

**J. (No. 2)**

**v.**

**WHO**

**134th Session**

**Judgment No. 4530**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. J. against the World Health Organization (WHO) on 27 August 2019 and corrected on 30 September 2019, WHO's reply of 6 January 2020, the complainant's rejoinder of 15 April and WHO's surrejoinder of 20 July 2020;

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 challenges the effective date of termination of his appointment, which had previously been deferred on a number of occasions due to his sick leave.

The complainant joined the United Nations Joint Programme on HIV/AIDS (UNAIDS), a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO, in December 2007. He was informed in June 2017 that his appointment would be terminated on 12 September 2017 due to the abolition of his post and the absence of any suitable vacant position to which he could be reassigned. He challenged that decision in his first complaint before the Tribunal.

As from 5 July 2017 the complainant was absent from service on certified sick leave.

Based on the advice of the Staff Physician, Staff Health and Wellbeing Services (SHW) (hereinafter “the Staff Physician”) the complainant was informed on 6 September 2017 that, in accordance with Section III.10.5.10 of the eManual, an administrative extension of his appointment and deferral of the effective date of termination until 6 October 2017 was granted. Subsequently, his appointment was further extended on the same grounds until 4 March 2018.

By a letter of 2 March the complainant was informed that the Staff Physician, having received updated medical reports, was against any further deferral of his separation after 4 March 2018. Consequently, his sick leave under insurance cover would end on 4 March 2018. However, to facilitate completion of outstanding administrative formalities, a final administrative extension of his appointment and deferral of the effective date of termination was granted until 7 March 2018.

In May 2018 the complainant requested the review of that decision. His request was dismissed by a decision of 28 June 2018 which noted that, based on the advice of the Staff Physician and in accordance with Section III.10.5 of the eManual, he was no longer determined to be incapable of performing his duties on the scheduled date of separation. The conditions for an exception to the effective date of separation thus no longer applied and the effective date of termination of his appointment of 7 March 2018 was confirmed.

On 25 September the complainant appealed against the decision of 28 June 2018.

In its report of 2 May 2019 the WHO Global Board of Appeal (GBA) recommended dismissing the appeal as it concluded that the decision of 28 June 2018 had been taken in accordance with UNAIDS’s Staff Regulations and Staff Rules. It found that the Staff Physician had made a professional assessment after receiving medical reports from the complainant’s treating physician and the external physician duly designated by her. The GBA found no evidence in support of the complainant’s allegations of bias, personal prejudice or abuse of authority. It also concluded that the complainant was not on sick leave on the effective date of termination of his appointment. Lastly, it noted that his claim

that his illness was service-incurred was a separate issue and that it was before the Advisory Committee on Compensation Claims (ACCC).

By a decision of 29 May 2019 the *ad interim* Executive Director of UNAIDS informed the complainant that she had decided to follow the GBA's conclusions and recommendation to dismiss his appeal. That is the impugned decision.

In Judgment 4305, delivered in public on 24 July 2020 on the complainant's first complaint, the Tribunal awarded the complainant 70,000 Swiss francs in damages (60,000 francs by way of material damages and 10,000 in moral damages) for the flawed reassignment process and consequent lost opportunity to secure another position within the Organization.

The complainant asks the Tribunal to quash the impugned decision and to order his retroactive reinstatement as from 7 March 2018. In the alternative, he asks the Tribunal to award him material damages equal to all salary and other entitlements he would have received for a period of five years. He seeks moral and exemplary damages, in an amount of not less than 250,000 Swiss francs, as well as costs, with interest on all sums awarded. He seeks the disclosure of documents, including the medical assessment relied upon by the GBA in its report. He also seeks the disclosure of any and all documents relating to the decision to terminate his appointment.

WHO objects to his request for documents, recalling that medical information of staff members is confidential information and that medical records are maintained and kept by the SHW. It is therefore not accessible to the Administration. WHO invites the complainant to contact SHW directly if he wishes to request any information from his medical file. It submits that his claims that his illness is service-incurred are irreceivable for failure to exhaust internal remedies and those relating to the termination of his appointment due to the abolition of post are irreceivable as they were the subject of his first complaint before the Tribunal. It asks the Tribunal to dismiss the complaint as entirely unfounded.

## CONSIDERATIONS

1. Given the overlapping nature of the parties' submissions, it is important to note at the outset that this complaint is not concerned with the complainant's challenge to the decisions to terminate his appointment due to the abolition of his post and not to reassign him to another suitable vacant position. The Tribunal determined that challenge in favour of the complainant in Judgment 4305, delivered in public on 24 July 2020. The Tribunal will not consider his pleas which raise these issues.

2. As is evident from the request for review, dated 1 May 2018, underlying the present complaint, this case is centrally concerned with the effective date from which the complainant's appointment was terminated. The complainant challenged therein the decision of 2 March 2018 which advised him that he was no longer on recognized sick leave and, as a result, his appointment would terminate on 7 March 2018. The Deputy Executive Director, Management and Governance (MER) refused to further defer the termination of the complainant's appointment beyond that date; dismissed his request to quash the decision to terminate his appointment with effect from 7 March 2018; and rejected his request to reinstate him with retroactive effect from that date as well as his consequential requests for relief. In the decision of 29 May 2019, which the complainant impugns, the *ad interim* Executive Director of UNAIDS, on the recommendation of the GBA, dismissed his internal appeal for essentially similar reasons.

3. Before considering the merits of the discrete issue of the effective date on which the complainant was separated, two procedural issues must be addressed. In his complaint form, the complainant requested oral proceedings. The request is rejected as the documents and the parties' submissions sufficiently inform the Tribunal of the case (which essentially turns on the discrete issue concerning the effective date of termination of the complainant's appointment) to permit it to make an informed decision.

The complainant seeks the disclosure of “any and all documents, reports, correspondence, e-mails, notes, records, memoranda, letters, notices, file contents, minutes, minuted phone calls, or any other documents or items in the possession of the Administration that in any way describes, comments on, relates or refers to, controls, records, and/or evidences, in general or specifically, the decision to terminate the Complainant’s employment, in particular medical records or reports indicating that the [c]omplainant was fit to return to work at the time of his termination, as well as the medical assessment made by the WHO Staff Physician purportedly relied upon by the GBA in its report (with which assessment to date the [c]omplainant has never been provided)”. The request is rejected as it is cast in such wide and general terms that it constitutes an impermissible “fishing expedition” (see, for example, Judgments 4247, consideration 3, and 4086, consideration 9). Moreover, as WHO points out, the medical reports which the complainant seeks to have disclosed are maintained and kept by WHO’s Staff Health and Wellbeing Services (SHW). It invited the complainant to contact SHW directly if he wishes to request any information from his medical file.

4. Regarding the provisions in WHO’s rules regime that are applicable to this case, Staff Rule 740 provides for the grant of sick leave. Under Staff Rule 740.2, where work incapacity continues beyond one month, a medical report from the treating physician is required. The pivotal role which the Staff Physician plays in the process is evidenced in Staff Rule 740.3. It states that in any case of a staff member’s claiming sick leave, he shall submit such periodic medical reports on his condition as the Staff Physician shall require and shall be examined by the Staff Physician, or by a physician designated by the Staff Physician, if the latter so decides.

Staff Rule 1090, which is under the rubric “Effective Date of Termination”, provides as follows:

“Subject to Rule 1083 on notice of termination during maternity leave, paternity leave and adoption leave, the effective date of termination shall be as follows:

1090.1 For staff locally recruited and those to whom Rules 1010.2 and 1010.3 apply, the last day of duty;

1090.2 For all other staff, that day on which it is calculated that the staff member, by departing promptly after completion of his duties, is able to reach his recognized place of residence by a route and means of transport designated by the Organization.”

5. Additionally, WHO’s eManual Section III.10.5.10, which is under the rubric “Effective date of separation”, provides exceptions to Staff Rule 1090. It relevantly states as follows:

“An appointment normally comes to an end effective on the dates specified in Staff Rule 1090. There are the following exceptions:

[...]

- If a staff member is determined to be incapable of performing his/her duties by the Staff Physician or by the Regional Staff Physician as appropriate on the scheduled date of separation other than on retirement under Staff Rules 1020.1 or 1020.2, the appointment is extended for the duration of the illness or disability or until the exhaustion of the staff member’s entitlement to sick leave under Staff Rule 740.1.1 and, if applicable, of any sick leave under insurance cover under Staff Rule 750.1;

[...]”

6. According to these provisions, the Staff Physician is responsible for assessing a staff member’s health condition to determine whether her or his sick leave for the purpose of extending the date of termination of appointment should end, facilitating setting the termination date, or whether it should continue, deferring that date. In so doing, the Staff Physician may, pursuant to Staff Rule 740.3, request a staff member concerned to submit periodic medical reports and be examined by the Staff Physician or by a physician that she or he designates. Section III.10.5.10 of the eManual permits the Staff Physician to determine whether a staff member is incapable to perform her or his duties as a result of illness or, as in the present case, whether sick leave should end. In the latter event, the Administration may proceed to set the effective date of separation.

In the letter of 8 June 2017 the Director, Human Resources Management (HRM), informed the complainant that the effective date of the termination of his appointment was 12 September 2017. However, that date was deferred on a number of occasions because the complainant was on sick leave which was extended on the Staff

Physician's advice after she assessed relevant medical reports. In his letter of 2 March 2018, the Director, HRM, informed the complainant that, based on the Staff Physician's advice, his sick leave would end on 4 March 2018 and that the effective date of termination was deferred to 7 March 2018 to facilitate completion of outstanding formalities relating to his separation and repatriation travel pursuant to Staff Rule 1090.2.

7. WHO objects to the receivability of the complainant's claims relating to the recognition of his sick leave as service-incurred. WHO submits that they exceed the scope of this complaint and the complainant has not exhausted the internal means of redress open to him in relation to that issue. WHO observes, correctly, that the matter falls within the exclusive purview of the ACCC and that a decision based on a recommendation by the ACCC was taken on 8 May 2019, which the complainant has challenged in other proceedings. In response, the complainant states that the determination of the nature of his illness is subject to other proceedings and that his arguments on his service-incurred illness are relevant in the present case as they present the surrounding circumstances demonstrating the unlawfulness of the impugned decision. As the Tribunal reiterated in consideration 3 of Judgment 3058, it is well established that the same question cannot be the subject of more than one proceeding between the same parties. Accordingly, to the extent that this complaint raises the issue whether the complainant's illness was service-incurred, those aspects of the present complaint are irreceivable.

8. Contrary to the complainant's contention, the applicable provisions (reproduced above) do not require the Administration to appoint a medical board for the purpose of determining the effective date of a staff member's separation from service. Moreover, eManual Section III.20 Annexes, Annex 7.E, paragraph 29.a and b, upon which the complainant relies, relate to Rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties and have no bearing on the issue of the effective date of the termination of a staff member's appointment.

9. The complainant's submission that the decision to terminate his appointment with effect from 7 March 2018 also violated the rules on special leave without pay is unmeritorious. The rules on special leave without pay did not apply to determine the termination date of the complainant's appointment as he was on sick leave pursuant to Staff Rule 740. Moreover, there is no evidence on record that the complainant requested or was on special leave.

10. The complainant's submission that he should not have been separated from service at least until his sick leave and other entitlements were exhausted is also unmeritorious. As WHO submits, the only material point was whether the complainant was on sick leave at the time the decision was taken to terminate his appointment. The record shows that at the time this decision was taken the complainant was no longer determined to be "incapable of performing his duties by the Staff Physician" within the meaning of Section III.10.5.10 of the eManual. The conditions for an exception to the effective date of termination which had previously justified extending his appointment on a number of occasions were no longer met.

11. The complainant argues, in effect, that the date on which he was separated should be revised as it did not provide him with the requisite notices. This argument is unfounded. As the GBA (whose recommendations were accepted in the impugned decision) observed, the complainant was first notified of the abolition of his post in November 2016. The reassignment period ended in May 2017 and in June 2017 he was notified of the termination of his appointment, effective 12 September 2017. The GBA further observed that under Staff Rule 1050.1, the Executive Director is authorized to terminate a staff member's appointment whose post is abolished after giving the staff member three months' notice of termination as required by Staff Rule 1050.9. The GBA concluded, correctly, that the complainant was given three months' notice, which was extended eventually to 7 March 2018 due to sick leave. In those circumstances and given that he would have travelled from New York to his home in Canada, the Tribunal finds that the five days within which the complainant was informed of the



effective date of the termination of his appointment and the three days which he was subsequently given to complete the administrative duties for separation were consistent with the provisions of Staff Rule 1090.2.

12. In the foregoing premises, the complaint will be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 24 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ