L.

v.

WHO

129th Session **Judgment No. 4239**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A. L. against the World Health Organization (WHO) on 19 May 2018 and corrected on 23 June, WHO's reply of 5 October 2018, the complainant's rejoinder of 16 January 2019 and WHO's surrejoinder of 16 April 2019;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision to terminate her appointment for health reasons and claims that the compensation she received for her service-incurred injury is grossly inadequate.

At the material time the complainant was employed under a temporary appointment as a technical officer at grade P.4. On 14 February 2013 she had a car accident while she was on duty travel in India. She was in hospital until the day after. From 15 to 19 February she remained in a hotel room in India. She was repatriated to Geneva on 20 February and was placed on sick leave with retroactive effect from 14 February. Her appointment, which was due to expire on 28 February 2013, was extended and on 17 August 2013 she was placed on sick leave under

insurance cover ("SLIC") after the exhaustion of her sick leave entitlements.

On 17 February 2014 the complainant was informed that her accident had been accepted as service-incurred and that consequently the medical expenses relating to the accident would be reimbursed in full.

On 30 June the complainant was informed that her SLIC entitlements would end on 15 August 2014, that the Staff Health and Wellbeing Services did not expect her to be able to resume her professional activity before the end of her SLIC and that it expected her health condition would be of long duration. While her separation was deferred due to her ongoing health situation, her appointment would be terminated for health reasons pursuant to Staff Rule 1030. The complainant was informed that her case would be considered for the award of a disability benefit under Article 33 of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF), and that she could be entitled to a benefit from the Group Personal Accident and Illness Insurance (GPAII) pursuant to WHO eManual, III.20, Annex 7.C, and to compensation payments pursuant to WHO eManual, III.20, Annex 7.E. She was however also informed that, pursuant to paragraph 6 of Annex 7.E, benefits from the GPAII would be deducted from the compensation set out in Annex 7.E.

By a letter dated 14 October 2014 the complainant was informed that, as she was no longer capable of performing her duties "now or in the future", as her health condition would be of long duration and as it was not possible to reassign her, her appointment would be terminated for health reasons on 15 November 2014 and she would be awarded a UNJSPF disability benefit as from that date. On 16 October she was informed that she would be paid an annual invalidity pension pursuant to WHO eManual, III.20, Annex 7.E, and that the amount corresponding to her UNJSPF disability benefit would be deducted from the amount of her invalidity pension.

On 12 December 2014 the complainant filed two Notices of Intention to Appeal with the Headquarters Board of Appeal (HBA). In the first appeal, she challenged the decision to terminate her appointment. She requested the quashing of the 14 October decision, her reinstatement with full payment of all salaries and benefits and the payment of "actual,

consequential and moral damages" suffered as a result of the termination of her appointment. In her second appeal, she challenged "the measure and amount of damages awarded to her [...] on account of her service-incurred injuries". She claimed that WHO had breached its duty of care and had been negligent during and following her accident, during her six-day stay in India and after her return to Switzerland. She stated that the compensation she received was not sufficient to compensate the damages she suffered as a result of her service-incurred injury. She requested the quashing of the 16 October decision, the payment of "actual, consequential and moral damages" – in addition to the compensation already awarded – based on WHO's liability in "causing, contributing or exacerbating" her service-incurred injury. In both appeals, she claimed reimbursement of her legal fees and interest on the amounts claimed.

In its report of 21 December 2017 the HBA, which joined the two appeals, concluded that the termination of the complainant's appointment was in accordance with the provisions of Staff Rule 1030, and that the complainant had not established negligence or a breach of the duty of care on the part of WHO relating to her accident and medical care in India, her stay in a hotel, her repatriation and treatment in Geneva. It also found that the compensation paid to the complainant was in accordance with WHO eManual, III.20, Annex 7.E. In its view, there was no basis to recommend additional compensation for losses outside the scope of the said Annex. Therefore, the HBA recommended to dismiss the appeals. On 19 February 2018 the Director-General informed the complainant that he agreed with the HBA's conclusions and that he had decided to endorse its recommendation. Consequently, her appeals were dismissed. That is the impugned decision.

The complainant requests the Tribunal to quash that decision, to order her reinstatement with full retroactive effect, to award her "actual, consequential, moral and exemplary damages", and to order that "all her home care needs and medical expenses" arising from her service-incurred injury be reimbursed at 100 per cent. She also claims reimbursement of her legal fees, interest on all the amounts claimed and such other relief as the Tribunal deems just, necessary and fair.

WHO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. On 14 February 2013 the complainant was injured in a car accident in India. She was then working for WHO and it is not in issue that her injuries were service-incurred. At the time, she was employed under a temporary appointment as a P.4 technical officer. Effective 15 November 2014, the complainant's appointment was terminated. In these proceedings commenced by a complaint filed on 19 May 2018, the complainant seeks damages on the footing that her injury arose from the negligence of WHO and also reinstatement on the basis that the termination of her employment was unlawful. Part of the complainant's case is, additionally, that WHO breached its duty of care towards her particularly having regard to the way she was treated both immediately after the accident and in the longer term.

It is desirable to mention an important matter at the outset. The complainant suffered a brain injury in the accident. She was then 37 years old and was a qualified medical practitioner. There is medical evidence before the Tribunal, the substance of which is not in issue, which states in various ways that, as a result of the brain injury she suffered, the complainant is permanently unable to perform her previous professional activity or any professional activity, that the situation is definitive and that no further improvement can be expected. Moreover, the medical evidence is that the complainant suffers from an impairment of her higher functions and has undergone significant changes in her personality making it impossible for her to return to her previous professional activity. This injury has also negatively impacted on the complainant's personal life in a material way including as a mother of young children and, more generally, on her enjoyment of life.

2. The following are specific findings of fact made by the Tribunal having regard to the material furnished by the parties. The car accident occurred in the early morning while the complainant was on duty travel in India. The driver of the vehicle, who was not a WHO employee, swerved to avoid colliding with a buffalo but hit a road divider and then a power pole. The complainant was rendered unconscious by the accident. She was ultimately admitted to the Apollo Hospital in Mysore.

3. During the course of the day on 14 February 2013 there were a series of email exchanges between staff of WHO about the complainant's condition. In summary, what emerged was that the treating neurosurgeon, Dr L., thought the complainant's CT scan was normal, she had suffered concussion but she was speaking normally.

4. The Deputy Project Manager of the WHO Country Office for India, Ms S., reported the accident by email to the Head of this Office and provided her with a summary of the situation. She stated that a "colleague", who was not working for WHO, was helping the complainant, and that she, Ms S., had spoken with a WHO Surveillance Medical Officer, Dr P., who was at the hospital at her request. After speaking with him, Dr L., the "colleague" and the complainant, she believed there was no imminent danger to the complainant who was being taken care of "to the best ability".

5. The Clinical Nurse at the South-East Asia Regional Office in New Delhi, Ms T., wrote to the WHO Regional Staff Physician, Dr S., and to the complainant's supervisor, Mr K. (later forwarded to a Medical Officer at headquarters, Dr H.) to give them an "update" on the complainant's situation. She said that Dr P. was in constant touch with the team of treating doctors, that the complainant had been examined by Dr L., that her CT scan was "normal", that her condition was stable and that she was to be discharged from hospital the next day. The complainant's supervisor, Mr K., replied that arrangements were being made to organize the complainant's trip home in two days so that she could "recover" in Geneva.

6. On 15 February 2013, Ms T. informed Dr H. by email that according to Dr L. the complainant was "conscious, well oriented and appear[ed] to be fine" and that "as everything appear[ed] to be normal" the complainant would be discharged from the hospital the same day. This email was copied to Mr K. On the same day the complainant was informed that she would travel back to Geneva on 20 February 2013.

7. After she was discharged from the hospital, the complainant went to a hotel. On 16 February 2013, upon receiving some documents relating to her insurance cover and being requested to fill a form, the complainant pointed out in an email to Ms H., a Patient Safety Programme official with WHO, and Mr K., that "[her] brain" did not seem to be able to "manage much focus at the moment". She mentioned that she was sleeping a lot and that she probably would not be able to fly back in economy as she had planned. Ms H. replied (copied to Mr K.) that she would request for her to fly back on business class. At this point the recipients of the complainant's email and Mr K. in particular, should have appreciated that real doubts had arisen about whether the summary of the circumstances of the complainant in the emails referred to in the preceding two considerations was correct.

8. Indeed, by an email of 18 February 2013 Mr K. informed Ms H. that he had spoken with a "trauma surgeon at Hopkins" who had been in touch with him and that, in their joint opinion, the complainant "need[ed] to be very careful on the return" and was still suffering from post-concussive issues with constant sleeping, slight disorientation and some vision issues. In Mr K.'s opinion, at a minimum, medical assistance should be arranged for her trip back to Geneva. The reference in this email to the "trauma surgeon at Hopkins" was, fairly clearly, to Dr K.S. (though the name was mis-described in Mr K.'s email) who, in a letter dated 19 September 2015, explained his involvement in the events concerning the complainant following the accident. He said in the letter, and it is tolerably clear these were his views at the time based on what he then knew, that, after the complainant was discharged from the hospital, she had been transported to a local hotel where she required a darkened room due to light hypersensitivity. In addition, calls between the complainant and family members and work associates "with expertise in both public health and clinical medicine" (as described in the letter) had raised concerns that the complainant was experiencing altered mental status and her decision-making capabilities were altered. He also then believed the complainant was unable to correctly formulate a plan for her care and make decisions for returning home. In the letter, Dr K.S. said he was so concerned about the complainant's condition at the time

that he "contacted the [WHO] leadership in hopes of returning her to active care in India or expediting her return to Geneva for appropriate care". The Tribunal infers that the substance of the discussion between Dr K.S. and Mr K. comprehended the matters summarised in the letter of 19 September 2015. This is reinforced by what Mr K. said in the email of 18 February 2013. So by this time, Mr K. was aware that it was more likely than not that the diagnosis of Dr L. was far too positive and that the complainant's capacity to make decisions about the future, including travel to Geneva, was significantly impaired.

9. This email of Mr K. was, in due course but also on 18 February 2013, forwarded to Dr H., who then contacted Ms T. and Dr S. saying that she was not sure that the complainant was fit to travel and that the complainant should be examined by a neurologist. She asked them to organize a consultation and to "try [...] to obtain a medical report" from the Apollo Hospital. Ms T. contacted the complainant to follow up and was informed by her that she was scheduled to see Dr L. "in the morning" and that she would ensure to get a "note" confirming her ability to travel.

10. It is necessary to refer to one other matter of detail revealed in a letter dated 15 September 2015 from a former colleague of the complainant, Dr E.S. (not a medical doctor), who is an epidemiologist. He said much of his work had been focused on traumatic injury with a particular focus on injury to the central nervous system (brain and spinal cord). He said he had substantial research experience examining disparities in patient access to appropriate care and on outcomes after moderate to severe traumatic brain injury. Then after explaining at length his professional relationship with the complainant, he addressed his involvement with the complainant following the accident. He said he had been receiving unusual emails from the complainant about her project that "did not quite make sense". It turned out that these emails had been sent by the complainant when she was being transferred from the hospital to the hotel. Dr E.S. also spoke to her and he said: "it was difficult for her to speak coherently and she seemed to have trouble pronouncing her words." Of some importance is that Dr E.S. subsequently learned that one of the complainant's medical colleagues in India,

Dr N.M., had spoken to the complainant and had been sufficiently concerned to "immediately request that colleagues take [the complainant] back to the hospital for further assessment and possible care". It was his understanding that the complainant refused to do so.

11. On 19 February 2013 the complainant informed Dr H. that Dr L. (who was not a neurologist but a neurosurgeon) had examined her, that he had confirmed that she could travel back to Geneva and that he had given her a "letter saying [she was] fit to travel by air".

12. On 20 February 2013, the complainant travelled back to Geneva and was placed on sick leave with retroactive effect from 14 February 2013. It is unnecessary to detail the trip beyond noting that the complainant was unaccompanied and there was no "medical assistance", which Mr K. had identified as a minimum. The Tribunal will discuss, shortly, what transpired on the complainant's return to Geneva. Suffice it to note that on 27 February 2013, she was examined by a neurosurgeon who referred her to a neurologist. She was examined by this neurologist, Dr G., on 27 March 2013. In his report, Dr G. stated that the complainant, who reported that she was unconscious for at least 90 minutes after the accident, suffered a moderate to severe traumatic brain injury. He noted that, analysing the CT scan of 14 February 2013, there was no active bleeding but there were reasons to suspect a diffuse axonal injury. He concluded that six weeks after the accident, fatigue, impaired memory and irritability persisted and that a return to work was at that time impossible.

13. On 11 July 2013, the complainant had an MRI of her brain. The radiologist concluded that "there was an initial injury to the left frontal region of the head, with a significant scalp injury on the initial CT scan of 14 February 2013. The brain MRI [...] demonstrates evidence of previous haemorrhage and axonal injury to the left frontal lobe, probably with a contrecoup injury involving the right frontal and parietal lobes."

14. It is convenient to address at the outset the complainant's case that WHO was negligent. The Tribunal's case law is settled on what constitutes a cause of action based on negligence. The cause of action contains several elements (see, for example, Judgment 3733, consideration 12). The first is that the organisation has failed to take reasonable steps to prevent a foreseeable risk of injury. The second is that liability in negligence is occasioned when the failure to take such steps causes an injury that was foreseeable. As noted in Judgment 3215, consideration 12, the word "injury" in this context is not used in any technical, legal or medical sense. Equally apt and often used is the word "damage", which may be physical (including psychological), financial or, as is often the case, both. In the context of employment with an international organisation, physical damage or injury is more likely to be foundational to the claim though the damage could well be, as is alleged in this case, consequential financial damage occasioned by loss of earning capacity flowing from the physical injury.

15. However, another essential element of the cause of action is that the negligent act or omission caused the damage. That is to say, there must be a causal link between the conduct complained of and the damage suffered. Moreover, the person seeking damages for negligence bears the burden of establishing the factual foundation on which the claim is based (see, for example, Judgment 3215, consideration 12). In the pleas, and particularly in the rejoinder, the complainant identifies aspects of WHO's conduct, whether acts or omissions, which were said to have constituted its negligence. Firstly, and importantly, in her rejoinder the complainant says of WHO, when seeking to clarify the claim based on negligence, that she "does not blame it or hold it responsible for the accident in itself" with the rider that WHO should take more responsibility by ensuring that "proper and well-equipped vehicles are at the disposal of its staff members on mission". In this case, the complainant says WHO clearly failed to verify the security of the vehicle. The complainant's stance in relation to the accident itself is important. That is because, at least as a matter of initial impression, the physical injury she suffered was a result of the accident, but that is not an event for which she seeks to hold WHO accountable in a claim of

negligence. In relation to the state of the vehicle that the complainant appears to raise as part of her claim of negligence, the following needs to be established. The complainant must prove that, in the circumstances, WHO should have, but failed to, either check the vehicle actually used and the vehicle was in some respect defective or provide a vehicle that was not defective. The complainant must also prove that either in whole or in part any established defect in the vehicle caused or contributed to the physical injury she suffered resulting, on her case, in a diminished earning capacity. None of these matters are established on the evidence.

16. Elsewhere in her pleas, the complainant characterises the conduct of WHO as negligent in several other respects. One was the way WHO dealt with the complainant throughout her trauma. This included the circumstances in which the complainant remained at a hotel in Mysore after discharge from the hospital, the processes leading to the decision to transfer the complainant from India back to Switzerland and the transfer itself. The complainant also points to alleged inaction on the part of WHO in assessing and monitoring her condition including in Switzerland and, ultimately, the time taken to assess whether her injury was service-incurred. But it is necessary to assess whether the evidence establishes that all or any of these matters caused or contributed to the physical injury she suffered or its exacerbation resulting, on her case, in a diminished earning capacity. The Tribunal is not suggesting that WHO was not under a duty of care to address the complainant's circumstances in an appropriate way. It was. But presently being discussed is the question of whether WHO is liable to pay damages for its negligence on the assumption that any of this conduct, which is mainly of omission, constituted negligence.

17. There is an overarching obstacle confronting the complainant in her case based on negligence. It is whether there is sufficient evidence to establish, on the balance of probabilities, that, apart from the injury she suffered in the accident itself, the alleged conduct of WHO summarised in the preceding consideration caused further injury or, put slightly differently, exacerbated the injury suffered in the accident. At base, this is a medical issue.

18. In the material before the Tribunal, there are medical reports from two doctors that bear on the issue referred to in the preceding consideration. One was the treating doctor of the complainant, the other was not. In a report dated 11 January 2016, the Geneva-based treating neurologist, Dr G., said:

> "Medical management during the first weeks was inadequate since the patient received specialised advice and appropriate treatment only 6 weeks after the accident. Earlier care would have allowed a hospital stay of rehabilitation with neuropsychological follow-up and occupational therapy. It is of course impossible to retrospectively know if such care would have improved recovery, but current knowledge highlights the power and importance of the first few weeks after the accident for recovery."*

19. In a similar vein were the conclusions of Dr K.S. in his letter of 19 September 2015. He was not a treating doctor but a former colleague of the complainant. In his letter he describes his qualifications as including attending to and treating patients who had suffered traumatic brain injury, including their assessment at the time of presentation, acute treatment and continuing intensive care management. He said:

> "It is my opinion that [the complainant] should have undergone intensive hospital-based post-injury evaluation for several days. Also, I believe that she would have had a better outcome if transported to a higher level of care. There is no guarantee that such measures would have improved her outcome. However, it is possible that these measures might have reduced or eliminated secondary injury and lead to a better outcome. It is certainly possible that aspects of [the complainant's] current functional difficulties might have been moderated by more intensive and appropriate treatment."

The Tribunal notes that Dr E.S., whilst an epidemiologist but with significant professional experience in the field, expressed in his letter of 15 September 2015 a similar view about the inadequate level of care for the complainant and that "it seems quite possible that a more focused approach to caring for her [...] might have provided an opportunity for interventions that could have made a difference in her outcome".

20. While this evidence establishes fairly conclusively that the level of care was inadequate, and WHO provided no evidence to the contrary, it does not provide a sufficiently firm factual foundation to

* Registry's translation.

enable the Tribunal to conclude that had the level of care been adequate the ultimate outcome for the complainant would have been any different. That is to say, the Tribunal cannot conclude that the disabling injury of the complainant was caused or exacerbated by any acts or omissions of WHO even if they are capable of being characterised as negligent.

21. This leads to a consideration of whether WHO breached its duty of care to the complainant. An international organisation has a duty to adopt appropriate measures to protect the health and ensure the safety of staff (see, for example, Judgment 3689, consideration 5). An organisation has an overarching duty of care towards its staff. In the present case, WHO acted reasonably and did not breach its duty to the complainant, by entrusting her to the care of the Indian health system as occurred on the day of the accident and the following day. WHO had no realistic alternative. And faced with the medical opinion that the complainant could be discharged from hospital, it was not unreasonable for WHO to accept that the complainant could be accommodated in a hotel pending her repatriation to Geneva. As time passed while the complainant was in the hotel, it is less clear whether WHO should have taken additional measures to deal with the complainant's brain injury and the emerging evidence that she was quite unwell. One obvious option was to take whatever steps were available to ensure the re-hospitalisation of the complainant. However it seems that the complainant herself resisted being re-hospitalised and, understandably, the focus of much of WHO's activities was to facilitate the complainant's return to Geneva if she was well enough to travel. Perhaps some criticism can be levelled at WHO for accepting, seemingly without reservation, the opinion of Dr L. about the complainant's fitness to travel given that his judgement should have, by this time, been open to doubt. But it has to be remembered that the complainant herself relayed that opinion and was seemingly supporting the idea that she could return. It is true that it should have been apparent that her judgement was likely not to be reliable given the injury she had suffered. But the officials of WHO involved in the decision-making about the return of the complainant did not have the benefit of limitless time to make a decision nor had immediate access to the complainant.

22. However, from the point in time a decision was made to repatriate the complainant, WHO's conduct can be criticised and did involve a breach of its duty of care to the complainant. The complainant returned to Geneva by air unaccompanied and no effective arrangements were made to provide her with support during this travel. Whether, as a minimum, this would have involved greater support from the airlines (as seemingly proposed by Mr K.) or might have involved the complainant being accompanied by a nurse or doctor, is now presently difficult to say. But what should have occurred was more than what in fact did occur.

23. The failings in the approach of WHO arose when the complainant returned to Geneva and they arose immediately. The following observations are not intended to be a criticism of any individual. They relate to systemic failure. From the time the complainant arrived back in Geneva, WHO should have taken a much more aggressive and active role in the treatment of the complainant and the management of her brain injury. She had suffered a brain injury while working and it should have been appreciated by the WHO officials involved in her repatriation, and was, that the brain injury was far less benign than originally believed based on Dr L.'s initial assessment. The complainant was, with her husband, left to take whatever steps they thought might be appropriate to obtain further treatment. As it turns out, this resulted in the husband's mistaken belief (on the advice of his wife's colleagues at WHO) that the complainant should see a neurosurgeon. She did but was then immediately referred to a neurologist. It is tolerably clear that Dr H. knew the significance of consulting with a neurologist having regard to her request earlier referred to about the complainant's fitness to travel.

24. The position of WHO in the internal appeal and which it continues to maintain in these proceedings, and additionally the approach of the HBA, is encapsulated in the following passage from its report:

> "The Administration stated that '[i]t was the [complainant]'s own responsibility to seek as soon as possible medical care upon her return from India' which she did by visiting a specialist on 27 February and 27 March 2013. The Administration stated that '[t]he Organisation's Staff Physician is not the treating physician for the Organisation's staff [...]' and '[t]he [complainant] correctly sought medical treatment with her choice of physicians'.

> [...] The Board concluded that WHO was not responsible for arranging the [complainant]'s medical care upon her return to Geneva. The Board noted that this responsibility is not set out in the Staff Regulations and Staff Rules and that such a responsibility would fall to the staff member. In any event, the [complainant] has not submitted any evidence that she or members of her family requested WHO's intervention. The Board also considered that she or members of her family could have visited a hospital at any time if it was deemed necessary."

25. Focusing on whether the WHO's Staff Physician was a treating physician, whether the complainant was exercising choice about who she saw for medical assistance and whether she sought assistance from WHO obscures the role and responsibility of WHO. One of its staff had been injured, as it turns out seriously, in a car accident while on a mission overseas when performing work for the Organization. WHO had an ongoing responsibility to do all it could to mitigate the effects of the accident as part of a more general obligation to protect the health and ensure the safety of its staff (see Judgment 3994, consideration 8). It is true that Dr H. asked the complainant to see her on her return and she did not. But that provides no real justification for WHO effectively doing nothing by way of further mitigating the effects of the accident. The complainant is entitled to moral damages for this breach of the duty of care.

26. The Tribunal does not resile from its conclusion in consideration 20. Nonetheless there is a possibility that the breach of WHO's duty of care concerning the complainant when she returned to Geneva has led or contributed to the professional and personal circumstances in which the complainant now finds herself. An inference can readily be drawn that the complainant knows that, had she received appropriate treatment immediately on her return to Geneva, her grave present predicament, arising so early in her adult life, might not have come about and also she believes WHO should have done more to support and help her. It cannot be doubted that these matters have caused and will continue to cause the complainant considerable distress. In the special circumstances of this case, the complainant is entitled to a significant award of moral damages that the Tribunal assesses in the

sum of 180,000 United States dollars. However, as discussed earlier, because the evidence does not establish a causal link between the acts and omissions of WHO (including those, as just discussed which constitute a breach of its duty of care) and the ultimate incapacitation of the complainant, no material damages can be awarded and in particular, awarded for future loss of earning capacity.

27. The complainant also seeks exemplary damages. However, the conduct of WHO does not exhibit any of the characteristics which might justify the award of exemplary damages (see, for example, Judgment 3419, consideration 8).

28. The next issue arising from the complainant's pleas concerns the termination of her appointment. As noted in consideration 1, the complainant's appointment was terminated effective 15 November 2014. In terminating the appointment, WHO acted under Staff Rule 1030 which relevantly provided:

> "1030.1 When, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member is incapable of performing [her or] his current duties, [her or] his appointment shall be terminated.
>
> 1030.2 Prior to such termination the following conditions must be fulfilled:
>
> 1030.2.1 the medical condition must be assessed as of long duration or likely to recur frequently;
>
> 1030.2.2 reassignment possibilities for staff members holding continuing or fixed-term appointments shall be explored and an offer made if this is feasible;
>
> 1030.2.3 participants in the Pension Fund shall have their pension rights determined."

29. The complainant argues that the three conditions in this provision were not met. They were. With regard to the first condition, Dr H., expressed in a memorandum dated 16 June 2014 the opinion that "the complainant's health condition will be of long duration". It is not for the Tribunal to gainsay this opinion (see, for example, Judgment 2578, consideration 6). Hence the first condition was met. With regard to

the second condition, the complainant argues there is no document evidencing the exploration of reassignment possibilities. WHO's response includes an argument that the complainant was "100% incapable of returning to professional activity". If so, reassignment would not have been possible. This appears to be correct and the complainant does not advance an argument challenging this asserted fact. Lastly it is said by the complainant that the third condition was not met. In fact, prior to the termination of her appointment on 15 November 2014, the complainant was informed by letter dated 14 October 2014 that her pension rights had been determined, a process fore-shadowed in a letter to the complainant of 30 June 2014.

30. A further matter raised by the complainant concerns the notional allocation or transfer of the benefits due to her under WHO's GPAII (eManual, III.20, Annex 7.C) to WHO's Special Fund for Compensation (the Compensation Fund). The amount in question is 460,240.20 United States dollars ("the Amount").

The Rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties (eManual, III.20, Annex 7.E) provide under paragraph 6 that from compensation paid out of the Fund under Annex 7.E, certain amounts "shall be deducted". One specified amount is "all benefits actually paid in respect of the same series of circumstances under [...] any [...] social insurance scheme to which contributions are paid by [WHO]". In fact what appears to have occurred is that the insurance company paid the Amount to WHO which thereupon transferred the Amount in its entirety into the Compensation Fund.

31. WHO now justifies this arrangement in its pleas by reference to eManual III.7.3, paragraph 310, which relevantly provides:

> "Benefits are fixed in accordance with the provisions of III.20 Annex 7.E. In determining the amount of compensation to be paid by [WHO] and how it shall be funded, account is taken of benefits provided by other schemes to which the [WHO] contributes (see III.20, Annex 7E, [paragraph] 6). This applies in particular to benefits due [...] from [WHO's] commercial accident and illness insurance policies."

This is simply a summary of the obligations and rights of both staff and WHO derived from elsewhere and, in this case, including eManual, III.20, Annex 7.E, paragraph 6, which authorises the deduction from the compensation awarded under Annex 7.E, of all benefits actually paid under, inter alia, a social insurance scheme.

If there was a basis for the action taken by WHO, it is not found in eManual III.7.3, paragraph 310, but it is to be found elsewhere (see, for example, eManual III.7.3, paragraphs 70, 80 and 350). WHO should provide the complainant with a detailed written explanation as to the legal foundation and rationale for the action taken.

Ultimately, however, the decision to transfer the Amount into the Compensation Fund is not the decision impugned in these proceedings. Accordingly, no order can be made in relation to this decision.

32. The next issue concerns delay. The complainant raises the subject of delay in two contexts. Firstly she argues that the comparatively lengthy time taken to recognise her accident was service-incurred was a further manifestation of WHO's indifference and negligence. These two matters have already been discussed more broadly and WHO's conduct in this respect adds nothing of substance on the question of whether WHO breached its duty of care to the complainant after the accident and, in particular, when she returned to Geneva.

33. The second context in which the subject of delay arises concerns the internal appeal process. The complainant filed two notices of intention to appeal to the HBA on 16 March 2015 and another to the Director General under Staff Rule 1220. They raised, generally, the matters addressed, to this point, in this judgment. It was not until 7 March 2016 that the pleas before the HBA were completed though some of the time taken concerned an attempt by both the complainant through her lawyer and WHO to resolve procedural issues and avoid a circumstance where different people or bodies would come to be addressing the complainant's grievances. After the pleas closed the HBA sought additional information from the Administration that was provided on 15 February 2017. The HBA delivered its report on 21 December 2017.

The Director-General responded on 19 February 2018, being the impugned decision in these proceedings. The time taken for the internal appeal was clearly lengthy. But having regard to the potentially complex factual and legal issues raised, the gravity of the subject matter and the fairly detailed consideration of the appeals undertaken by the HBA as revealed by its report, the time taken was not so long as to warrant the award of additional moral damages.

One further matter should be mentioned. The complainant says that in addition to the damages sought, the Tribunal should "recognize her future right to request compensation in the event of any deterioration of her health attributable to the service-incurred injury for any additional expenses resulting, without limitation, from any treatment, examination and in-house/nursing care". She cites Judgment 2533, consideration 26, in which the Tribunal said "the defendant's obligation to pay the complainant reasonable compensation for the results of his workplace injury is a continuing one". If, and to what extent, such a claim of compensation might be justifiably made in the future and rejected is a matter of speculation though WHO's future obligations are not, in all respects, resolved by this judgment.

34. The complainant is entitled to an order for costs which the Tribunal assesses in the sum of 10,000 United States dollars.

DECISION

For the above reasons,

1. The decision of 19 February 2018 and the earlier decision of 16 October 2014 in so far as it concerns WHO's breach of duty of care are set aside.

2. WHO shall pay the complainant 180,000 United States dollars by way of moral damages.

3. WHO shall pay the complainant 10,000 United States dollars in costs.

In witness of this judgment, adopted on 7 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President, Mr Giuseppe Barbagallo, Judge, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

PATRICK FRYDMAN

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