J.

v.

WIPO

126th Session **Judgment No. 3998**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. J. against the World Intellectual Property Organization (WIPO) on 14 June 2016 and corrected on 22 July, WIPO's reply of 31 October 2016, the complainant's rejoinder of 1 February 2017 and WIPO's surrejoinder of 8 May 2017;

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 decision not to grant her compensation pending a determination by a medical expert as to whether her illness in 2012 through 2014 was service-incurred.

The complainant joined WIPO's Human Resources Management Department (HRMD) in 1993. She was awarded a permanent appointment in 2006. On 23 October 2012 she submitted a medical certificate requesting sick leave for an indefinite period.

On 17 February 2014 the complainant was informed that her statutory sick leave entitlements at full pay and half pay had been exhausted. As agreed with her on 6 February, her annual leave entitlements would be used to maintain her salary at half pay.

On 20 February 2014 the complainant's counsel claimed that her illness was service-incurred, as confirmed by her treating physician, and requested compensation under Staff Regulation 6.2. He further requested that she be granted special leave with full pay and a transfer to another department.

By a letter of 7 March 2014 HRMD informed the complainant that a medical examination would be arranged with the United Nations Office at Geneva Medical Services Section (UNOG MSS) in order to determine whether her illness could be considered as service-incurred. The letter also indicated that she could obtain special leave under Staff Rule 6.2.2(e)(3) only once her accrued annual leave entitlements were exhausted and that, as suitable positions available for transfer were limited, she was encouraged to apply for posts corresponding to her profile when advertised.

The complainant's request for review of that decision was dismissed by a letter of 25 June 2014 from the Director of HRMD, who emphasized that "a final administrative decision ha[d] not yet been taken as regards whether compensation [was] due to [the complainant] under Staff Regulation 6.2".

By a memorandum of 8 August 2014 UNOG MSS informed WIPO and the complainant that according to the medical expert who had examined her on 1 May 2014, she was considered 100 per cent fit for work in a service outside of HRMD. While the medical expert did not reach a conclusion as to whether the complainant's illness was service-incurred, he had found a causal link between her illness and her professional environment.

By a letter of 14 August 2014 HRMD informed the complainant that it would take steps to identify a suitable post in another department for her transfer. Meanwhile, the Director General had decided to place her on special leave with full pay as from 8 August 2014. With respect to the medical expert's findings, the letter indicated that it would seek clarifications from UNOG MSS in order to determine the action to be taken.

The complainant filed an appeal on 24 September 2014 against the decision of 25 June 2014. She returned to work in February 2015.

In its conclusions of 17 December 2015 the Appeal Board found that the issue of whether the complainant's illness was service-incurred was not "unambiguous". It recommended that a review of the medical expert's assessment be conducted and, if necessary, that a new medical examination be undertaken. It also recommended awarding the complainant 3,000 Swiss francs in moral damages for the delay in resolving her claim, as well as costs.

By a decision of 17 March 2016 the complainant was informed that the Director General had decided to follow the Appeal Board's recommendations to review the medical expert's assessment and, if necessary, to conduct a new examination. The letter stated that, once the issue of whether and to what extent the complainant's illness was service-incurred had been resolved, she would be compensated accordingly. The Director General also agreed to award her 3,000 francs in moral damages for the delay in processing her claim for compensation, but found no justification for an award of costs. That is the impugned decision.

Following the decision of 17 March 2016 Dr N. was appointed to act as an independent medical expert to review the matter. He examined the complainant on 5 October 2016. WIPO was informed by a memorandum dated 26 October 2016 that Dr N. had concluded that her illness could not be considered as service-incurred.

The complainant asks the Tribunal to order WIPO to pay her compensation in accordance with Staff Regulation 6.2 and Staff Rule 6.2.2(e)(4), including all the salary, benefits and other emoluments she has lost as a result of absences due to service-incurred illness, and to re-credit all her statutory annual leave, which she estimates at 84.5 days. She seeks the reimbursement of all medical expenses incurred as a result of her service-incurred illness and asks to be transferred to a suitable permanent position commensurate with her training, grade and experience. She claims moral and exemplary damages, as well as costs, with interest on all sums awarded. In her rejoinder the complainant contests Dr N.'s report and asks the Tribunal to disregard it.

WIPO submits that the complaint is irreceivable as the complainant does not challenge a final decision. It submits that her appeal was premature and that a number of her claims are either time-barred or have become moot. In its surrejoinder it asks the Tribunal to request the production of Dr N.'s report.

At the Registrar's request, the complainant's counsel provided copies of Dr N.'s report to the Tribunal.

CONSIDERATIONS

1. In a letter dated 20 February 2014, the complainant requested compensation for her service-incurred illness, special leave with full pay and a transfer out of the department to which she was assigned. HRMD responded in a letter dated 7 March 2014 noting, inter alia, that prior to the 20 February letter, it had not received any indication that the complainant's 16-month absence was due to a service-incurred illness. HRMD explained that a verification and certification of the illness by UNOG MSS would need to be organized prior to any decision regarding compensation being taken.

2. The complainant filed a request for review of the 7 March 2014 implied rejection of her request for compensation. In a letter from the Director of HRMD dated 25 June 2014, the complainant was notified that the decision of 7 March 2014 was maintained as "a final administrative decision ha[d] not yet been taken as regards whether compensation [was] due to [the complainant] under Staff Regulation 6.2". The Director went on to state that a final determination from UNOG MSS was required prior to taking a final decision on whether or not the complainant's illness was service-incurred. Based on the fact that the complainant had "provided no evidence of damage, actual or consequential, and that [her] illness ha[d] not yet been confirmed by UNOG MSS as service-incurred", she decided to "maintain the (implied) decision that no compensation, associated emoluments or damages [were] due to [the complainant] at [that] time under Staff Regulation 6.2". In the same letter, the complainant was notified,

inter alia, that as she had not yet exhausted her accrued annual leave entitlements, in accordance with Staff Rule 6.2.2(e)(3), she was not yet eligible for "special leave for prolonged illness".

3. The complainant filed an internal appeal against the 25 June 2014 decision. In its conclusions, dated 17 December 2015, the Appeal Board found that the complainant's requests to be put on special leave with full pay and to be transferred to a different post had become moot. Noting that WIPO contested the appeal's receivability, the Board observed: "While it is true that at [the time of the request for review] no determination had been made as to whether or not the [complainant's] illness was service-incurred, and whether consequently she was entitled to compensation, much has happened in the meantime concerning the first issue [...]". It went on to state that it would deal with the question on the merits. In considering the merits the Board found, inter alia, that the documentation regarding the complainant's illness was inconclusive and needed to be clarified by conducting a prompt review of the medical assessment, including if required by a medical board, or if necessary by a further examination of the complainant by a medical expert.

4. The complainant was notified, via a letter dated 17 March 2016 from the Director of HRMD, that the Director General had decided to adopt the Appeal Board's recommendations in part. Specifically, he endorsed the recommendations to arrange a prompt review of the medical assessment and, if necessary, that a new medical expert examination be conducted, in order to arrive at an "unambiguous and reliable" answer regarding whether or not the complainant suffered from an illness that was service-incurred and to pay the complainant 3,000 Swiss francs in moral damages for the delay in processing her claim for compensation. The complainant impugns this decision in the present complaint.

5. The complainant impugns the 17 March 2016 decision on the following grounds: the complainant's work environment violated the standards requiring "favourable" and safe work conditions, and the intentional delay in transferring her aggravated her injuries; reducing

her salary despite her service-incurred illness violated WIPO Staff Regulation 6.2 and Staff Rule 6.2.2(e)(4), as well as the principles of international civil service law; and WIPO's treatment of the complainant's case violated the insurance contract and was humiliating and prejudicial to her. She requests oral hearings.

6. WIPO asserts that the complainant's claim for compensation for a service-incurred illness is premature as no final assessment has been made certifying her illness as service-incurred. The 17 March 2016 decision endorsed the Appeal Board's recommendation to examine the complainant's case and a medical expert was duly charged with making a final assessment of the complainant's illness. As of 14 June 2016, the date of the filing of the complaint in the Tribunal, that assessment had not yet concluded and thus no final decision had been taken. As there was no final decision with regard to her request for compensation, WIPO asserts that the present complaint is irreceivable. WIPO also submits that the complainant raises inadmissible claims which are moot, premature, or time-barred and that her claims are unsubstantiated. In a memorandum dated 26 October 2016 from UNOG MSS, the Director of HRMD was notified that the medical expert who conducted a new examination of the complainant's case had concluded that her illness was not service-incurred.

7. As the written submissions are sufficient to allow the Tribunal to render an informed decision, the Tribunal rejects the request for oral hearings.

8. The complainant's claims that her work environment violated the standards requiring "favourable" and safe work conditions and that the intentional delay in transferring her aggravated her injuries are irreceivable. The question of the complainant's work environment covers a period from 2010 to 2012. Any challenges relating to that period had to be made within the time limits afforded for contesting decisions which adversely affect a staff member. As the complainant did not file any requests for review or appeals regarding her work

environment or the lack of transfer at that time, her claims in this regard are now time-barred.

9. The complainant claims that reducing her salary despite her service-incurred illness violated Staff Regulation 6.2 and Staff Rule 6.2.2(e)(4) as well as the principles of international civil service law. Staff Regulation 6.2 provides as follows:

> "In addition to the provision made pursuant to Regulation 6.1, the Director General shall establish a scheme of social security for staff members and other WIPO employees designated by the International Bureau, which shall provide in particular for health protection, sick leave and maternity leave, as well as reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the International Bureau."

Staff Rule 6.2.2(e)(4) on "Long Term Sick Leave and Special Leave for Prolonged Illness" provides as follows:

> "Special leave for prolonged illness with full or partial pay, or without pay, may be granted by the Director General. The purposes for which such special leave may be granted shall normally be to provide a bridge to a staff member's recovery and resumption of duties, or pending the finding of incapacity by reason of injury or illness for further service within the meaning of the Regulations of the UNJSPF, and the consequent payment of a disability benefit. To receive consideration for special leave, a staff member should provide an appropriate medical certificate or, in the case of a pending request for the finding of incapacity, as referred to above, evidence of a petition to the UNJSPF for payment of disability benefits. The interests of the service to which the staff member is assigned must, however, be safeguarded."

10. The Tribunal finds that WIPO has properly followed its Staff Regulations and Rules regarding sick leave and service-incurred illness. According to Staff Rule 6.2.2(e)(1-3):

> "(1) A staff member who [...] is entitled to sick leave at half pay, may choose to use accrued annual leave entitlements in order to receive full pay. In the event that the staff member, following the initial period of three or nine months, respectively, of sick leave at full pay, returns to duty on a half-time basis during the ensuing period of sick leave at half pay, the staff member may receive full pay by using the entitlement to sick leave at half

> pay or by using half-days of accrued annual leave entitlements, if he agrees to such an arrangement.
>
> (2) Staff members who [...] are on sick leave with half-pay after exhausting their sick leave on full pay and who cannot be maintained on full-pay status through a combination of sick leave on half pay with accrued annual leave or half-time duty, shall receive half their net salary and post adjustment, where applicable. [...]
>
> (3) Staff members who have exhausted all entitlements to paid sick leave, as well as their accrued annual leave entitlements, may in exceptional circumstances apply to the Director General through the Director of HRMD for special leave for prolonged illness."

The complainant authorized the use of her accrued annual leave in an email dated 6 February 2014. WIPO therefore acted in accordance with the requirement under Staff Rule 6.2.2(e)(1) to obtain the staff member's agreement before using her or his accrued annual leave to make up for the fact that her or his sick leave entitlements are exhausted in order to maintain her or his salary during a prolonged illness. As the complainant had not exhausted her accrued annual leave entitlements at the time of her request, she was not eligible for coverage under Staff Rule 6.2.2(e)(3). Her claims against the deduction of her annual leave are unfounded.

11. The complainant's claims that the way WIPO treated her case and its refusal to accept the service-incurred nature of her illness violated the insurance contract and was humiliating and prejudicial to her are unfounded. WIPO was correct to treat the complainant's illness as not service-incurred, pending an actual assessment by UNOG MSS to the contrary. The Tribunal finds that as sick leave must be approved by the Director General, the nature of the sick leave must also be approved. Considering that sick leave for service-incurred illness is an exception to the general sick leave entitlements, it follows that if further verifications are requested, WIPO is bound to treat the staff member's illness under the usual terms for sick leave until the determination by UNOG MSS that the illness is service-incurred (see Judgment 3591, consideration 11). The Tribunal notes that this practice is not prejudicial to staff members as any eventual determination that an illness or injury

is service-incurred will naturally be remedied retroactively to the start date of the determined period of service-incurred illness or injury.

12. Considering the above, the Tribunal finds that the 17 March 2016 decision cannot be considered a final administrative decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal with regard to the claim for compensation. It is also useful to note that the final assessment by Dr N., the medical expert appointed to conduct a new medical examination of the complainant, was communicated to HRMD by a memorandum dated 26 October 2016. The finding in that memorandum was that the complainant's illness was not service-incurred, but as of the date of filing the present complaint, that assessment, which was made in the course of these proceedings, had not been challenged through the internal means available and no final decision had been taken. Hence it shall not be considered in the present complaint. Consequently, the Tribunal finds the complaint irreceivable for failure to exhaust all internal means of redress insofar as it addresses the complainant's claim for compensation for a service-incurred illness. As the claim relates to the questioning of a medical assessment, the Tribunal notes that it is particularly important that the proper internal procedures for review be followed.

13. The 17 March 2016 decision was final only insofar as it awarded the complainant 3,000 Swiss francs in moral damages for the delay in processing her claim for compensation. As the complainant does not challenge that aspect of the decision in the present complaint, and the remaining claims are either irreceivable or unfounded, the Tribunal must dismiss the complaint in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ