

**112th Session**

**Judgment No. 3076**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. L. against the World Health Organization (WHO) on 14 May 2010, WHO's reply of 10 September, the complainant's rejoinder dated 14 October 2010 and the Organization's surrejoinder of 18 January 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 to be found in Judgment 2784, delivered on 4 February 2009, on the complainant's first complaint. Suffice it to recall that the complainant joined the Organization's Regional Office for Europe in 2003 as Director of Administration and Finance. Following the announcement of his marriage to Ms J., who, as the Office's Acting Human Resource Services Manager, worked under his supervision, concerns were raised by the Staff Association that a conflict of interest could arise from that marriage. The Regional Director engaged a consultant to carry out a review and prepare a report on the Organization's rules and policies regarding

spouse employment. As a result, he decided to transfer Ms J. to a different position. Ms J. resigned and appealed the decision to transfer her, claiming inter alia that she had suffered harassment on the part of the Regional Director. She then filed two complaints with the Tribunal, which led to Judgments 2839 and 2840, delivered on 8 July 2009. In August 2009, pursuant to an order made by the Tribunal in Judgment 2839, Ms J.'s allegations of harassment were referred to the Grievance Panel. In the ensuing proceedings, the Regional Director exercised his right of reply on 10 December 2009 by submitting a statement in response to her allegations of harassment.

Prior to that, in July 2009, a separation agreement had been concluded between the complainant and WHO. This agreement provided, inter alia: that the complainant's appointment as a WHO staff member would come to an end on 30 November 2011, whereupon he would cease to have any contractual relationship with the Organization; that his entitlements and benefits would cease on 31 July 2009; that from 1 August 2009 until 30 November 2011 he would be on leave without pay for pension and staff insurance purposes only; that he would complete the separation clearance process and return all WHO identification documents by 27 July 2009; that he would not be allowed to work for the Organization for two years following separation from WHO; and that he would withdraw all existing claims against the Organization and renounce his right to bring any further claims against it in connection with his employment with WHO, except in the event of a dispute relating to the honouring by the Organization of its obligations under the separation agreement itself.

On 10 February 2010 the complainant wrote to the Director-General arguing that the statement submitted by the Regional Director in the context of the harassment proceedings brought by Ms J. constituted an attack on his dignity and reputation and a violation of the terms of the separation agreement concluded between himself and WHO. He requested that a number of corrective measures should be taken, in particular that the statement should be officially withdrawn, that all existing originals and copies should be destroyed and that all those aware of it should be informed that it had been withdrawn

as unsubstantiated. He also requested the Organization to identify “reparatory measures”. The Director of Human Resources Management replied on 18 February that the Administration was not aware of the contents of the Regional Director’s statement before the Grievance Panel or of its circulation and that it was therefore not in a position to make any comment on the complainant’s letter of 10 February. There was a further exchange of correspondence in which the complainant sought confirmation by 9 April 2010 of the Director-General’s decision to reject his requests and was informed that a response could not be provided by that date, but that it would be provided as soon as possible.

In an e-mail of 12 April to the Director-General the complainant reiterated his request for corrective measures and stated that, if the Administration failed to provide him with a response by 14 April, he would consider this as confirmation of the *de facto* rejection of his requests. By a letter of 14 April 2010, which is the impugned decision, the Director of Human Resources Management informed the complainant that the Regional Director’s statement before the Grievance Panel was part of the Panel’s confidential background material and, as such, would be securely held by it while Ms J.’s allegations were under consideration. The Director also expressed the Administration’s disagreement with the complainant’s view that the Regional Director’s statement constituted a violation of the terms of the separation agreement, and she asserted that WHO had fully honoured its obligations under that agreement, and continued to do so.

B. The complainant argues that the Regional Director made highly defamatory allegations against him in his statement of 10 December 2009 to the Grievance Panel in the context of the harassment proceedings brought by Ms J. He contends that these allegations, which concerned in particular abuse of power, conflict of interest and failure to meet the standards of conduct applicable to international civil servants in the performance of his duties, were false and

inappropriate, as throughout his service his performance was rated as “exceeding all expectations” and he was not a party to the harassment complaint brought by Ms J. In addition, these allegations were in breach of the terms of the separation agreement concluded between himself and WHO in July 2009, which imposed upon the parties the obligation to set aside their differences. Indeed, the Director ad interim of Human Resources Management had assured him in an e-mail of 8 June 2009 that “[i]f a [separation agreement] is signed, it will be signed on the basis that both parties wish to put behind them past tensions, and for there to be no on-going or future disputes between us”.

The complainant explains that he agreed to withdraw his appeals and claims against the Organization and to renounce his right to return to it on the understanding that WHO would refrain from any action liable to damage his professional reputation and dignity. He considers that the Director-General ought to have intervened to ensure adherence to the separation agreement and that, by refusing to take the corrective measures he requested, she condoned the Regional Director’s breach of the agreement and failed in her duty to protect his rights, dignity and reputation. In his opinion, the circulation amongst senior WHO officials of the Regional Director’s defamatory allegations and their subsequent endorsement by the Director-General was a continuation of the harassment campaign directed against him and Ms J. since 2005, which seriously prejudiced his career prospects.

He asks the Tribunal to set aside the impugned decision and to order WHO to delete all references to him from both the Regional Director’s statement before the Grievance Panel and the Panel’s final report. He also asks that all references to the Regional Director’s allegations against him be deleted from the Director-General’s response to the Grievance Panel and that an official communication dissociating the Organization from the allegations made by the Regional Director in his statement before the Grievance Panel be sent to all those who have seen that statement. He seeks confirmation that these actions have been performed, failing which he requests a declaration that he is no longer bound by his obligations under the

separation agreement. He claims moral and exemplary damages, and costs.

C. In its reply WHO contends that the complaint is irreceivable on several counts. Firstly, the complainant did not exhaust internal remedies, as required by the Staff Rules and Article VII, paragraph 1, of the Statute of the Tribunal. Indeed, he was still a WHO staff member at the time he filed his complaint with the Tribunal. He therefore still had access to the internal appeal process and was in fact obliged to exhaust internal remedies before having recourse to the Tribunal. Secondly, under the terms of the separation agreement the complainant is precluded from bringing a complaint against the Organization, except when the latter fails to honour its obligations. In light of the fact that WHO has honoured its obligations, the filing of the complaint amounts to a breach of the separation agreement. Thirdly, the complainant has no cause of action because the letter of 14 April 2010, which he intends to impugn, is not a decision within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, i.e. a decision affecting the terms of his appointment, but merely part of an exchange of correspondence.

On the merits, the Organization submits that the complaint is unfounded. It denies the complainant's allegations and states that it has fully complied with the terms of the separation agreement. It explains that, in providing his statement to the Grievance Panel in the context of the proceedings brought by Ms J., the Regional Director was simply exercising his right of reply to the harassment allegations made against him. Any interference by the Director-General to curtail that right would therefore have been inappropriate and contrary to the Tribunal's case law. Furthermore, as the Panel is independent and its deliberations are confidential, the Administration, which was not a party to the proceedings brought by Ms J., had no knowledge of the Regional Director's statement until the complainant brought it to its attention. WHO also denies that the Regional Director's statement was circulated amongst senior officials and points out that the Grievance Panel consisted of three individuals, all of whom had a duty of confidentiality in respect of their function as members of the Panel.

D. In his rejoinder the complainant asserts that the complaint is receivable. He argues that he separated from service on 31 July 2009, at which point he ceased to be a WHO staff member. He refers in this regard to the terms of the separation agreement, under which all his entitlements and benefits ceased on that date and he was required to complete the separation clearance process before the end of July 2009. He points out that as of 1 August 2009 he had no right to return and the only purpose of his placement on leave without pay until 30 November 2011 was to allow him to contribute to the United Nations Joint Staff Pension Fund. Therefore, in line with the Tribunal's ruling in Judgment 2840, as a former staff member he did have direct access to the Tribunal at the time he filed the complaint. Referring to Judgment 2740 concerning another organisation, he adds that, in any event, WHO's position in the letter of 14 April 2010 rendered an internal appeal process meaningless and thus amounted to an implicit waiver by the Organization of the requirement to exhaust internal remedies. On the merits, the complainant contends that in his statement before the Grievance Panel the Regional Director abused his right of reply by making defamatory allegations against him, which were irrelevant to the harassment complaint brought by Ms J. He accuses WHO of bad faith, malice, and failure to ensure due process.

E. In its surrejoinder the defendant reiterates that the complaint is irreceivable. It argues that the terms of the separation agreement made it clear that the complainant's appointment would end on 30 November 2011 and that, until then, the complainant would remain a WHO staff member. It explains that the complainant's placement on leave without pay for pension purposes did not sever his contractual relationship with the Organization, given that staff member status is a condition for participation in the United Nations Joint Staff Pension Fund. Similarly, neither the cessation of accrual of entitlements and benefits nor the absence of a right to return had a bearing on the complainant's status as a WHO staff member. Consequently, the complainant was required to exhaust internal remedies, especially since there was no implicit waiver of that requirement, contrary to the argument put forward in the rejoinder. On the merits, WHO dismisses

the accusations of bad faith and malice as unfounded and unsupported by the facts. It denies having ever prejudiced the complainant's career prospects.

## CONSIDERATIONS

1. In July 2009 the complainant concluded a separation agreement with WHO. He now alleges that the Organization has breached that agreement.

2. The circumstances giving rise to the present complaint began in 2005 when the complainant, who was serving at the time as Director of Administration and Finance for the WHO Regional Office for Europe, announced his impending marriage to Ms J., the Acting Human Resource Services Manager, who was working under his supervision. The subsequent events that have given rise to a multiplicity of legal proceedings may be found in Judgment 2839. Other background facts may also be found in Judgment 2784 on the complainant's first complaint and in Judgment 2840. In the complaint leading to Judgment 2839 Ms J., who is now the complainant's spouse, claimed, among other things, that she had been harassed by the Regional Director. In accordance with Judgment 2839 her allegations of harassment were referred to a Grievance Panel in August 2009.

3. In the course of its investigation, the Grievance Panel asked the Regional Director to provide a written response to the allegations of harassment brought by Ms J. The Regional Director submitted his statement in December 2009. Upon learning of this statement, the complainant wrote to the Director-General on 10 February 2010, alleging that portions of it were false, defamatory, and irrelevant to the harassment investigation. He claimed that its production constituted a breach of the separation agreement concluded between himself and WHO, a serious attack on his dignity and reputation and a violation of basic due process.

4. The complainant asked the Director-General to withdraw the statement and to take a number of corrective measures to minimise injury to his reputation. After several exchanges, on 14 April 2010 the Director of Human Resources Management, replying on behalf of the Director-General, denied that the Organization had breached the separation agreement and refused to grant the requested relief. That is the decision which is impugned before the Tribunal.

5. The complainant did not lodge an internal appeal. Instead, he filed his complaint directly with the Tribunal. He claims that, as a former staff member, he does not have recourse to the internal appeal process.

6. The Organization contends that, pursuant to the first paragraph of the separation agreement, the complainant was a WHO staff member until 30 November 2011 and that on this basis the complaint is irreceivable as the internal means of redress have not been exhausted. It further contends that the complaint is also irreceivable, because the terms of the separation agreement preclude the complainant from initiating any further litigation against the Organization, except in the event of a dispute related to the interpretation and enforcement of the agreement itself. Lastly, WHO argues that the Tribunal lacks jurisdiction on the grounds that the complaint does not involve a decision affecting the complainant's terms of appointment as required by Article II, paragraph 5, of the Statute of the Tribunal.

7. Alternatively, the Organization submits that it has complied with its obligations under the separation agreement and that the complaint should therefore be dismissed as unfounded.

8. It should be recalled that the complainant and WHO concluded the separation agreement on 23 July 2009. It became effective on 31 July 2009. Paragraph 4 of the agreement provided for a period of leave without pay, the purpose of which was to enable the



complainant to continue his contributions to the United Nations Joint Staff Pension Fund. That paragraph reads, in relevant part:

“As from 1 August 2009 until 30 November 2011, you will be on leave without pay for pension and staff health insurance purposes only [...] for a period of 28 months, ending on 30 November 2011.”

9. Staff Rule 655.3 permits the Director-General to grant leave without pay for pension purposes. It reads as follows:

“The Director-General may authorize leave without pay for pension purposes for staff who are within two years of reaching age 55 and 25 years of contributory service [...]”

10. The complainant argues that when a staff member separates from service under a separation agreement without a right to return and in that context accepts leave without pay, pursuant to Staff Rule 655.3, he or she ceases to be a staff member. This, in his view, is different to a normal leave without pay situation, such as that which occurs when leave is granted to permit a staff member to take up employment elsewhere. In that case the staff member status of a person accepting leave without pay is unaffected. The complainant stresses that, while there are various purposes for which leave can be granted, the separation agreement specified in his case that the leave was for pension purposes only.

11. He claims that, by inserting the word “only” in paragraph 4 of the separation agreement, the parties elected strictly to limit his rights and privileges to pension purposes. For all other purposes, the separation agreement operated to terminate his rights as a staff member following his separation from service on 31 July 2009, including his right to access the internal appeal process.

12. The complainant also argues that this position finds support in other provisions of the separation agreement, namely:

- Paragraph 3 specifies that “all entitlements and benefits will cease on 31 July 2009”;

- Paragraph 7 details his entitlement to “terminal emoluments [...] as of 31 July 2009”;
- Paragraph 8 requires him to complete the separation clearance process and return all WHO identification documents before 27 July 2009;
- Paragraph 9 entitles him to a lump-sum payment equivalent to terminal remuneration, based on the rates applicable on 31 July 2009;
- Paragraph 10 allows him to request payment of a repatriation grant “from the start date of [his leave without pay] (i.e., 1 August 2009)”;
- Paragraph 15 provides that he “[would] not be allowed to work for the Organization under any type of contractual arrangement for the entirety of the exceptional [leave without pay], and for two years following separation from WHO”;
- Paragraph 18 provides that all WHO’s obligations under the agreement are conditional on the completion, inter alia, of the steps detailed in paragraph 8;
- Annex B to the separation agreement lists an “effective separation date” of 31 July 2009.

13. Lastly, the complainant points out that, pursuant to the terms of the separation agreement, as of 31 July 2009 he no longer had a WHO badge or identification or a United Nations “Laissez-Passer”. He no longer enjoyed WHO entitlements of any kind and he had no internal e-mail address or access to the intranet. Moreover, he could not enter WHO premises except as a visitor. In addition, he had completed the separation clearance process before the end of July 2009 and, again pursuant to the agreement, he had no right to do any work for WHO for at least four years.

14. The Tribunal rejects the complainant’s arguments on receivability. Regardless of the various references to the separation clearance process, the separation agreement is unambiguous with respect to the complainant’s separation date and employment status.

Indeed, paragraph 1 of the agreement provides that “[his] appointment as a WHO *staff member* will come to an end on 30 November 2011” (emphasis added). As this language is clear, the general rule that ambiguities will be construed against the drafter of an instrument has no application here (see, for example, Judgment 2292, under 10).

15. Regarding the complainant’s argument based on Staff Rule 655.3, it must be noted that the purpose of the leave period is to permit continued participation in the United Nations Joint Staff Pension Fund. Participation in the Fund is contingent on having staff member status. The termination of salary and benefits is a normal feature of a leave without pay and reflects the fact that the staff member is not performing his or her employment functions.

16. As a staff member, the complainant was required to exhaust the internal means of redress before bringing his complaint to the Tribunal. However, he maintains that, even if he had had access to WHO’s internal appeal process, it would have been “meaningless” in the circumstances, because the decision underlying the complaint “cannot be construed [...] as anything other than a final decision by the Organization itself”. The impugned decision which is dated 14 April 2010 and which was addressed to the complainant by the Director of Human Resources Management on behalf of the Director-General states:

“[W]e do not agree with your assertion that [the Regional Director’s] confidential statement to the Grievance Panel ‘constitutes a contravention to the spirit and the letter of the dispositions of the [separation agreement] concluded between [yourself] and WHO in the summer of 2009’. WHO has fully honoured, and continues to fully honour, its obligations under that agreement.”

17. The complainant takes the position that, given the stridency of its language and the fact that it is expressed on behalf of the Organization itself, the “final decision” referred to above makes

an impartial internal appeal impossible. In his view, it constitutes, moreover, an implicit waiver by WHO “of any requirements [that] current or former [s]taff [...] ‘exhaust’ internal means of redress” before filing a complaint with the Tribunal.

18. In advancing this position, the complainant relies on the Tribunal’s Judgment 2740, under 4(c), as authority for the proposition that a complainant is not required to proceed with the internal appeals process where to do so would be a “hollow and meaningless formality”. In that case, the Director-General of the Organization had informed a staff member in very strong terms that the Organization would not correspond with her any further regarding a request she had made some years earlier. “Such a response”, the Tribunal found, “could not be construed by the complainant as anything other than a final dismissal of her claims by the Organization itself.”

19. The complainant contends that the decision impugned in the present case is of precisely the same nature and is a final decision of the Organization itself. The Tribunal observes, however, that the letter of 14 April 2010 constitutes no more than an expression by WHO of its disagreement regarding the complainant’s view of the Regional Director’s statement and of its opinion that it has honoured and will continue to honour its obligations under the separation agreement. The letter does not contain the requisite finality to constitute an implied waiver of the internal appeals process.

20. Consequently, as the complainant has failed to exhaust the internal means of redress, the complaint is irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 10 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet