112th Session **Judgment No. 3092**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs K. J.L. against the World Health Organization (WHO) on 11 April 2009, WHO's reply of 2 September, the complainant's rejoinder dated 12 November 2009, the Organization's surrejoinder of 12 February 2010 and the additional documents that it submitted on 17 October 2011 at the Tribunal's request;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are given in Judgments 2839 and 2840, delivered on 8 July 2009, on the complainant's first two complaints. Suffice it to recall that the complainant, a Danish national born in 1958, tendered her resignation on 15 September 2005. Although her resignation was due to take effect on 15 December 2005, its effective date was deferred because she was then on sick leave. She separated from the Organization on 31 December 2006.

Prior to that, in January 2006, she submitted a claim for compensation for illness attributable to the performance of official duties, namely a "stress disorder" resulting from "a feeling of unjust treatment and harassment at work". The Advisory Committee on Compensation Claims (ACCC) first met in April 2006 to consider the claim. In August 2006 it asked the complainant whether she had lodged an official complaint of harassment and, if so, to provide information on the status of that complaint. It also requested her to complete the relevant forms in support of her claim. The Committee met for a second time in November 2006 and, having ascertained that the complainant's allegations of harassment formed part of a pending appeal against her reassignment, it decided to await the outcome of that appeal before taking a decision on her compensation claim. The Secretary of the ACCC so informed the complainant by an e-mail dated 8 March 2007. The latter, however, asked the Headquarters Board of Appeal (HBA) to suspend its proceedings pending a decision on her compensation claim by the ACCC, and her request was granted. She informed the ACCC of this in April 2007, whereupon the ACCC met for a third time in May 2007 and concluded that, on the basis of the available evidence, her illness could not be considered to be service-incurred. It therefore recommended that the Director-General should reject her claim. The Director-General adopted that recommendation in July 2007.

In August 2007 the complainant requested the convening of a Medical Board to review the ACCC's recommendation. In its final report of December 2008 the Medical Board unanimously concluded that her condition was service-incurred, and the ACCC then made a further recommendation to the Director-General. All five members of the ACCC agreed with the Medical Board's finding that the complainant had developed mental health problems in 2005-2006. However, they were unable to reach a consensus on a recommendation to the Director-General. Indeed, by this time the complainant's allegations of harassment had been brought before the Tribunal, as she had filed a complaint (her first one) challenging the outcome of her appeal against her reassignment. Three members recommended that the Director-General should await the Tribunal's

ruling on that complaint before taking a final decision, whilst the other two recommended that her compensation claim should be allowed immediately. The first three members considered in particular that the complainant's allegations of harassment were at the heart of her claim for recognition of a service-incurred illness and that "a perception of harassment, in the absence of any finding as to whether that perception was based on events that actually occurred, or occurred in the manner alleged, was an insufficient basis to conclude that [her] condition was service-incurred". On the contrary, the other two members considered that the undisputed documented events which had occurred at the complainant's workplace would alone justify the diagnosis made by the Medical Board, which therefore provided a sufficient basis for considering her condition to be service-incurred. They also considered that any further delays "could have very negative consequences on [the complainant's] health".

By a letter of 2 April 2009 the complainant was informed that the Director-General had decided to adopt the first of these recommendations and that she would therefore defer her decision on the complainant's claim until the Tribunal had issued its judgment on her first complaint. That is the impugned decision.

On 8 July 2009 the Tribunal delivered Judgment 2839, in which it held that the HBA had committed an error of law by not referring the complainant's allegations of harassment to the Grievance Panel. By a letter of 13 July 2009 the complainant was informed that the Director-General had decided to allow her compensation claim for service-incurred illness. In view of the Tribunal's findings in that judgment and also the delay in treating her claim, WHO offered to pay the complainant 5,000 euros in moral damages and 1,000 euros in costs, which she refused.

B. Referring to the Tribunal's case law on undue delays in processing internal appeals, the complainant submits that her complaint is receivable before the Tribunal. In light of WHO's obligation to process her claim diligently and the fact that, at the time of the impugned decision, she had already been waiting for almost four years for a final decision, she argues that it was unreasonable for the Director-General

to prolong her distress by deciding once again to postpone the final decision on her claim.

On the merits, the complainant contends that the ACCC and, in particular, the majority of the Committee members, committed errors of fact and law. In questioning the actual occurrence of events which undisputedly took place, namely the canvassing of 40 to 50 staff members on the implications of her marriage and her reassignment with immediate effect to a lower-level post in September 2005, and in considering that such events were insufficient to conclude that her condition was service-incurred, the three members committed an error of fact.

She also contends that those members committed an error of law in disregarding the Medical Board's conclusion of December 2008 that her condition was service-incurred. Moreover, they erred in concluding that "a perception of harassment, in the absence of any finding as to whether that perception was based on events that actually occurred, or occurred in the manner alleged, was an insufficient basis to conclude that [her] condition was service-incurred". The majority committed a further error of law, since the issue before them was not whether the undisputed events which led her to collapse in September 2005 amounted to harassment, but rather whether such events could have played a determinant role in her collapse and ensuing illness.

In her view, the majority of the members committed these errors of fact and law purposefully, since there was no logical reason for them to disregard all the medical information available, in particular the Medical Board's report, as well as WHO's own definitions of "harassment" and "service-incurred" illness. She submits that this is evidence of the bad faith displayed by all three members of the majority. She adds that one of these members lacked impartiality and independence. As a result, since the impugned decision is based on a flawed recommendation, the Director-General's decision of 2 April is itself legally flawed.

The complainant asks the Tribunal to order WHO to pay exemplary damages for once again delaying the processing of her compensation claim as a direct consequence of her having exercised

her right to lodge an appeal, and to award her moral damages. She also asks the Tribunal to order WHO to take an immediate decision on the status of her condition as service-incurred, based on the medical evidence accumulated since September 2005 and, in particular, on the final report of the Medical Board.

C. In its reply WHO submits that to the extent that it lies against the letter of 2 April 2009 the complaint is irreceivable on two grounds: the absence of a final decision and, in the alternative, failure to exhaust internal means of redress. It emphasises that the impugned decision indicated explicitly that it was "an interim communication only and […] not the Director-General's final decision" on the complainant's claim. Additionally, it argues that the complainant has not exhausted internal remedies since, in accordance with WHO Manual II.7, Annex E, paragraph 28(e), the Director-General's determination on a claim for compensation is subject to appeal to the HBA and the complainant did not file such an appeal.

On the merits, WHO denies that the time taken by the ACCC to consider the complainant's claim, and by the Director-General to decide on it, was either excessive or unnecessary. It asserts that the complexity of the claim was a central reason for the time taken by the ACCC to make its recommendations. In its opinion, it was not unreasonable for the ACCC to consider that the final outcome of the complainant's appeal would be a key piece of information in determining whether her condition resulted from the official performance of her duties. Indeed, the ACCC has neither the mandate nor the expertise to assess harassment allegations and the complainant had filed a parallel appeal with the HBA alleging harassment.

The Organization stresses that the complainant's compensation claim was not only based on the events mentioned in her submissions before the Tribunal, but included a whole list of allegations which are contained in her letter of 18 September 2006 entitled "request for illness to be acknowledged as service-incurred". This, in the Organization's view, also underlines the complexity of her claim.

It denies that her claim could have been decided solely on the basis of medical reports that were available to the ACCC in February 2006, as WHO Manual II.7, Annex E (rules governing compensation claims), at paragraph 4(a), relevantly provides that, in order for the Committee to recommend that a claim be accepted, it would have to be satisfied that the injury "result[ed] directly from the performance of official duties". Further, the establishment of a causal link between the medical condition and the performance of official duties is also required by the Tribunal's case law.

The Organization further denies that any of the members of the ACCC acted in bad faith. It maintains that regular and continuous progress was made throughout the ACCC process and that, at all times, WHO officials involved in the process acted in good faith and without personal prejudice. It emphasises that, immediately upon receipt of Judgment 2839, the complainant was informed of the Director-General's final decision to accept her condition as service-incurred.

Regarding the complainant's contention that the impugned decision was based on a flawed recommendation by the ACCC, WHO observes that her compensation claim was inextricably linked to the allegations that were under consideration before the Tribunal and it was therefore not unreasonable for the Director-General to await the outcome of her first complaint in order to take the Tribunal's eventual decision into account in determining her claim to compensation.

D. In her rejoinder the complainant presses her pleas. With regard to the Organization's argument that she failed to exhaust internal remedies, she refers to the Tribunal's finding in Judgment 2840 on her second complaint that, "under the WHO Staff Regulations and Staff Rules where a decision has not been communicated until after a staff member has separated from service, the former staff member does not have recourse to the internal appeal process".

She adds that the impugned decision is based on improper reasons, since the Director-General had all the requisite information and ample medical evidence at her disposal to make a final determination on her

claim. In her view, the impugned decision was a delaying tactic designed to prevent her from exercising her rights. Further, she alleges that the Director-General committed an abuse of power directly and through the "severely dysfunctional ACCC". She refers, inter alia, to the Director-General's failure to ensure that her harassment allegations were properly investigated, despite having several opportunities to correct the HBA's initial failure to refer the matter to the Grievance Panel. Lastly, she asserts that the appointment of the Chair of the ACCC gave rise to a conflict of interest and that several of its members were not impartial.

E. In its surrejoinder WHO maintains its position in full. It recognises that, in light of Judgment 2840, there is some question as to whether the complainant had access to the HBA when she received the impugned decision. However, it considers that the present complaint can be distinguished on its facts from the ruling in Judgment 2840, insofar as the rules contained in WHO Manual II.7, Annex E, unlike the Staff Regulations and Staff Rules governing the internal appeal process, expressly apply to former staff members and provide that decisions by the Director-General concerning service-incurred claims are subject to appeal to the HBA.

The Organization acknowledges that the complainant is owed compensation for the time taken in this case. It emphasises that it offered to pay her 5,000 euros in moral damages and 1,000 euros in costs, which she refused. It maintains that the time taken was not a consequence of any bias, ill will or other improper purpose.

CONSIDERATIONS

1. The background to the facts of this complaint are detailed in Judgment 2839. In January 2006 the complainant submitted a compensation claim for service-incurred illness. This claim was referred to the Advisory Committee on Compensation Claims (ACCC) at its meeting in April of that year. Between the time of the referral and April 2009, the ACCC met on four occasions. Following its third

meeting in May 2007 the Committee recommended to the Director-General that the claimed condition should not be recognised as service-incurred. The Director-General accepted the recommendation and decided accordingly. Subsequent to that decision, a Medical Board was constituted at the complainant's request to advise on the medical aspects of the compensation claim. In its final report of December 2008 the Medical Board concluded that the complainant's condition was service-incurred and advised the ACCC of its conclusion.

2. Following its fourth meeting in February 2009, at which the Committee considered the Medical Board's final report, three of the five members recommended to the Director-General that she should delay her final decision on the complainant's claim for recognition of her illness as service-incurred pending resolution of her first complaint before the Tribunal. The other two members recommended that the Director-General should immediately acknowledge the complainant's ailment as service-incurred. On 2 April 2009 the Secretary of the ACCC advised the complainant that the Director-General had accepted the majority's recommendation to defer a final decision on the compensation claim. That decision is impugned before the Tribunal. On 8 July 2009 the Tribunal issued Judgment 2839. On 13 July 2009 the Director-General rendered a decision allowing the complainant's claim for compensation for service-incurred illness.

3. The complainant submits that the ACCC majority recommendation and, in turn, the Director-General's decision adopting it, are tainted by conflicts of interest and errors of law and fact so serious as to amount to bad faith. She alleges that the Administration delayed the processing of her claim intentionally in an effort to prevent her from vindicating her right to have her illness recognised and compensated as service-incurred. In light of WHO's alleged *mala fides* and abuses of power during the compensation claim review, she seeks exemplary damages.

4. The defendant concedes that the compensation claim review process could have advanced more quickly and, in view of the delay,

has offered to pay the complainant 5,000 euros in moral damages and 1,000 euros in costs. However, it denies any bad faith on its part, attributing the bulk of the delay to the complexity of the compensation claim and asks the Tribunal to dismiss the claim for exemplary damages. Leaving aside the merits of the complaint, WHO submits that the complaint is irreceivable, because the impugned decision is not a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal, and because the complainant has not exhausted the internal means of redress.

5. The Tribunal finds that the decision to defer a final decision on the compensation claim is overtaken by the Director-General's decision of 13 July 2009 and, therefore, the deferral decision requires no further consideration, whether as to receivability or otherwise. WHO concedes that there is an ambiguity in the Staff Regulations on the question whether a retired staff member may proceed to the Headquarters Board of Appeal (HBA). It nevertheless argues that, under WHO Manual II.7, Annex E, retired staff members have access to the HBA with respect to a decision taken following a recommendation by the ACCC. In these circumstances, the duty of good faith precludes WHO's reliance on its interpretation of the rules. Accordingly, the complaint is receivable.

6. The remaining issue concerns the complainant's entitlement to damages for the delay in processing the compensation claim. In her submissions the complainant refers to a number of specific instances of delay that she alleges were deliberately and maliciously caused by WHO officials in an effort to dissuade her from pursuing her claim. She asserts that "[e]very possible obstruction [was] thrown her way" including "bullying, marginalization, misleading violation of procedures, blunt conflict of interest, etc".

7. On the question of delay, the Organization maintains that the complexity of the complainant's service-incurred illness claim was the primary factor that precluded an expeditious disposition of the claim. It points to four broad reasons for the delay. First, the ACCC's

compensation claim process ran concurrently with the HBA appeal in which the issue of harassment was raised. Given that the ACCC lacked both the mandate and the expertise to assess harassment allegations and that the HBA possesses such expertise, it was reasonable for the ACCC to await the outcome of the HBA appeal, since it could provide important information regarding any causal link between the claimed condition and its claimed cause. Second, the complainant alleged several causes for her stress disorder. Third, medical reports alone are an insufficient basis upon which to make a recommendation on a service-incurred illness claim. The Organization points out that WHO Manual II.7, Annex E, requires the Committee to determine that an injury is attributable to the "performance of official duties" before it can recommend to the Director-General that a claim be accepted. Fourth, the Medical Board process naturally entailed some delay. WHO concedes that it took the Director of Health and Medical Services and the complainant's nominee to the Medical Board some time to agree on the appointment of a third member. However, it attributes this delay to legitimate differences of opinion between the two doctors as to the expertise and background required of the third member. In its view, once the Medical Board was constituted, it completed its work in a reasonable time.

8. In addition to the delay itself, the complainant alleges bias, malice, abuse of power and bad faith, and she claims that a course of events involving bad faith, dilatory tactics and other unfair administrative actions caused the delay and entitle her to exemplary damages. WHO strenuously denies that the delay in processing the compensation claim arises in any way from malice, abuse of power, bad faith or any other improper purposes, and takes the position that exemplary damages are not appropriate in this case.

9. In light of the Organization's acknowledgement of unwarranted delay, only two matters require consideration: whether the amount of moral damages WHO offered to pay the complainant is adequate in the circumstances and whether the complainant is entitled to an award of exemplary damages.

10. In her pleadings, the complainant identified specific instances of delay that, she alleges, were deliberately caused by WHO officials in an effort to dissuade her from continuing with her claim. At this point, it is noted that there are some discrepancies in the pleadings regarding specific dates; however, they are not significant in terms of an overall assessment of the delay. In the first three months following the initiation of the compensation claim in January 2006 concerns were raised regarding deficiencies in the complainant's documentation. Also, in early February the complainant was asked to obtain an additional mental health assessment from a psychiatrist. The complainant provided the report before mid-February. At its first meeting in April 2006 the ACCC concluded that it required additional information and documentation from the complainant. However, this was not communicated to the complainant until the end of August 2006. WHO does not explain the four-month delay in communicating this to the complainant. It appears that the complainant responded to the requests on 18 September 2006.

11. At its next meeting in November 2006 the ACCC decided that it was preferable to await the outcome of the HBA appeal before making a recommendation on the claim. This was not communicated to the complainant until 8 March 2007 at which time the ACCC asked the complainant to indicate the status of her HBA appeal. On 27 March 2007 the HBA recommended that the Director-General should dismiss the complainant's appeal. With regard to her request that her illness should be considered as service-incurred, it concluded that the matter was not within its purview and was thus to be reviewed by the ACCC. Subsequently, at its meeting in May 2007 the ACCC concluded that the complainant's condition was not service-incurred and recommended its rejection. In July 2007 the complainant was advised of the Director-General's decision to accept the recommendation and to reject her claim. In August 2007 the complainant asked that a Medical Board be constituted to review the ACCC's recommendation and the Director-General's decision. Although there is no date of receipt stamp on the request, WHO states that it was received on 12 September. In early October 2007

the ACCC informed the complainant that a Medical Board would be convened; the complainant replied before the end of that month, indicating her nominee for the Board. Although there is some dispute between the parties in relation to the time taken to select the third member for the Medical Board, by 8 March 2008 the third member had been agreed upon and the Board met for the first time at the end of May 2008. Between the end of May and 4 July, the Board worked on a series of draft reports resulting in a preliminary report issued on the latter date and received by the Health and Medical Services in the beginning of August.

12. Before submitting its final report, the Board requested a copy of the report which had been prepared on 20 May 2005 by a consultant engaged to review the Organization's rules and policies on the issue of spouse employment, and an interview with the complainant. The ACCC met in September 2008 to review the preliminary report. At the end of October it advised the Medical Board and the complainant of the Director-General's decision to provide the requested report and to allow the Board to interview the complainant. In early December the Medical Board interviewed the complainant. It then prepared its final report which all three members approved by 20 December 2008.

13. The ACCC met for the fourth time in early February 2009 to review the Medical Board's final report. On 2 April the Secretary of the ACCC informed the complainant that the Director-General had decided to defer the final decision until the Tribunal issued its judgment. On 11 April the complainant filed the present complaint. On 8 July the Tribunal issued Judgment 2839 on her first complaint and on 13 July the Secretary of the ACCC advised the complainant of the Director-General's decision to recognise her medical condition as service-incurred.

14. Neither party advanced a position regarding the normal time frame for the completion of a compensation claim review in respect of

which the input of a Medical Board is sought. The absence of a norm is not surprising given the nature of such claims and the potential inherent complexity of some of them. Further, there are no statutory time limits, as there are, for example, in relation to certain steps in the internal appeal process, against which the departure from the norm can be assessed. In these circumstances, the Tribunal will consider the overall length of the process and whether there is a rational explanation for periods of inactivity.

15. The Tribunal observes that a significant part of the delay stems from the ACCC's failure to inform the complainant in a timely manner of the outcome of their meetings. In addition to causing unwarranted delay, this lack of information reflects a failure to respect the complainant's dignity during a lengthy process and is liable to promote suspicion and anger in relation to the process itself. The Tribunal also observes that, although part of the delay may be attributable to the selection of the third member of the Board, a delay of approximately eight months between the decision to convene a Medical Board and its first meeting is unreasonable, particularly in view of the complainant's fragile health. It must also be observed that, by any standards, a delay of 42 months in completing the processing of a compensation claim, such as occurred in the present case, is unreasonable. In these circumstances, an award of 5,000 euros for moral damages is manifestly inadequate.

16. With respect to the claim for exemplary damages, the Tribunal notes that in general these awards are meant to sanction bias, ill will, malice, bad faith, and other improper purpose. Although the complainant broadly alleges bias, conflict of interest, malice, bad faith, and other improper motivation in her pleadings, she does not separately analyse the grounds upon which an award of exemplary damages could rest. In Judgment 2762 involving similar allegations, under 25, the Tribunal held that:

> "the main thrust of the complaint is the allegation of abuse of authority, conflict of interest, bias and bad faith […]. At this juncture, it should be

> noted that in the complainant's submissions there is no separate analysis for each of these allegations. Instead, the complainant uses the terms almost interchangeably. For the purpose of this discussion, it is not necessary to engage in a separate legal analysis for each of the allegations."

17. Further, in Judgment 2293, under 12, the Tribunal noted:

> "Although to act in bad faith is always to mismanage, the reverse is not the case and honest mistakes or even sheer stupidity will not, without more, be enough. Bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose."

18. In the present case, a review of the overall procedure and the Administration's specific decisions and conduct, which the complainant alleges demonstrate improper purposes or motives, are equally amenable to explanations that do not involve bad faith, but rather a lack of diligence in processing the claim in a timely manner. Accordingly, the Tribunal concludes that an award of exemplary damages is not warranted in the circumstances. However, the Tribunal is of the view that the offer of compensation in the amount of 5,000 euros is manifestly inadequate and will order WHO to pay 10,000 euros in moral damages. The complainant is also entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the amount of 10,000 euros.
2. It shall also pay her costs in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet