Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

C.-W. (No. 3)
v.
WIPO

129th Session **Judgment No. 4245**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms M. C.-W. against the World Intellectual Property Organization (WIPO) on 18 February 2017 and corrected on 27 March, WIPO's reply of 3 July, the complainant's rejoinder of 2 August, WIPO's surrejoinder of 6 November 2017, the documents produced by WIPO on 24 May 2018 and the complainant's comments thereon dated 2 July 2018;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to terminate her employment for reasons of health.

Facts relevant to this case are set out in Judgments 4243 and 4246, also delivered in public this day, concerning the complainant's first and fourth complaints, respectively.

The complainant, who held a permanent appointment, suffered an injury at work (lumbago) on 18 March 2013. She was placed on 100 per cent sick leave until 19 May, and then on 50 per cent sick leave. On 11 November the medical officer of the Medical Services Section of the United Nations Office at Geneva (hereinafter the MSS), who was also the

WIPO Medical Adviser, stated that she was not in a position to approve the complainant's sick leave relating to the above-mentioned injury beyond 15 November. As from 14 November 2013, the complainant's treating physician issued her with certificates placing her on 100 per cent sick leave for a depressive/anxiety disorder.

By a letter of 9 January 2014, the complainant was informed that, in view of the information in its possession, the MSS had not validated the latest medical certificates she had submitted and that consequently her absence up to 7 January 2014 had been recorded as annual leave. On 18 January 2014 the complainant, who had been issued with a new certificate of sick leave by her treating physician until 9 February 2014, expressed her disagreement and requested that an independent "second medical opinion"* be obtained from a rheumatologist and a psychiatrist. This request was accepted and her medical certificates covering the period from 14 November 2013 to 7 February 2014 – the date on which the multidisciplinary expert assessment was due to take place – were validated.

By a letter of 16 April 2014, the Human Resources Management Department (HRMD) informed the complainant that, according to the information received from the MSS, the expert assessment had confirmed that her absence beyond 14 November 2013 could not be ascribed to her injury at work and that the corresponding days would therefore be deducted from her sick leave entitlement. Given that her last period of sick leave – until 18 May 2014 – was at odds with the conclusions of the expert assessment, according to which she would have been fit to resume work on a half-time basis on 17 March and on a full-time basis on 7 May, the 50 per cent absences from 17 March onwards would be deducted from her annual leave entitlement. Moreover, the complainant was instructed to "resume work without delay"* and no later than 23 April. On 8 May she stated that she was unfit to resume work and requested that a medical board be established pursuant to Staff Rule 6.2.2(g). This request was granted.

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* Registry's translation.

The medical board, which met on 27 January and 17 March 2015, issued its conclusions on 4 June 2015. It considered that the conclusions of the expert assessment in February 2014 were well founded, even though the prognosis concerning the resumption of full-time work was “probably over-optimistic”*. Asserting that the complainant’s state of health had worsened since 17 March 2014 and that she was “currently” unfit for work because of her psychological illness – and had been since 17 March –, the board recommended that she be retired on invalidity grounds. By a letter of 30 June 2015, the complainant was informed that, further to the recognition of her unfitness for work, her sick leave and annual leave entitlements had been exhausted as of 7 May 2015 and that, as “the [MSS] [...] ha[d] confirmed”* that she was unable to perform her duties or other duties which might reasonably be assigned to her, the Director General had decided, pursuant to Staff Regulations 9.2(a) and 9.4, to terminate her appointment for reasons of health as from 30 September 2015.

On 3 August the complainant submitted a request for a review of this decision. At this juncture, she also requested “the set[ting] up [of] the procedure to have [her] illness recognized as an occupational illness”*. At the end of the month, she was advised of the decision to grant her a disability benefit as from 8 May. By a letter of 20 October, she was informed that her request for review of the decision to dismiss her had been rejected. With regard to her request for recognition of an occupational illness, she was informed that it had not been possible to submit an official request to the MSS since she had not returned the relevant declaration form, which had been sent to her on 2 October.

In November 2015 the complainant returned the occupational illness declaration forms in relation to her lumbago and a “major depressive episode”. WIPO forwarded the requests for recognition of these illnesses as occupational illnesses to the MSS and to its insurer. By an e-mail of 16 June 2016, the insurer informed WIPO that, regarding the lumbago, the file had been closed and that, regarding the psychological illness of 14 November 2013, it was not in a position to

* Registry’s translation.

examine the complainant's request since she had submitted it outside the contractual time limit of 120 days.

In the meantime, on 11 February 2016, the complainant had lodged an appeal with the Appeal Board against the decision to terminate her appointment. The Appeal Board issued its conclusions on 7 November 2016. It found that, at the date of the complainant's dismissal, the two prerequisites for the application of Staff Regulation 9.4 were fulfilled, that is to say she had exhausted her sick leave entitlement and it was medically established that she was unable to perform her duties or other duties which might reasonably have been assigned to her. The Board therefore recommended that the appeal be dismissed in its entirety. By a letter of 23 November 2016, the Director General informed the complainant that he had decided to accept this recommendation. That is the impugned decision.

In a letter of 16 December 2016, referring to WIPO's submissions before the Appeal Board, the complainant inferred that the Director General was in possession of information that had not been disclosed to her concerning the occupational nature or otherwise of her illnesses, and she requested that this information be sent to her. By a letter of 1 March 2017, the complainant was informed that, up to the entry into force, on 1 January 2015, of Office Instruction No. 79/2014, WIPO's practice had been not to deduct absences for an occupational injury or illness from the staff member's sick leave entitlement. Thus, although the complainant's psychological illness had manifested itself before 1 January 2015, that circumstance alone would not have prevented the resulting absences from being deducted from her sick leave entitlement: the illness in question also had to be recognized as occupational, which was not the case. On this point, it was made clear to the complainant that it was not for WIPO to give an opinion on the occupational nature or otherwise of an illness and that, apart from the insurer's "decision" of 16 June 2016, the Organization was not in possession of any document enabling it to confirm or deny the occupational nature of her illness. On 30 April 2017 the complainant requested a "review of the non-recognition"[*] of her illnesses as occupational. This request was rejected on 3 July, and on 7 August 2017 the complainant lodged an appeal with

the Appeal Board. In its conclusions of 2 February 2018, the Board recommended that the appeal be dismissed. By a letter of 4 April 2018, the Director General informed the complainant that he had decided to accept this recommendation.

In the meantime, on 18 February 2017, the complainant had filed the present complaint, in which she asks the Tribunal to help her in obtaining various documents, to make a number of declarations of law, to sanction WIPO for its serious misconduct in misleading the insurer and the Appeal Board, to set aside the decision to terminate her employment on health grounds, the insurer's "decision" and the recommendations of the Appeal Board of 7 November 2016, to order her reinstatement and the resumption of the procedure for recognition of an occupational illness, to order WIPO to "rectify all current and pending procedures" [*], including in relation to the grant of a disability benefit, and to award her damages and costs.

WIPO requests the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. By her third complaint, the complainant impugns the Director General's decision of 23 November 2016 confirming his decision of 30 June 2015 to terminate her appointment for reasons of health.

2. Staff Regulation 9.4, in the version applicable at the material time, provided in relevant part as follows:

> "The services of staff members may be terminated when they are unable to perform their duties or other duties which might reasonably be assigned to them, as a result of infirmity, illness or the weakening of their physical or mental faculties after exhaustion of any sick leave entitlement."

3. The complainant contends that this provision has been violated. She argues that the decision of 30 June 2015 is flawed because it indicates that it was taken on the basis of a decision of the MSS,

[*] Registry's translation.

whereas the latter never issued an opinion on her incapacity to perform her duties.

The Organization replies that the reference to the MSS in a passage of the decision of 30 June 2015 was an editorial error and that it ought really to have referred to the conclusions of the medical board of 4 June 2015.

The Tribunal notes in this regard that the disputed passage of the decision is preceded by a subparagraph 1, mentioning the medical board's conclusions of 4 June 2015, according to which the complainant had not been fit for work since 17 March 2014 and her state of health warranted retiring her on invalidity grounds. In view of the context of the matter, it is clear that it is indeed the medical board's conclusions which served as the basis for the decision. Regrettable though the editorial error is, it does not render the decision in question unlawful.

Lastly, Staff Regulation 9.4 does not impose any obligation to consult the MSS, so it cannot be concluded that there has been any breach of this Regulation.

It follows that the plea is unfounded.

4. The complainant points out that the medical board considered that she was "currently" not fit to work. She therefore criticises the Organization for wrongly considering that her incapacity was permanent and for not checking whether she was fit to work in more suitable conditions.

However, Staff Regulation 9.4 does not require permanent incapacity as a condition for terminating an appointment for reasons of health. The length of the incapacity permitting termination of a staff member's appointment for reasons of health is governed by the second condition established in Regulation 9.4, namely the exhaustion of the sick leave entitlement. WIPO was not therefore obliged to determine whether or not the complainant's incapacity was permanent. Furthermore, given that the medical board considered in general terms that the complainant was no longer fit to work and that her psychological state justified retiring her on invalidity grounds, the Organization was not required to check whether other work could be assigned to her.

Moreover, the WIPO Pensions Committee granted the complainant a disability benefit, which is only granted if the United Nations Joint Staff Pension Fund (UNJSPF) finds that an official is incapacitated for further service reasonably compatible with her or his abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration (Article 33(a) of the UNJSPF Regulations). Furthermore, it is stipulated that where the official has reached the age of 55 years – as was the case for the complainant when her employment was terminated – incapacity shall be deemed to be permanent (Article 33(b) of the UNJSPF Regulations).

The plea therefore fails.

5. Before 1 January 2015, in accordance with a practice in force at the time, where an illness was recognized as occupational, leave days related to this illness were not deducted from the sick leave entitlement. This situation was changed by the entry into force on 1 January 2015 of Office Instruction No. 79/2014 (entitled "Sick leave, leave for family-related emergencies and absences for medical appointments"), paragraph 14 of which relevantly provides that "[c]ertified sick leave occasioned by illness or accident attributable to the performance of official duties shall be charged to the staff member's entitlement to sick leave [...]."

In the instant case, the complainant's sick leave days were recorded as follows:

– days of sick leave from 19 March 2013 to 14 November 2013, linked to lumbago resulting from an injury at work, were not deducted from the complainant's sick leave balance;
– days of sick leave from 15 November 2013, linked to the depressive/ anxiety disorder declared on 14 November 2013, were deducted, since the illness was not deemed to be occupational.

6. The complainant submits that there is an error in the calculation of her sick leave, the exhaustion of which served to justify the termination decision. She argues, firstly, that the illness resulting from the injury at work lasted beyond 14 November 2013 and, secondly, that

from 15 November 2013 she suffered from a psychological illness caused by the negligence and abusive treatment to which she was exposed, which should have been considered as an occupational illness. She contends that since WIPO did not take account of these two elements in the calculation of leave days, the termination of her employment was unlawful.

The complainant also considers that the Organization should have suspended the decision to terminate her appointment for reasons of health while it settled the question of whether or not her illnesses were occupational. She highlights the rapidity with which the impugned decision was taken (some 20 days after receipt of the medical board's conclusions), whereas all the other procedures took much longer.

7. In Judgment 4246, also delivered in public this day, the Tribunal dismissed the complainant's fourth complaint, which challenged the refusal to recognize the occupational nature of her illnesses, and held that WIPO had rightly considered, firstly, that the request for recognition, after 15 November 2013, of the illness resulting from the injury at work was not justified and, secondly, that the request for recognition of the psychological illness diagnosed on 14 November 2013 was made after the expiry of the prescribed time limit and was therefore irreceivable.

The complainant's arguments must therefore be dismissed.

8. The same applies, for the same reason, to the complainant's other arguments, namely: the refusal to take account of the work-related injury of March 2013 beyond 15 November 2013; the fact that the health reasons invoked by WIPO to justify termination of her appointment result from a negligent attitude and abusive treatment; the absence of a final decision regarding recognition of her illness as occupational owing to the Organization's bad faith; the reprehensible refusal to respect the procedure established in Article 12.2 of the insurance contract; the Organization's failure to fulfil its duty of protection and good faith; and the deliberate misleading of the insurer by omitting essential facts.

9. The complainant requests the Tribunal to make a number of declarations of law. According to the Tribunal's established case law, such claims are irreceivable (see Judgments 3876, consideration 2, 3764, consideration 3, 3640, consideration 3, and 3618, consideration 9).

10. It follows from the above that the complaint must be dismissed in its entirety, without there being any need to order the production of the documents requested by the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ