

119th Session

Judgment No. 3396

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Ms K. J. L. against the World Health Organization (WHO) on 7 June 2011 and corrected on 28 June, WHO's reply of 3 February 2012, the complainant's rejoinder of 7 May and WHO's surrejoinder of 10 August 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, 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 Judgments 2839 and 2840, delivered on 8 July 2009, Judgment 2895, delivered on 3 February 2010, and Judgment 3095, delivered on 8 February 2012, concerning the complainant's first, second and tenth complaints.

The complainant is a former WHO staff member who resigned in September 2005. In January 2006 she submitted a claim to the Advisory Committee on Compensation Claims (ACCC) requesting that her medical condition be recognised as service-incurred. By a letter of 13 July 2009 she was informed that the Director-General had accepted the ACCC's recommendation and had decided that the complainant's condition was serviced-incurred. The complainant asked to undergo a medical and a psychiatric examination. On 18 August 2009 she was examined by a United Nations (UN) physician designated by WHO. Following a review of the UN physician's report, the complainant was informed in September 2009 that she would also undergo a psychiatric

examination by a psychiatrist designated by WHO. By an e-mail of 16 October 2009 she was informed of the psychiatrist who had been designated to conduct the examination and of his availability to conduct the examination in December 2009. The e-mail stated that the purpose of the examination was to evaluate her current state of health and that the report by the psychiatrist might be used as medical evidence in relation to any claim for invalidity payments that she might submit to the ACCC.

The complainant filed an invalidity claim in October 2009, requesting a “damage payment and recognition of disability” in relation to her service-incurred illness. She was informed by a letter of 4 November 2009 that the 2008 Medical Board’s report was not sufficient for the purposes of her invalidity claim, as it did not address her work incapacity and its degree, but only the service-incurred nature of her illness. The complainant declined to attend the appointment scheduled with the psychiatrist designated by WHO and, by an e-mail of 12 November 2009, informed WHO of her intention to refer the matter to the Tribunal.

In January 2010 the ACCC reviewed the complainant’s invalidity claim and recommended that, on the basis of the UN physician’s medical report of August 2009, she should be considered as having a total or partial invalidity (that is, work incapacity) at the time of her examination by that physician. However, in the absence of the necessary medical information, the ACCC was unable to make a recommendation as to whether the invalidity was continuing and, if so, to what degree. It found that it did not have the mandate to take a position regarding her claim for damages. It recommended that the complainant be examined by a suitable body, in accordance with paragraph 27(a) of Annex 7.E to the WHO Manual governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of the World Health Organization (hereinafter “the Annex 7.E Rules”), and that the body be requested to report to the Director-General on the question of whether the invalidity was continuing and whether it was partial or total. In order to facilitate the medical examination, it further recommended that two suitable

bodies, one in the complainant's country of residence and the other in her country of nationality, be identified and that the complainant be given the choice as to which one would conduct the medical examination, but that the chosen body should not involve in any capacity a physician or medical specialist who had previously examined and/or treated the complainant. It also recommended that, in view of the importance of the examination in the determination of her claim, if the complainant refused or failed without a valid reason to undergo the assessments, compensation should be denied under paragraph 27(a) of the Annex 7.E Rules.

The complainant was informed of the Director-General's decision to follow those recommendations by a letter of 25 February 2010. WHO identified two bodies to conduct the examination and the complainant chose one of the two, a Swedish clinic. She was examined on 11 May 2010 by a psychiatrist, Dr Z., at the Swedish clinic and a report was sent to WHO.

WHO corresponded with the psychiatrist at the Swedish clinic and the complainant, seeking to obtain additional medical information and clarification as to whether her invalidity was continuing and whether it was total or partial. The psychiatrist had determined that the complainant was fully incapacitated when she had been examined in May 2010, but had stated that in her view the condition was not permanent and had recommended six months of extensive treatment, to be followed by another assessment. WHO sought additional information on what the extensive treatment entailed, but the psychiatrist did not reply.

In August 2010 the complainant wrote to the Director-General stating that she was under no obligation to provide WHO with the information requested concerning her current treating physician and the nature and frequency of her treatment. Following further exchanges, the complainant informed WHO of the number of therapy sessions she had attended, listed her prescribed medications and sent a copy of a medical report dated 21 December 2010 written by another doctor at the Swedish clinic, Dr G. In that report, the second doctor indicated that the complainant's medical condition had been assessed

in August, in October and in December 2010 and that her work incapacity was still considered total, but that her condition would most likely improve over time, provided she received sustained follow-up and treatment. In January 2011 WHO wrote to the two doctors seeking additional information on the medical rationale for their conclusions, in particular asking to be provided, by 18 February 2011, with the details of the diagnosis, prognosis, plan of care, treatment received and the plan for follow-up treatment. WHO also wrote to the complainant stating that, if the requested information was not received by 18 February, she would have the option of being examined by another psychiatrist designated by WHO to advise the Organization on whether her invalidity was continuing and, if so, to what degree, and details of the treatment to be followed.

The complainant sent an e-mail to the Director-General in February 2011 alleging harassment by WHO and stating that her legal representative would contact the Administration concerning the status of her invalidity claim. The complainant's legal representative wrote to WHO in March 2011 stating that the medical examinations requested by WHO had confirmed the complainant's continuing invalidity at 100 per cent. WHO replied that the material before the ACCC was insufficient to establish by satisfactory medical evidence that the complainant's invalidity was continuing, total or partial. The legal representative replied that WHO had already received medical opinions certifying the complainant's total and continuing work invalidity. He concluded by stating that, in the absence of a response by 8 April 2011, a complaint would be filed with the Tribunal.

By a letter of 5 April 2011 WHO replied that the medical information at its disposal was insufficient to establish a partial or total invalidity and to determine her entitlement to an invalidity payment. That is the impugned decision.

WHO wrote to the complainant in June 2011 explaining that, as the doctors at the Swedish clinic had not provided the specific information requested, she was invited to attend another examination with a psychiatrist designated by WHO. The complainant declined to be examined, stating that since WHO refused to process her claim on the

basis of the existing medical evidence, she would await the Tribunal's ruling on the matter. WHO replied that, given the complainant's refusal to attend the medical examination by another psychiatrist, it would not be possible to consider her invalidity claim further. The complainant wrote to the Director-General on 16 July 2011 stating that, in view of the conflict of opinion on the aspects of the medical evidence required to determine her invalidity claim, she requested the establishment of a medical board as per paragraph 29(a) of the Annex 7.E Rules. By a letter of 27 July WHO informed the complainant of the Director-General's decision to refer the case to a medical board pursuant to paragraph 29(a) of the Annex 7 E Rules. She was also informed that the medical board would begin to carry out its work once the Tribunal had issued its judgments on the relevant pending complaints, as her complaints alleging harassment by various serving or former WHO officials had a direct bearing on her claim for an invalidity benefit. In the intervening period, WHO would prepare draft terms of reference for the medical board, which would be provided to the complainant for her comments. The complainant was provided with the draft terms of reference on 24 October 2011. The complainant objected to the medical board's terms of reference and reiterated that the existing medical evidence was sufficient for the medical board to carry out its work. In December 2011 the complainant wrote to the Director-General to inform her that, as no progress had been made on the agreement to create a medical board, she believed it best to suspend further discussions on the matter until the Tribunal reached a conclusion on her eighteenth complaint.

B. The complainant argues that WHO possesses all the medical evidence it needs to decide that she has a continuing, long-term, total, service-incurred invalidity, warranting a service-incurred disability pension under the Annex 7.E Rules. WHO's denial of her service-incurred invalidity claim is evidence of its improper motives and bad faith. The Organization purposefully delayed her exit medical examination and subsequently lured her into a never ending processing of her claim in order to avoid having to review her separation date and to avoid having to restore her sick leave status.

She alleges that the Director-General's decision to appoint a medical board was motivated by ill will, malice and amounts to "psychological abuse". She also alleges that WHO breached its duty of care.

The complainant seeks the quashing of the impugned decision; the deferral of her separation date to the date when the determination as to her invalidity is made, based on the results of the comprehensive exit medical examination; restoration of her sick leave status with full pay and entitlements from January 2007 until the date of determination of her invalidity; full remuneration for one year following the determination of her invalidity; and disability payments from one year after the determination of her invalidity status, subject to bi-annual examinations. She also asks for a performance appraisal for the year 2005 and a certificate of service. She claims material damages for the loss of income due to the service-incurred illness suffered, calculated from her separation date until the retirement age. She also claims exemplary damages and costs.

C. In its reply WHO denies that it acted out of malice or bad faith. Based on the medical information available on the date of the impugned decision, and that which is currently available, it does not have sufficient medical evidence to make a determination on her invalidity claim. In particular, the 2008 Medical Board report did not address the question of invalidity payments, which, under the Annex 7.E Rules, requires a determination of: (i) the extent of the invalidity (total or partial, and if partial, to what degree); and (ii) whether or not the invalidity is continuing and therefore whether payment is due and, if so, the amount of the payment.

WHO considers that its requests for clarification and for additional information were both reasonable and necessary. A determination that a staff member has a long-term, total work incapacity, and is entitled to receive the invalidity payments described in the Annex 7.E Rules, has profound implications for the individual concerned, as well as for the Organization. Such claims must be assessed on the basis of detailed, reliable medical information. It was both reasonable and in keeping with the Annex 7 E Rules for WHO to request the medical information

considered relevant to evaluate the complainant's invalidity claim. Further, it is the responsibility of the person making the invalidity claim to state all material facts and to provide all the necessary medical information affecting the determination of entitlements. The complainant refused to cooperate, without proper justification. In so doing, she breached her obligations under the Annex 7.E Rules, especially paragraph 26(c), as well as the Tribunal's case law on the duty of staff members in such circumstances to undergo required medical examinations.

The Organization denies that it breached its duty of care. It informed the complainant in September 2009 of her right to make such a claim and referred to the applicable rules. It also drew her attention to the fact that invalidity payments are not automatic.

D. In her rejoinder the complainant presses her pleas. She considers that the information requested by WHO can be withheld on the basis of medical confidentiality.

E. In its surrejoinder WHO maintains its position in full. It strongly denies the complainant's allegations of malice and ill will.

CONSIDERATIONS

1. The complainant is a former WHO staff member. Details of her employment history may be found in Judgments 2839, 2840, 2895 and 3095. This complaint concerns her claim to an invalidity pension. For the sake of finding a resolution to the current dispute, WHO does not challenge the receivability of this complaint. However, to the extent that the complainant in her submissions attempts to relitigate matters already addressed in the earlier judgments, WHO submits that they are *res judicata*. This plea is accepted. The complainant's submissions and arguments in relation to the matters already decided are clearly irreceivable and will not be considered. As the present complaint addresses a discrete issue, an enumeration of the complainant's various pleas that will not be considered is unnecessary.

2. In October 2009, the complainant submitted a claim accepted by WHO to be a claim for an invalidity pension for a service-incurred condition. Ultimately on 5 April 2011, WHO advised the complainant that “it has not been established by satisfactory medical evidence that [the complainant] has a continuing total or partial invalidity”. This is the impugned decision.

3. In August 2009 a UN medical doctor designated by WHO examined the complainant and concluded that she “suffer[ed] from depression and post-traumatic stress disorder, both to a severe degree”. WHO accepts that the complainant’s condition is service-incurred. WHO also accepts the existence of an invalidity as of the date of that diagnosis. In February 2010, for the purpose of assessing her invalidity, the WHO recommended and the complainant accepted to be examined by a suitable body as contemplated in the relevant WHO rules and that body would be asked to report on its assessment.

4. WHO arranged for the consultation at a Swedish clinic agreed upon by the complainant and asked the clinic to address the following questions in its report:

- “1. whether the invalidity is continuing and, if so;
2. the degree of invalidity, i.e., whether it is total or partial and, if partial, the precise degree of invalidity. (The degree of invalidity should be assessed in relation to the loss of earning capacity in the [complainant’s] normal occupation (HR professional) or an equivalent occupation appropriate to [...] her qualifications and experience.)
3. and when the [complainant] should undergo a further examination to assess the evolution of her condition.”

5. The complainant attended at the Swedish clinic for the examination on 11 May 2010. WHO did not include a copy of Dr Z.’s report in the record, however, a psychiatrist at the same clinic, Dr G., to whom the complainant was referred for treatment stated in a 21 December 2010 report that on 11 May 2010 Dr Z. “established that [the complainant’s] disability level was 100% [...] and referred [the complainant] to [her] for therapy, with the recommendation that

her condition be reassessed after six months”. Dr G. stated that she assessed the complainant on 9 August 2010 and assessed that the complainant’s “disability was still 100%” and remained the same when she assessed the complainant on 27 October 2010.

6. On 8 June 2010 WHO wrote to Dr Z. requesting clarification of her report regarding the first two questions posed. WHO explained the nature of the information required in the following terms:

“On point (1), a ‘continuing’ invalidity is an invalidity which is ongoing and not of a temporary nature.

On point (2), a ‘total’ invalidity is an invalidity whereby [the complainant] is 100% incapacitated for work as an HR professional or equivalent occupation appropriate to her qualifications and experience.”

In her 22 June 2010 supplementary opinion in response to the request, Dr Z. indicated a 100 per cent incapacity to work; that the complainant was in an untreated state of depression that was not permanent; that the complainant required six months of extensive treatment to be followed by another assessment; and that the complainant could not at present undertake the duties of a lawyer.

7. On 19 August WHO wrote to Dr Z. seeking clarification of her supplementary opinion regarding the nature and frequency of the extensive treatment that would be required and the degree of invalidity in relation to the loss of earning capacity. By a letter of the same date, WHO forwarded a copy of Dr Z.’s 22 June report and its request for clarification to the complainant. In the letter, it is recalled that the first matter to be determined is whether the complainant has a continuing invalidity. The letter goes on to state that “it is concluded that when you were examined on 22 June 2010 you had an untreated depression that rendered you incapable of working in your normal occupation at that time. The depression was not diagnosed as permanent and it has been concluded that you need at least six months of extensive treatment, following which a new psychiatric assessment should be made.” Lastly the complainant is informed that the Director-General is not in a position to assess that the complainant has a “continuing invalidity” and that after she had undergone six months of extensive treatment

and a new assessment of her condition had been made, her invalidity claim would be considered again.

8. An exchange of correspondence between WHO and the complainant ensued that ultimately resulted in the complainant providing WHO with the 21 December 2010 medical report from Dr G. referred to above. The report stated that as of the date of the report the complainant still had a 100 per cent disability. However, it was expected that over time the complainant's condition would gradually improve provided there was sustained follow-up treatment and a resolution of her employment issues. The report recommended bi-annual evaluations to monitor the complainant's condition and to make appropriate adjustments to her treatment.

9. On 19 January 2011, WHO wrote to Dr G. requesting additional information that was needed for a consideration of the complainant's invalidity claim including diagnosis, prognosis, plan of care, treatment, plan for follow-up treatment and whether the complainant was following the prescribed course of treatment. On the same day, WHO wrote to Dr. Z. again requesting clarification. And, on that same day, WHO advised the complainant that based on the available information the Director-General was not in a position to assess that she had a continuing invalidity and that upon receipt of the requested information together with the requested clarifications the matter would be reviewed.

10. In mid-February and early March, Dr G.'s office contacted WHO to say that the requested information would be provided, however, despite a number of reminders the information was never provided. In the interim, there was an exchange of correspondence between WHO and the complainant's lawyer that resulted in the 5 April 2011 impugned decision.

11. The Rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties are found in Annex 7 E to the WHO Manual. Section III of

Annex 7.E sets out the rules regarding the compensation “in case of continuing total invalidity” (paragraph 10) and “in case of continuing partial invalidity affecting the professional ability of a staff member” (paragraph 11). Under paragraph 10, once it has been determined that an individual has a continuing total invalidity that individual is entitled to the payment of compensation as provided in paragraph 10. Paragraphs 11 and 12 deal with the case of a continuing partial invalidity and the basis upon which the degree of that invalidity is to be assessed. It provides that “[t]he degree of invalidity shall be assessed on the basis of medical evidence and in relation to loss of earning capacity in the normal occupation or an equivalent occupation appropriate to the staff member’s qualification and experience”. Paragraph 26(c) requires that the person claiming the compensation must furnish the necessary documentary evidence for the purpose of determining entitlement to compensation under the Annex 7.E Rules. Lastly, paragraph 30 gives the Director-General the authority to periodically review the amount of pension payable under the Annex 7.E Rules and alter the amount payable in the event of a change in condition.

12. The Annex 7.E Rules exist to benefit staff members. As it is a beneficial normative legal document it should be interpreted liberally and, in the event of ambiguity in a particular provision, a meaning favouring a wide application of the provisions for the benefit of staff members should be adopted rather than a narrow application of the provisions which could deny benefits to staff members.

13. A review of WHO’s correspondence with the two psychiatrists, Dr Z. and Dr G., and the complainant reflect a lack of clarity and understanding regarding the meaning of “continuing” and as a consequence a failure to focus on the right question. For example, in the 19 August 2010 letter from the Secretary of the ACCC to the complainant referred to earlier, this erroneous comment is made: “[Your] depression was not diagnosed as permanent”, implying that permanency was a condition precedent to the payment of the continuing total invalidity pension. This is also perpetuated in WHO’s submissions to the Tribunal as seen, for example, at paragraph 114 of the reply, in

which it is said that the invalidity has to be “long-term” or “for a long duration, possibly permanently”. Although the threshold question as to whether the complainant had a “continuing” invalidity was properly identified, in the course of the communications it appears that from WHO’s perspective the meaning of the term “continuing” involved the question as to whether the condition was permanent or long-term, on the one hand, or temporary on the other hand. This interpretation is incorrect. The continuing nature of a condition is simply whether it will, at the time of diagnosis and prognosis, continue into the future for, if known, anything other than a brief period or continue with an unknown end date. This erroneous approach, in turn, led to a rejection of the medical opinions which do sustain a conclusion that the complainant was suffering from a continuing total invalidity even though the doctors did not say this would continue long-term or was permanent.

14. In particular, the medical reports support a conclusion that at least from 11 May 2010 the complainant had a continuing total invalidity. That may remain so now.

15. The Tribunal proposes to order that the complainant be paid a continuing total invalidity pension from the date when, on the medical evidence, it is clear that the complainant was suffering from total invalidity. This order is subject to qualifications which are apparent from the order itself.

16. Moreover the delay in resolving the issue whether the complainant was entitled to a continuing total invalidity pension has undoubtedly caused the complainant considerable stress and anxiety which is all the more regrettable and serious having regard to what appears to be, or at least was, her psychiatric condition. For this she is entitled to moral damages assessed in the sum of 20,000 euros. She is entitled to costs, which are assessed in the sum of 1,000 euros.

DECISION

For the above reasons,

1. WHO shall pay the complainant an amount equal to the sum of all periodic pension payments plus interest that were payable under paragraph 10(a) of Annex 7.E to the WHO Manual between 11 May 2010 and the date of delivery of this Judgment or an earlier date determined under paragraph 2 of this order.
2. “An earlier date” for the purposes of paragraphs 1 and 4 of this order, is a date on which the complainant’s total invalidity ceased (as provided for in paragraph 10(a) of Annex 7.E) in the opinion of two independent psychiatrists whose opinion WHO has or obtains within 60 days of the date of delivery of this judgment.
3. Interest at the rate of 5 per cent shall be payable under paragraph 1 of this order in relation to each periodic pension payment from the date it would have been paid under paragraph 10(a) of Annex 7.E.
4. WHO shall pay the complainant a pension under paragraph 10(a) of Annex 7.E unless and until a determination is made under paragraph 30 of Annex 7.E or the complainant’s invalidity has ceased for the purposes of Section III of Annex 7.E in the opinion of two independent psychiatrists whose opinion WHO obtains. Provided that this paragraph has no application if “an earlier date” has been established under paragraph 2 of this order.
5. For the purpose of implementing paragraphs 2 and 4, the complainant shall comply with any reasonable request of WHO to attend at the office of a psychiatrist for examination.
6. WHO shall pay the complainant 20,000 euros in moral damages.
7. WHO shall pay the complainant 1,000 euros in costs.
8. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2014,
Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F.

Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ