Appeals Board articulated the submissions of the parties on the issue of the receivability and the merits of the appeal. Other than noting that the complainant had not formally contested the actions that had occurred from 2001 to 2006 before her 27 August 2007 protest, the Appeals Board did not arrive at any conclusions regarding the receivability of the appeal or its merits. However, the Appeals Board recommended “[i]n a spirit of conciliation and for the good of both the Organization and the staff member” to transfer the complainant from the ICTP to UNESCO’s Headquarters, where she would be closely monitored by the Chief Medical Officer; or, in the alternative, to grant the complainant an agreed mutual separation package.

6. On 15 June 2018, the Director of HRM notified the complainant of the Director-General’s decision on her appeal. The Director-General considered that the complainant’s appeal was irreceivable as she had not submitted her protest of 27 August 2007 within the time limit defined in paragraph 7(a) of the Statutes of the Appeals Board. On the merits of the complainant’s case, the Director-General determined that the ICTP Medical Officer had the authority to contact the complainant’s physician. This is the impugned decision.

7. The complainant advances a number of submissions in support of her position that the internal appeal was receivable. She submits that as the Appeals Board did not make a finding that her appeal was irreceivable, considered her case on the merits and made recommendations, she is entitled to file the present complaint with the Tribunal. As noted above, in consideration 5, the Appeals Board did not arrive at any conclusions regarding the receivability of the appeal or its merits. The Appeals Board opted to try to arrive at a conciliatory solution for the long-standing conflict between the complainant and the ICTP Medical Officer. It does not follow from the fact that the Appeals Board did not deal with the issue of receivability that the

complaint is receivable. As stated in Article VII, paragraph 1, of the Statute of the Tribunal, a complaint is not receivable unless the impugned decision is a final decision and the complainant has exhausted the internal means of redress.

8. The complainant contends that the date from which the two-month time limit for submitting her protest to UNESCO's Director-General started to run was 30 November 2006. Thus, the submission of her protest on 26 January 2007 was within the two-month time limit provided for in paragraph 7(a) of the Statutes of the Appeals Board. In advancing this contention, the complainant makes some assertions that are not supported by the record. The complainant points out that she was not informed whether "the decision to question her medical certificate was taken by or issued after consultation with the [Chief Medical Officer], as required pursuant to the 2000 [m]emorandum". On 6 October 2006 the complainant heard about the ICTP Medical Service's attempt to contact her physician on 3 October. The record shows that in the meantime, on 4 October, the ICTP Medical Service informed the ICTP Director of Administration by email of the inconsistency between the medical certificate and the complainant's leave slip, and that, as provided for in Staff Rule 106.1(h), the ICTP Medical Service tried unsuccessfully to contact the complainant's physician for clarification of the certificate. The ICTP Medical Service also informed the ICTP Director of Administration that given the inconsistency, it was not possible to endorse the leave slip and that the documentation was being returned to the complainant with an invitation to contact the ICTP Medical Service for clarification. Thus, contrary to the complainant's assertion, the attempt to contact the complainant's physician was not to obtain an explanation or to question the physician's professional opinion that the complainant required rest. It was simply to clarify the inconsistency between the medical certificate and the leave slip.

9. It is also observed that on 19 October 2006, the ICTP Director of Administration asked the Chief Medical Officer about UNESCO's practice with respect to medical certificates issued by a staff member's own physician and asked in what circumstances is the ICTP Medical Officer expected to consult the Chief Medical Officer. The Chief Medical Officer responded that in order to validate the

prescribed sick leave the ICTP Medical Officer may seek clarification from the staff member's physician by phone or in writing.

10. As to the 30 November 2006 date, the complainant asserts that she wrote to the Chief Medical Officer and received the latter's reply dated 23 November 2006 on 30 November. In her pleadings the complainant does not indicate when she wrote to the Chief Medical Officer or the reason for the communication. According to the record, on 23 November 2006, the Chief Medical Officer informed the complainant in writing that having reviewed her medical file, he would like to have more information about her present health condition and requested a report from the complainant's physician "about [her] medical or surgical records as well as any present treatment or any useful information". Based on this letter, the complainant submits that, as the Chief Medical Officer had not taken "any decision in her matter" she considered this omission to be an implicit decision against which she began the internal appeal process on 26 January 2007. In view of the fact that there was no outstanding decision that had to be taken by the Chief Medical Officer and having regard to the content of the Chief Medical Officer's letter of 23 November 2006, the complainant's submission is untenable.

11. The complainant submits that her note of 26 January 2007 to the ICTP Director was a protest. It must first be observed that having regard to the content of that note, it cannot be reasonably inferred that it constituted a protest. Even if it could be inferred that the note was intended to be a protest regarding the action of the ICTP Medical Service to contact her physician on 3 October 2006, of which she became aware on 6 October, it was not submitted within the two-month time limit provided for in paragraph 7(a) of the Statutes of the Appeals Board.

12. The Tribunal has constantly held that a complaint will not be receivable "if the underlying internal appeal was not filed within the applicable time limits" (see Judgment 3758, consideration 10, and the cases cited therein). As the complainant did not exhaust the internal means of redress regarding the ICTP Medical Service's unsuccessful attempt to contact her physician, as required in Article VII, paragraph 1, of the Tribunal's Statute, the complaint is irreceivable. Additionally,

as the complainant did not contest the actions that occurred between 2001 and 2006 within the prescribed time limit, her claims in relation to those actions are also irreceivable for failure to exhaust the internal means of redress. Accordingly, the complaint will be dismissed. In these circumstances, it is unnecessary to hold an oral hearing or to order the production of the documents for which the complainant applies.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 June 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ