Registry's translation,
the French
text alone
being authoritative.

105th Session **Judgment No. 2734**

The Administrative Tribunal,

Considering the third complaint filed by Ms A. K. against the World Health Organization (WHO) on 4 June 2007, and the Organization's reply of 12 September 2007, that the complainant has not submitted a rejoinder, but she informed the Registrar in a letter of 14 December 2007 that she presses her claims of 4 June 2007;

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. The complainant, a Swiss national born in 1952, joined WHO on 23 April 1990. She held various temporary appointments until 31 January 2002. On 1 February 2002 she was given a two-year fixed-term appointment which was extended until 28 February 2007.

The complainant was informed by letter of 10 January 2006 that her post in the Sustainable Development and Healthy Environments Cluster would be abolished on 31 January 2006 and that, in accordance with Staff Rule 1050.2, efforts would be made to reassign her through a six-month process lasting until 30 June 2006. The Director-General exceptionally extended this reassignment period first for three months and then for a further one month. The complainant's contract was therefore extended until 28 February 2007. The complainant was informed by letter of 28 November 2006 that it had proved impossible to identify a suitable alternative assignment for her by the end of the reassignment process and that her appointment would therefore be terminated on 28 February 2007.

In the meantime, the complainant lodged an appeal on 6 March 2006 with the Headquarters Board of Appeal in which she challenged the decision of 10 January 2006 to abolish her post. The Board, in its report of 9 January 2007, considered that since there was no evidence of any procedural irregularities or failure to observe the provisions of the Staff Rules and Staff Regulations, the appeal against the abolition of her post should be dismissed. It noted, however, that the clumsy handling of the procedures might have induced a perception of personal prejudice or incomplete consideration of the facts. There should therefore be some revision, in the Board's view, of the way in which those procedures operated. Moreover, the Board recommended that every effort should be made to find a post for the complainant which would be commensurate with her skills and experience. The Director-General informed the complainant by a letter of 9 March 2007 of her decision to accept the Board's recommendation to dismiss the complainant's appeal against the abolition of her post. She added that she was satisfied that every possible effort had been made to find a suitable post for the complainant. That is the impugned decision.

B. The complainant alleges that the procedure applicable to the abolition of a post was breached because the three-month period of notice was not observed – she was notified on 10 January 2006 of the decision to abolish her post on 31 January 2006 – and because she was not informed of her entitlement to an indemnity under the Staff Rules. She also argues that her post was not abolished on objective grounds, since the decision of 9 March 2007 fails to provide any cogent reason for the abolition, and that the letter of 10 January 2006 refers to a post of indefinite duration whereas she held a fixed-term appointment.

The complainant denounces what she regards as the constant professional sidelining to which she was subjected. She emphasises her precarious occupational situation between 1990 and 2002 and draws attention to the fact that her work was never formally appraised. She explains that she was transferred twice in 2002 without being given any clearly defined duties and that three attempts were subsequently made to abolish her post. Moreover, she

claims, as she did before the Board, that the decision to abolish her post is tainted with personal prejudice and is linked to her active participation in the Staff Association; in her view this is shown by the closeness of the dates of the decision in question and those of some of her trade union activities. In this connection she submits a letter written by the former Director-General the day before a concerted work stoppage that took place on 30 November 2005, in which he warned WHO staff that disciplinary measures, including dismissal, might be taken against staff members who participated in the stoppage.

The complainant contends that WHO failed to comply with the reassignment procedure laid down in the Staff Rules. She alleges that her "right to be given preferential consideration for any post falling vacant" between the end of January and 30 June 2006 has been violated. She states that her skills and experience have been disregarded. For example, the Reassignment Committee did not contact her about the post advertised in Vacancy Notice TDR/05/FT553, which in her opinion "match[ed] [her] skills".

If she is not reinstated in the Organization, the complainant considers that she is entitled to redress for the material and moral damage she suffered on account of the abolition of her post. She draws attention to the deterioration in her health caused by stress at work.

The complainant requests the Tribunal to:

"- find that the correct procedure for abolishing [her] post has not been followed […] because the compulsory three months' notice was not given and no appropriate indemnity was provided;

- find that there has been a subjective breach of [an employee]'s personal rights and a violation of [her] right of association […];

- quash the final decision abolishing [her] post […];

- therefore order the conclusion of a new contract for a fixed term of two years in the said post […];

<u>If, by some remote chance, the impugned decision is not quashed,</u>

- find that the paramount considerations of the reassignment procedure carried out after the abolition of her post have been undermined;

- find that the Staff Rules and Staff Regulations of [WHO] on the subject have been infringed;

- therefore order a six-month reassignment process which may be extended once;

- order the provision of suitable training to enhance [her] skills and […] vocational experience […];

- order that [she shall be given] preferential consideration for any vacant post and subsequently that a new contract for a fixed term of two years in the said post be concluded […];

<u>And, if she is not reinstated,</u>

- award [her] […] a pension of […] 3,000 [Swiss francs] as from the age of 62;

- order that she be covered for life by [WHO] health insurance as from [her] possible separation […] or, failing this, ensure the same level of social protection as that provided by the host country through the award […] of fair financial compensation to pay for Swiss compulsory health insurance;

- [a]ward [her] […] fair financial compensation, in a provisional amount, as redress for the moral injury caused by the occupational precariousness she has suffered and also for one of the serious consequences thereof, namely her current […] medical condition."

C. In its reply WHO submits that several of the complainant's claims are irreceivable. First, internal means of redress have not been exhausted, as the Headquarters Board of Appeal has not completed its consideration of two further appeals lodged by the complainant concerning, on the one hand, her participation in the concerted work stoppage of 30 November 2005 and, on the other hand, the decision of 28 November 2006 to terminate her contract

and the reassignment process that she underwent. Moreover, the Advisory Committee on Compensation Claimshas not yet issued its opinion on her request for recognition of a service-incurred medical condition. Secondly, the Organization asserts that the Tribunal is not competent either to evaluate or to award the complainant's retirement pension, since the United Nations Joint Staff Pension Fund is alone authorised to decide such matters. Nor can the Tribunal order the Organization to provide the complainant with lifelong health insurance coverage before it has been established whether she actually meets the conditions for such a measure of social protection under the Organization's rules. Thirdly, WHO draws attention to a considerable difference in the wording of the claims presented to the Board of Appeal and those submitted to the Tribunal, and it emphasises that some requests have never been presented to the competent internal bodies. This applies, for example, to the request for a new extendable six-month reassignment process and the request for training.

On the merits the defendant asserts that it has complied with the provisions of the Staff Rules. It contends that the complainant is confusing the decision to abolish her post, which is not subject to any notice, with the termination of the appointment of a staff member affected by such abolition, which is subject to three months' notice in accordance with Staff Rule 1050.3. It submits that the complainant's post was abolished following an objective analysis of WHO's needs and priorities and that the justification for it was both summed up by the competent Assistant Director-General and brought to the attention of the various people concerned. The allegations of personal prejudice made in connection with the complainant's successive contracts before 1 February 2002 and with certain decisions reached with regard to her after that date have already been examined by the Tribunal in Judgment 2308 which carries the authority of *res judicata*. As for the link between the impugned decision and the complainant's trade union activities, WHO explains that, as the Board of Appeal noted, the decision to abolish the post was taken long before the concerted work stoppage of 30 November 2005. In this connection, the Organization points out that the Director-General took steps to ensure that she could effectively discharge her mandate as staff representative. Moreover, the Organization has set up a special procedure to enable staff members to refer allegations of harassment to an investigation panel. The complainant had not filed a complaint with that panel by the date of the reply.

The Organization argues that most of the complainant's contentions regarding the reassignment process consist of vague statements not backed up by precise facts. These issues are being examined internally and cannot be ruled upon by the Tribunal. Moreover, contrary to the complainant's allegations, the Reassignment Committee did study the possibility of reassigning the complainant to the post advertised in Vacancy Notice TDR/05/FT553, but this post did not match her profile. The Organization adds that granting a further six-month reassignment period to the complainant, when she has already benefited from ten months of the maximum 12-month period of reassignment, would constitute an infringement of the Staff Rules. As for her medical condition, the Organization notes that the forms used to initiate proceedings before the Advisory Committee on Compensation Claims were probably filled out wrongly by the complainant. It was decided to ask her to fill in the form correctly if she really wishes to commence the procedure. If that is the case, this issue will be examined in accordance with the applicable rules and will form the subject of a recommendation from the Advisory Committee.

CONSIDERATIONS

1. The complainant joined WHO in April 1990. She was employed until January 2002 under temporary contracts which were renewed many times. On 1 February 2002 she was given a two- year fixed-term contract, which was subsequently extended.

She was assigned as from 27 May 2002 to the Sustainable Development and Healthy Environments (SDE) Cluster as a Technical Officer/Writer. She then challenged that decision before the Tribunal, arguing that she would have liked to be assigned to a post in the HIV/AIDS Department, where she had previously worked. In Judgment 2308, delivered on 4 February 2004, the Tribunal dismissed her complaint on the grounds that the complainant could not unilaterally lay down the terms of her assignment, which is within the power and discretion of the Director-General to decide. By the same judgment the Tribunal also dismissed the complainant's plea that she had been harassed by her supervisors and her claim for compensation for loss of earnings during the period when she had been remunerated on the basis of temporary employment while performing work equivalent to that of a fixed-term appointment. On the one hand, the submissions did not in any way substantiate the allegations of harassment. On the other hand, there was no basis on which the complainant could claim that she should be retroactively treated as if she had held a fixed-term appointment, given that she had freely signed all the short-term contracts offered to her, that those contracts did not violate any fundamental and overriding principle of law and that they had in fact

made it possible for her to be recruited without a competition.

2. In February 2004 there were plans to abolish the complainant's post in the SDE Cluster for "financial and programmatic" reasons. However, following an intervention by the Director-General's Office, the requisite funds were obtained to assign the complainant to a modified post. Thus, as from 1 July 2004 the complainant, who until then had been responsible for writing various documents, was given different duties mainly consisting in managing the SDE Cluster's internet and intranet sites. But owing to fresh budgetary constraints faced by WHO for the 2006-2007 biennium, it became apparent in June 2005 that the funding of the post in question was causing great difficulties. On 28 July 2005 the Assistant Director-General in charge of the SDE Cluster signed a request for the abolition of this post which, having initially been rejected by the Director- General's Office for procedural reasons, was ultimately approved on 1 December 2005.

The complainant was then notified by a letter of 10 January 2006 that this decision to abolish her post would take effect on 31 January 2006. In the same letter the complainant was further informed of the implementation on her behalf of the reassignment process. The purpose of this process, laid down in Staff Rule 1050.2, is to make provision, where a post has been abolished, for the possible assignment of the staff member concerned to a new post on the initiative of a Reassignment Committee. Although the reassignment period, which normally lasts six months, was extended twice in the present case to a total of ten months, the process proved unsuccessful. The complainant's appointment was thus finally terminated on 28 February 2007 by a decision of the Director- General, of which the complainant was notified in a letter of 28 November 2006.

3. In the meantime, on 6 March 2006, the complainant had, however, challenged the decision abolishing her post before the Headquarters Board of Appeal. In accordance with the Board's recommendation, the Director-General dismissed the complainant's appeal by a decision of 9 March 2007. That is the decision which is now impugned before the Tribunal.

4. In support of her claims, the complainant principally disputes the lawfulness of the actual decision to abolish her post. Later on in her submissions, the complainant also disputes the lawfulness of the subsequent decision terminating her appointment by questioning whether the Organization made any real effort to find her a new job under the reassignment process. Lastly, she submits a variety of other claims to the Tribunal and contends that her conditions of employment at the Organization were the cause of a serious medical condition warranting compensation.

5. The Tribunal first notes that the bulk of these submissions in fact refer to disputes which are legally distinct from that concerning the lawfulness of the decision to abolish the complainant's post.

This is true in particular of the challenge to the decision terminating the complainant's appointment. This decision which, as explained above, was announced in a letter of 28 November 2006, was not at issue in the appeal filed previously with the Board of Appeal against the abolition of the post. In accordance with Article VII, paragraph 1, of the Statute of the Tribunal and with a steady line of precedent, the complainant is not entitled to contest the termination decision before the Tribunal, since she has not exhausted the internal remedies offered by the Staff Regulations (see, for example, Judgments 1301, 2349 and 2511). At all events, any breach by the Organization of its duties under the reassignment process would not affect the lawfulness of the decision to abolish the post, since it was taken before that process was set in motion and is governed by independent considerations. In reality the challenge to the decision terminating her appointment is part of a separate dispute and the complainant is well aware of this, because the submissions show that she lodged another appeal with the Board of Appeal against this very decision.

Similarly, the complainant's submissions on the issue of whether her medical condition is work-related should not be examined in the context of this dispute. This issue, which is unconnected with the abolition of the post, has not yet given rise to a final decision from the Organization. The complainant may not therefore refer it to the Tribunal (see, for example, Judgment 2107, under 9, and 2308, under 14). Furthermore, the Organization's written submissions indicate that a specific decision on this subject should be taken once its Advisory Committee on Compensation Claims has completed its consideration of the file.

6. In order to dispute the lawfulness of the decision abolishing her post, the complainant first alleges breach of procedure because of a failure to comply with the requirement of three months' notice laid down by Staff Rule 1050.3. She asserts that she was not notified of this decision until the letter of 10 January 2006, whereas it took

effect on 31 January. But this plea rests on an error of interpretation of the above-mentioned Staff Rule 1050.3, which requires such a period of notice for a decision terminating the appointment of the staff member concerned – and this period has been observed in this case – and not for the decision to abolish the post.

Similarly, the complainant is mistaken in holding that she ought to have been informed of the payment of the indemnity under Staff Rule 1050.4 when she was notified of the decision to abolish her post, since the award of this indemnity is linked to the decision to terminate an appointment.

7. On the merits the complainant first submits that the impugned decision misrepresents the facts of the case inasmuch as it refers to the abolition of a "post of indefinite duration" whereas, according to her, it was actually a fixed-term post. But this plea has no factual basis. The character of the post in question was that of a post of indefinite duration and, although the complainant points out that she held a fixed-term contract, that circumstance has no bearing on the nature of the post that was assigned to her.

8. More substantively, the complainant submits that the decision to abolish her post was by no means based on the necessities of the service, as suggested by the Organization, but that it is attributable to personal prejudice towards her. In her opinion this hostility stemmed in particular from her membership of the Staff Association, her trade union activities and, above all, her participation in a concerted work stoppage on 30 November 2005. With reference to the latter she points out that the decision to abolish her post was taken in the period immediately following this stoppage and that in a message which the then Director-General had sent to all staff the previous day, he had indeed threatened to dismiss staff members taking part in it.

9. As the Tribunal has repeatedly stated, for example in Judgments 269, 1131, 1614 and 2510, when disputes concerning administrative management, such as the abolition of a post, are referred to it, the Tribunal will not substitute its own assessment for that of the organisation concerned. It therefore exercises only a limited power of review over such decisions. Nevertheless, in accordance with that same case law, it is incumbent upon the Tribunal to ascertain, not only whether the rules on competence, form and procedure have been observed, but also whether the decision submitted to it rests on an error of fact or of law, or is tainted with abuse of authority. In this case, the complainant's challenge, being based on an allegation of abuse of authority, therefore clearly comes within the scope of this review.

Furthermore, the Tribunal finds that, contrary to the view taken by the Organization, the complainant is entitled to assert that the abolition of her post resulted from the implementation of the threats of dismissal made by the former Director-General the day before the concerted work stoppage of 30 November 2005. Although the Organization comments that these threats led the complainant and several other staff members to lodge a specific appeal with the Board of Appeal, this fact cannot prevent the Tribunal from examining whether the decision referred to it today did not stem from such an abuse of authority.

10. But, however disturbing the threats made by the then Director-General and the closeness of the dates highlighted by the complainant may be, it does not appear from the submissions that the decision to abolish her post was prompted by any personal prejudice towards her. On the contrary, there is every indication that this decision was taken solely on the basis of objective considerations connected with the fact that this post was of little use and that the Organization had repeatedly experienced difficulty in funding it.

The sequence of events set out above shows that the abolition of this post had already been contemplated for the first time in February 2004 and that the fresh proposal to this end, which ultimately led to its actual abolition, had been made by the Assistant Director-General in charge of the SDE Cluster in July 2005, in other words well before the strike action that took place the following November. In fact it can be seen from the "Authorised position request" drawn up by him and from a memorandum of 2 May 2005 to all directors and coordinators of the SDE Cluster that the funding of this post was proving increasingly difficult, and it so happened that there tended to be less need for this post at a time when many of the departments in the Cluster were managing their own internet site. Moreover, the Tribunal notes that the complainant herself indirectly confirms that this post was of little use, because in her complaint she laments that she was given few real duties throughout the period she held it.

In addition, the complainant's argument that the Administration of WHO deliberately wished to harm her is not borne out by any evidence in the file. The above-mentioned fact that the Director-General's Office had previously twice refused to grant requests for the abolition of the post in question, thus enabling the complainant to keep her job despite management considerations in favour of this abolition, is sufficient to render this argument somewhat

implausible.

More generally, the complainant's contention that for many years she had been "professionally sidelined" owing to the Organization's prejudice against her proves to be unfounded on examining the file. Just as the Tribunal dismissed the complainant's allegations of "isolation" and "exclusion" in Judgment 2308, so too the allegations made in the present case must be rejected.

Lastly, the connection between the decision to abolish the complainant's post and her trade union activities, or her membership of the Staff Association, is not proven. As the Tribunal had cause to confirm in Judgment 2585, a staff member holding responsibilities of this kind, who complains of a violation of the specific rights and safeguards inherent to the exercise thereof, must prove that fact and not merely rely on bald assertions. It must be noted that in the present case the complainant's allegations are wholly unsubstantiated.

As for the closeness of the date of the decision to abolish the complainant's post to that of her participation in the concerted work stoppage on 30 November 2005, it does not appear to the Tribunal that, in the circumstances of the case, this reveals the existence of a link between these two events. As the Board of Appeal rightly noted, the file does not reveal any genuine connection, because the process of abolishing the post in question had begun well before the stoppage.

11. It may be concluded from the foregoing that the complainant has no grounds to seek the setting aside of the Director-General's decision of 9 March 2007 confirming the abolition of her post, nor therefore to request that WHO should be ordered to grant her a new fixed-term contract so as to keep her in this post. The principal claims presented in the complaint are thus dismissed.

12. The complainant subsidiarily asked the Tribunal to order that a new procedure to reassign her should be opened, that she should be provided with vocational training and that she should be given preferential consideration for any vacancy at WHO. But these various claims, which in fact are related to the separate dispute concerning the termination of the complainant's appointment at the end of the reassignment process, are all irreceivable. As they were not submitted to the Board of Appeal in the context of this case, they offend against the above-mentioned rule that a complaint may not be filed with the Tribunal until the internal means of redress offered to the staff of the Organization have been exhausted.

13. Lastly, the complainant has presented even more subsidiary claims designed to mitigate the harmful effects of her possible final separation from WHO. For example, she requests the Tribunal to grant her a monthly retirement pension of 3,000 Swiss francs as from the age of 62, to order that she should be given either life coverage by the health insurance provided for in the Staff Rules or financial compensation enabling her to subscribe to Swiss health insurance and to award her compensation for moral injury.

Although they, too, are related more to the dispute concerning the termination of the complainant's appointment, these claims were submitted to the Board of Appeal. However, it does not lie within the Tribunal's competence to award a retirement pension or to determine the amount thereof. As the Tribunal has already held with respect to WHO in Judgment 1206, these powers are vested in the United Nations Joint Staff Pension Fund and any disputes relating to the application of the Fund's Regulations lie within the sole jurisdiction of the United Nations Administrative Tribunal. Nor can this Tribunal order WHO to provide the complainant with life coverage under the Organization's health insurance or to pay for equivalent benefits, since the complainant does not supply any proof that she satisfies the conditions of entitlement to such benefits.

As for the award of compensation for moral injury, according to the complainant its purpose would be to compensate for the injury arising out of the precarious employment conditions to which she was long subject at the Organization and out of the medical condition which, she alleges, is the direct consequence thereof. The Tribunal has, however, already held in Judgment 2308 that there was no basis on which the complainant could claim compensation for her previous terms of employment and, as stated above, the issue of whether her medical condition is work-related is the subject of a separate dispute.

14. As none of the claims submitted to the Tribunal can be allowed, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.