P

v.

WHO

122nd Session **Judgment No. 3687**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. P. against the World Health Organization (WHO) on 24 August 2013 and corrected on 31 December 2013, WHO's reply of 14 April 2014, the complainant's rejoinder of 26 August and WHO's surrejoinder of 7 November 2014;

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 impugns WHO's decision to terminate her appointment for health reasons.

From 1995 to 2004 the complainant worked for WHO under various types of temporary contracts. In October 2004 she was awarded a fixed-term appointment and in November 2010 a continuing appointment with effect from 17 October 2009. In October 2008 she suffered an injury which became aggravated and compelled her to go on sick leave on a full-time basis in January 2009. Soon after, in February 2009, she was diagnosed as suffering from a condition called Complex Regional Pain Syndrome. In June 2009 she was placed on sick leave under insurance coverage (SLIC).

In the months that followed, Dr C., the Director of the WHO Health and Medical Service (HMS), held consultations with the complainant for the most part over the phone and via e-mail exchanges. In October 2009 Dr C. discussed with the complainant's supervisor the possibility of the complainant teleworking, but the supervisor did not consider this feasible given the nature of the complainant's responsibilities. On 18 March 2010 Dr C. wrote to the complainant to remind her that at the end of her SLIC on 18 June 2010 she had the option to either return to work or request a disability benefit. If neither of these options was possible, a separation procedure would be initiated by WHO. On 30 April 2010, based on the findings of a medical expert appointed by the WHO's insurance provider, the complainant was cleared for a return to work on a part-time basis as of 6 May 2010. The complainant resumed her duties on 6 May but went on sick leave from 16 to 27 June and again as of 30 June 2010.

On 29 June 2010 the complainant wrote to the Director of the Department of Human Resources Management (HRD) to enquire about her possible entitlement to a disability benefit under the Regulations and Rules of the United Nations Joint Staff Pension Fund (UNJSPF) and the disability payment under Staff Rule 720.2, in the event that her appointment was terminated for health reasons in accordance with Staff Rule 1030. The Director of HRD replied by a letter of 9 July 2010 specifying that the complainant's remaining sick leave and annual leave entitlements would be exhausted on 30 September 2010, at which point she would be considered for special leave without pay until her administrative status had been settled. The Director stated that, since the complainant was currently incapable of resuming her duties for an indefinite period, a determination would have to be made as to whether her appointment should be terminated for health reasons. Prior to such termination, the complainant's health condition would be assessed with a view to determining whether she would be eligible for the receipt of a disability pension from the UNJSPF. The Director then explained what the complainant's entitlements would be in the event of such termination and in the case of a positive or, alternatively, a negative decision regarding the award of a UNJSPF disability pension.

By a follow-up letter dated 19 October 2010, the Director of HRD informed the complainant that further to the HMS's determination of her medical condition, namely that it was of long duration and did not permit her to resume her duties then or in the near future or to be reassigned to another function, WHO had decided to terminate her appointment for health reasons under Staff Rule 1030, effective 21 January 2011. This letter also informed the complainant of her entitlements upon separation both in the event of a positive or, alternatively, a negative decision regarding a UNJSPF disability pension. It requested her to indicate whether she wished to maintain her participation in the WHO Health Insurance scheme during her special leave without pay from 1 to 21 October 2010 and it informed her that pursuant to Staff Rule 1220, she had the right to appeal the decision to terminate her appointment for health reasons "by informing the Director-General, in writing, within 15 calendar days of receipt of this notice". There was an exchange of correspondence between the complainant and HRD in late October 2010 regarding the modalities of the complainant's separation and her options regarding social security coverage. On 1 November 2010 the complainant wrote to the Director of HRD, acknowledging receipt of the letter of 19 October and indicating that she had "noted its contents". She also confirmed her choice to participate in WHO's Health Insurance scheme during her special leave without pay. The complainant separated from WHO for health reasons on 21 January 2011.

In the meantime, the complainant was informed by a letter of 15 December 2010 that the WHO Staff Pension Committee had decided not to recommend the award to her of a disability benefit under the Regulations and Rules of the UNJSPF. However, this decision was subsequently reviewed on request from the complainant's counsel, and in September 2011 the UNJSPF approved the award of a disability benefit with retroactive effect from 22 January 2011. Between February and April 2011, the complainant's counsel sought payment by WHO of the complainant's outstanding terminal emoluments. Finally, these were acknowledged by HRD on 18 April 2011 and subsequently settled.

On 19 October 2012, a different counsel representing the complainant wrote to the Director-General asserting that the complainant had been

involuntarily and irregularly separated from WHO and demanding that she be adequately compensated for the injuries caused to her by WHO's decision to terminate her appointment for health reasons. He asked the Director-General to treat his letter as a request for a final administrative decision, indicating that failing a response on her part within 15 days, he would pursue all legal avenues available to the complainant. The Administration replied on 19 November 2012 that the claims made by the complainant's counsel in the letter of 19 October 2012 were out of time, since the complainant had not appealed the 19 October 2010 decision to terminate her appointment for health reasons within the applicable time limit.

Prior to that, on 15 November 2012, the complainant's counsel had submitted to the Headquarters Board of Appeal (HBA) a "Combined Notice of Intention to Appeal and Statement of Appeal", contesting the Director-General's decision of 19 October 2010 to terminate the complainant's appointment for health reasons and claiming material and moral damages and costs. In a memorandum of 27 February 2013, the HBA considered that pursuant to Staff Rule 1220 the complainant should instead have filed an appeal with the Director-General and transferred the appeal to the Director-General for her review and consideration. Under cover of a letter dated 2 May 2013, the Administration forwarded to the complainant's counsel the HBA's memorandum and indicated that the Director-General agreed with the HBA's conclusions and was reviewing the appeal. By a letter of 27 May 2013, the Director-General notified the complainant of her decision to dismiss the appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to award her at least 10,000,000 United States dollars in compensation for a life-long and life-altering work-related injury, the loss of income, salary and career, moral damages, actual, compensatory and consequential damages, and the loss suffered by the complainant upon the forced sale of her principal residence caused by WHO's failure to pay her all due benefits in a timely manner. She claims reimbursement of all medical expenses resulting from what she considers to be her service-incurred injuries and which have not been reimbursed by her health insurance. She also claims reimbursement

of all actual legal fees and interest at the rate of 5 per cent per annum on all amounts paid to her from the date that her appointment was terminated through the date that all sums due hereunder are actually paid in full. She seeks such other relief as the Tribunal may determine just, necessary and equitable.

WHO invites the Tribunal to dismiss the complaint as irreceivable on the ground that the complainant's internal appeal was time-barred and she has therefore failed to exhaust the internal means of redress. Subsidiarily, it invites the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The determinative issue in this complaint is whether it is irreceivable for failure to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute.

2. As set out above, on 19 October 2010, the Director of HRD notified the complainant that her appointment would be terminated for health reasons in accordance with Staff Rule 1030, effective 21 January 2011. The termination notice informed the complainant of her entitlements upon separation in the event of a positive or negative decision regarding her potential UNJSPF disability benefit. It also informed her that, pursuant to Staff Rule 1220, she had the right to appeal the decision by informing the Director-General, in writing, within 15 calendar days of receipt of the termination notice.

3. On 1 November 2010, the complainant responded to the termination notice by acknowledging receipt of the letter of 19 October 2010 and indicating that she had "noted its contents".

4. On 19 October 2012, counsel for the complainant wrote to the Director-General requesting compensation for the injuries caused by WHO's decision to terminate the complainant's appointment for health reasons. Counsel also asked that the letter be treated as a request for a final administrative decision and indicated that failure to respond within

15 days would result in the complainant pursuing all legal avenues of redress available to her.

5. The Administration replied on 19 November 2012, noting that the claims made in the 19 October 2012 letter were out of time as the complainant had not appealed the 19 October 2010 decision to terminate her appointment within the applicable time limit.

6. Meanwhile, having not received a response from the Director-General within 15 days, on 15 November 2012, the complainant submitted a "Combined Notice of Intention to Appeal and Statement of Appeal" to the HBA. In the appeal, the complainant contested the decision to terminate her appointment for health reasons, as affirmed by the Director-General's implicit rejection of the letter dated 19 October 2012. The HBA referred the appeal to the Director-General for her consideration.

7. On 27 May 2013, the Director-General notified the complainant of her decision to dismiss the appeal as irreceivable. This is the impugned decision.

8. At this point it is useful to set out the relevant Staff Rules for the purpose of this discussion. Staff Rule 1030.1 deals with termination for health reasons. It reads:

> "When, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member is incapable of performing his current duties, his appointment shall be terminated."

Staff Rule 1220.1 concerns the initiation of an appeal against a decision made pursuant to Rule 1030.1. It reads:

> "A staff member may appeal against a decision taken under Rule 1030 to terminate his appointment for reasons of health. He must indicate in writing to the Director-General, within 15 calendar days of his receipt of the termination notice, his intention to do so. The Organization's Staff Physician will normally inform the staff member in writing of the medical conclusions upon which the decision was based except that, if he feels that such information may be harmful to the staff member, the medical findings may be provided in writing to a physician designated by the staff member."

9. The case law has consistently held that a complaint will not be receivable if the underlying internal appeal was not filed within the applicable time limits. For example, recently, in Judgment 3296, under 10, the Tribunal stated:

> "Article VII, paragraph 1, of the Statute of the Tribunal specifies that:
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> > 'A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.'
>
> In accordance with the Tribunal's case law, to satisfy this requirement the complainant must not only follow the prescribed internal procedure for appeal, but must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure (see, for example, Judgment 1469)."

10. The case law also recognizes that in very limited circumstances an exception may be made to the rule of strict adherence to the relevant time limit. The circumstances identified in the case law are: "where the complainant has been prevented by *vis major* from learning of the impugned decision in good time or where the organisation, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith" (see Judgment 3405, under 17; citations omitted); and "where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or where [the staff member concerned by that decision] is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken" (see Judgment 3140, under 4; citations omitted).

11. It must also be added that a later discovery after the expiry of the time limit for appealing the challenged decision of an irregularity that might have rendered the decision unlawful does not in principle have a bearing on the requisite adherence to the time limit (see, for example, Judgment 3405, under 16).

12. The complainant submits that in the 19 October 2010 decision the Director of HRD erroneously infomed her that she had 15 days

within which to bring an appeal against the impugned decision. She claims that where an appeal is brought on the grounds of bias and prejudice, such as, in her case, the time limit for filing the appeal is 60 days from the date of notification as provided in Staff Rule 1230.8.3. This argument is rejected. This latter rule deals with the time limit for lodging an appeal from a final decision. This is the provision of general application, however, it is overtaken by the specific provision, Staff Rule 1220.1 that expressly fixes the time limit for the filing of an appeal from a decision to terminate an appointment for health reasons.

13. It must also be observed that neither the 19 October 2012 request for a final administrative decision nor any purported absence of response created a new time limit for appealing the decision to terminate the complainant's appointment for health reasons. Furthermore, the Administration's response to the 19 October 2012 letter, which made it clear that the appeal was time-barred, did not alter the decision to terminate the complainant's appointment in October of 2010.

14. The complainant submits that there are several well-established exceptional circumstances that allow for the traditional timeframes regarding receivability to be tempered. In this case, the timeframe with respect to the filing of an appeal against the decision to terminate the complainant's appointment for health reasons should be disregarded for a number of reasons.

15. The complainant states she was not in a position to fully appreciate and be aware of the impact that the termination would have on her in October 2010. It wasn't until the nature of her injury fully revealed itself in 2012 that the impact of that decision became apparent. More specifically, the complainant contends that the decision to terminate her appointment on 19 October 2010 failed to generate the requisite awareness of damages. Rather, it was the administrative decision in conjunction with the slow bureaucratic process and slow evolution of her declining health status, stemming from the work-related injury, which precipitated the required awareness. She also claims that it was a reasonable supposition that her service-incurred injury would be

adequately covered by the disability process and that it was also a reasonable supposition that her foot injury would ultimately heal.

16. As WHO points out, a decision to terminate a staff member's appointment for health reasons, and the effective date for doing so, is not contingent on any hypothetical future recovery or on the award of any disability benefit. Neither is termination for health reasons under Staff Rule 1030 linked in any way to the process for determining whether or not a staff member incurred a service-related injury. Moreover, it is clear from the record that the Administration properly advised the complainant as to the potential consequences associated with the termination of her appointment for health reasons. For instance, in July 2010, the Director of HRD informed the complainant of the possible financial implications should her appointment be terminated for health reasons under Staff Rule 1030. The termination notice of 19 October 2010, also explained the possible financial outcomes resulting from the termination of her appointment for health reasons, and on 1 November 2010 the complainant acknowledged receipt of the 19 October 2010 termination notice and stated she had "noted its contents".

17. The complainant has also failed to establish any new and unforeseeable facts of decisive importance that would have warranted a waiver of the applicable time limit for appeal against the termination of her appointment for health reasons. The complainant's main assertion in this regard is that she was not aware of the complexity of her condition at the time of the termination of her appointment or that, following termination, her condition would deteriorate. However, it is clear from the evidence that the complainant was well aware of the complexity of her medical condition, as well as the potential for her medical condition to deteriorate, before the termination of her appointment. For instance, on 20 February 2009, the complainant informed her supervisor that she had been diagnosed by her doctor as suffering from Sudeck's Atrophy or Complex Regional Pain Syndrome (CRPS). In March 2009, the complainant's orthopedic surgeon characterized the complainant's deteriorating and debilitating condition as CRPS. On 12 July 2010, the complainant's medical practitioner provided HMS with a medical

report which diagnosed the complainant with CRPS. Moreover, the complainant has stated that her medical condition was of long duration and that, as of the date of the termination of her appointment, she had been 100 per cent incapacitated. In light of the foregoing, it cannot be said that the complexity of her CRPS condition or the subsequent deterioration of that condition amount to new and unforeseeable facts.

18. The remainder of the complainant's claims of new and unforeseeable facts of decisive importance relate to the initial decision of the WHO Staff Pension Committee to deny her a disability benefit and a so-called abandonment by the Administration following the termination of her appointment. Both these claims must fail. With respect to the claim that the decision of the Staff Pension Committee amounted to a new and unforeseeable fact, leaving aside any consideration as to the decisiveness of this fact, it is clear that the complainant was aware of this potential outcome, as evidenced by the letters sent by the Administration to the complainant setting out the possible scenarios associated with a termination for health reasons.

19. The complainant's allegations of abandonment by the Administration are similarly without merit. On the contrary, the Administration supported the complainant and fully discharged its responsibility towards her leading up to and following the termination of her appointment for health reasons. WHO gave the complainant extensive administrative assistance throughout the termination process. Further, WHO did not breach its obligation of good faith toward the complainant by failing to assist her in regard to her claims. Both HMS and HRD were in regular contact with the complainant and she was provided with the necessary administrative information related to her medical status and termination process. As well, there is no evidence that the Administration should have been aware that the complainant was somehow mistaken or confused, either about her rights or the procedural process for enforcing such rights. For instance, in June 2010, the complainant wrote to the Director of HRD enquiring about the financial implications and the outcome of the process if a termination for reasons of health under Staff Rule 1030 were to eventually take place.

In doing so, she demonstrated her understanding that her appointment may be terminated for health reasons and her knowledge of the relevant Staff Rule and related provisions. In response, the Director of HRD provided the complainant with detailed information concerning her current and future administrative situation, including information on her medical status, potential disability benefit and terminal emoluments following a termination for health reasons. In addition, as noted above, the termination notice of 19 October 2010 clearly set out the applicable deadline for appealing the termination of her appointment for health reasons, as well as the Staff Rule pursuant to which an appeal should take place.

20. The complainant has also failed to establish her other claims in support of the submission that WHO failed to meet its obligation to assist her, namely, that WHO's delay in acknowledging the service-incurred nature of her injury, as well as its blatant suppression of materially relevant information, caused the complainant not to have the requisite information regarding her rights in time to file the appropriate appeals.

21. The complainant's allegation that WHO breached her right to be treated in good faith, with fairness and in accordance with due process through the arbitrary application of time limits is without merit. As with other time limits, the time limit provided by Staff Rule 1220 is designed to balance the interests of a staff member to appeal a decision to terminate an appointment for health reasons with the need for certainty in legal relations (see Judgment 3614, under 13). Consequently, there is nothing arbitrary about the time limit set out in Staff Rule 1220, nor is there any validity to the complainant's suggestion that the applicable time limit was intended to set a trap for the complainant.

22. In conclusion, the complainant has not adduced any evidence of exceptional circumstances on the basis of which it could be said that the Director-General's decision not to waive the time limit provided in Staff Rule 1220 involved reviewable error. In the letter to the complainant dismissing her internal appeal on grounds of irreceivability, the Director-General pointed to the need for legal certainty created by time limits

and noted that, after taking into account all the elements of the case, she did not consider there to be exceptional circumstances that would warrant derogating from Staff Rule 1220.

23. Finally, contrary to the complainant's assertions, there were no procedural irregularities associated with the decision to transfer the complainant's appeal from the HBA to the Director-General, nor with the decision not to convene a medical board. It is clear that Staff Rule 1220 was the applicable provision. In the circumstances, an oral hearing will not be ordered.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER