Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 2)

v.

WHO

138th Session **Judgment No. 4863**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. B. against the World Health Organization (WHO) on 14 June 2021 and corrected on 20 July 2021, WHO's reply of 28 October 2021, the complainant's rejoinder of 17 February 2022 and WHO's surrejoinder of 9 June 2022;

Considering the documents and information provided by WHO on 16 January 2024 upon request by the President of the Tribunal, the complainant's comments thereon of 7 February 2024 and WHO's final comments of 19 February 2024;

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

Having examined the written submissions;

Considering the decision of the President of the Tribunal to disallow the complainant's request for postponement of the adjudication of the case;

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

The complainant contests the decision not to change her annual leave to certified sick leave and to place her on administrative leave without pay from 9 October 2019 until her summary dismissal on 13 December 2019.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations (UN) programme on HIV/AIDS administered by WHO. She joined UNAIDS in December 2009 and was summarily dismissed for serious misconduct on 13 December 2019.

Following the exhaustion of her entitlement to maternity leave on 11 June 2019, the complainant took annual leave from 12 June 2019 until 30 August 2019. On 12 June 2019, she sent to the department of Human Resources Management (HRM) of UNAIDS, copying WHO Staff Health and Wellbeing Services (SHW), a medical certificate for the period 11 June 2019 to 30 June 2019. On 19 June 2019, the Director of WHO SHW informed the complainant that her absence from 12 June until 30 August 2019 had been recorded as annual leave and that in order to change it to sick leave she had to provide a medical report as required by WHO e-Manual. The complainant did not report to work on Monday 2 September 2019 following the completion of her approved annual leave.

On 19 September 2019, the complainant asked UNAIDS HRM that the annual leave request she had made for the period 12 June 2019 to 30 August 2019 be cancelled and converted to certified sick leave. She also asked if she would receive "retroactive payment for [her newborn]" from the date of his birth as she had recorded him in the administrative system as a dependent. She sent photographs of medical certificates dated 7 June 2019, 28 June 2019, 28 July 2019 and 28 August 2019. Also on 19 September 2019, the complainant was informed that she was the subject of an investigation for misconduct.

On 26 September 2019, UNAIDS HRM informed her that WHO SHW had received all her medical certificates, including the one for September 2019, but not the medical report from her medical practitioner that SHW had asked her to provide. It added that only the Director of WHO SHW could approve her sick leave request and therefore advised her to contact SHW separately. Indeed, HRM could change her annual leave for the period 12 June 2019 to 30 August 2019 to certified sick leave only upon receipt of SHW's approval.

On 9 October 2019, the Director of WHO SHW wrote to the complainant that she had received her medical certificates but could not endorse her sick leave request without a full "detailed and comprehensive medical report". She asked the complainant to "take action". The complainant replied, on 25 October 2019, that she was unable to obtain the medical report from her medical practitioner but would continue the follow-up.

By letter of 11 December 2019, the UNAIDS Director of HRM informed the complainant that her sick leave requests could not be granted beyond 30 August 2019 because WHO SHW was unable to approve them. Consequently, the complainant was placed on annual leave with retroactive effect to 2 September 2019. She added that following exhaustion of the complainant's annual leave credits on 8 October 2019, the latter was placed on administrative leave without pay with retroactive effect from 9 October 2019. This measure was taken in accordance with Staff Rule 1120 pending the determination of the outcome regarding the allegations of misconduct made against her of which she had been informed on 19 September 2019. She added that administrative leave did not constitute a disciplinary measure, nor did it have any bearing on the outcome of the process. The complainant was summarily dismissed on 13 December 2019 for serious misconduct.

On 10 February 2020, the complainant submitted a request for administrative review against the decision of 11 December 2019. She filed an appeal with the Global Board of Appeal (GBA) in July 2020 against the implied rejection of her request.

In its recommendations of 26 January 2021, the GBA found that the appeal against the implied rejection of the complainant's request for review was receivable as there was no evidence to rebut her allegation that she had not received the email of 10 April 2020 rejecting her request for review. According to the GBA, she did not comply with the requirements of Staff Rule 630.7 and, therefore, the annual leave for the period 12 June to 30 August 2019 could not be changed to certified sick leave. It also determined that UNAIDS was correct in deciding not to approve certified sick leave after 2 September 2019 and did not make a mistake in exhausting her annual leave credit after 30 August 2019.

It further concluded that the decision to place her on administrative leave without pay was discretionary and founded. Therefore, the GBA recommended that the appeal be dismissed.

By a decision of 15 March 2021, the UNAIDS Executive Director accepted the GBA's recommendations. This is the impugned decision in the present case.

The complainant asks the Tribunal to set aside the impugned decision with all legal effects flowing therefrom, to order the defendant to pay her 82 days of annual leave including discretionary days together with child allowance in relation to her newborn son in an amount of 2,000 Swiss francs (calculated from December 2018 to December 2019), and the balance of her monthly salary she was due for December 2019. She seeks an award of moral damages, exemplary damages, and reimbursement of "all actual legal fees incurred in bringing this appeal". She further asks the Tribunal to award her interest at the rate of 5 per cent per annum on all amounts granted from 2 September 2019 through the date all amounts so awarded are paid to her in full, and to award her such other relief as the Tribunal deems necessary, just and fair.

WHO asks the Tribunal to reject the complaint as partly irreceivable insofar as it concerns claims for having the complainant's son recognised as her dependent. The complaint is otherwise devoid of merit.

CONSIDERATIONS

1. The complainant requests joinder of the present complaint (her second) with her first complaint. In her third and fourth complaints, she also requests their joinder with her first and her second complaints. Although the four complaints concern facts and decisions which, in the complainant's view, are interconnected, the legal issues raised are partially discrete and the decisions impugned concern different subject matter. Accordingly, the complaints will not be joined.

2. The complainant applies for oral proceedings. The parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. The request for oral proceedings is, therefore, rejected.

3. The complainant impugns the UNAIDS Executive Director's 15 March 2021 decision, which accepted the Global Board of Appeal (GBA)'s 26 January 2021 recommendations, and dismissed her internal appeal against the rejection of her request for administrative review of the 11 December 2019 decision. In turn, the 11 December 2019 decision informed the complainant that her requests for certified sick leave had not been approved and, to regularize her situation, placed her on annual leave with retroactive effect as of 2 September 2019 until 8 October 2019, and on administrative leave without pay from 9 October. She remained on administrative leave without pay until the date of her summary dismissal on 13 December 2019. It is useful to recall that the GBA, in its recommendations:

(a) found that the appeal was receivable, irrespective of the fact that an express decision on the request for review had been adopted and that the appeal had been lodged after the expiry of the established time limit, since the GBA was not certain that the express decision had been received by the complainant;

(b) found that the request for the child allowance was outside the scope of the appeal; and

(c) rejected the complainant's request to be granted 82 days of annual leave, on three grounds:

    (i) she did not comply with the requirements of Staff Rule 630.7 and, therefore, the annual leave for the period 12 June to 30 August 2019 could not be changed to certified sick leave;

    (ii) UNAIDS was correct in deciding not to approve her certified sick leave after 2 September 2019 and did not make a mistake in exhausting her annual leave credit after 30 August 2019; and

(iii) the decision to place her on administrative leave without pay was discretionary and well-founded.

4. The complainant advances six pleas, as follows.

(i) The Organization's failure to recognise the complainant's sick leave requests and to recredit her annual leave amounted to a breach of her statutory rights and to a violation of her contract of employment. The complainant contends that, based on Staff Rules 630.7, 740.2, 740.3, and section III.6.9 of the WHO e-Manual, the Organization bore the onus of formally requesting her to provide a medical report, and it was not her responsibility to provide it on her own motion. According to her, the Organization never requested that she submit a medical report for the period beyond 30 August 2019, as all correspondence between the Organization and the complainant concerning a medical report was specifically related to the period June to August 2019, the period for which she sought the conversion of her annual leave to sick leave. In her rejoinder, the complainant further notes that the Organization never sent her a written request accompanied by a letter to be sent to her medical practitioner, as per paragraph 105 of section III.6.9 of the WHO e-Manual, as it had done previously in 2017 with regard to a different sick leave requested by the complainant. She asserts that her annual leave from 12 June to 30 August 2019 had been converted to sick leave, therefore she is entitled to 82 days of annual leave to be recredited. She contends that she is also entitled to the dependent allowance from December 2018 to December 2019 for her newborn son, as requested on 19 September 2019, amounting to approximately 2,000 Swiss francs.

(ii) The impugned decision rejecting the complainant's appeal was based on errors of fact and law, as mistaken conclusions were drawn from the facts, and essential facts were overlooked. Firstly, according to the GBA, the 28 October 2019 medical certificate was "not accepted by SHW as fulfilling the requirements of a medical report", but the complainant was never informed, in violation of paragraph 105 of section III.6.9 of the WHO e-Manual.

UNAIDS never contested the medical assessment provided by her medical practitioner, either informally or formally by ordering an independent medical examination. A counter-expertise is necessary before contesting a medical practitioner's opinion. Secondly, she contends that the 28 October 2019 *"[c]ertificat médical"* was tantamount to a "medical report", having regard to its content. Thirdly, she reiterates her argument, already submitted in her first plea, that her annual leave from 12 June to 30 August 2019 had been converted to sick leave and the GBA erred in not accepting this argument. Fourthly, as to her placement on administrative leave without pay, the GBA wrongly relied on Staff Rule 1120.1, which permits the Organization to place a staff member on administrative leave pending the conclusion of an investigation into alleged misconduct "if the continued performance of functions of the staff member is considered to prejudice the Organization's interests". According to the complainant, she was not and could not be in a position to prejudice the interests of the Organization, as she was not performing any functions for the Organization at the time. Indeed, at the relevant time, she was allegedly on "service-incurred sick leave" and was not able, allowed, or expected to fulfil her professional duties while on leave. In her rejoinder, the complainant contends that she received her salary for the period from September to December 2019, and this proved that her request for sick leave had been accepted. In her further written submissions, the complainant contends that she never received the email by which she was summoned to a meeting with the Staff Physician.

(iii) Placing the complainant on administrative leave without pay with retroactive effect from 9 October 2019 amounted to an abuse of authority. She contends that, based on Staff Rules 1120.1 and 1120.2, placement on administrative leave could not be retroactive, and that the Organization provided no reason for this measure. She reiterates the argument, already contained in her second plea, that, since she was on sick leave at the relevant time, she was not in a position to endanger the Organization's interests, thus the conditions of Staff Rule 1120.1 were not met.

(iv) The decision to deny the complainant's sick leave and annual leave entitlements and to place her, retroactively, on administrative leave breached the principle of non-retroactivity. She relies on the Tribunal's case law according to which a decision adversely affecting a staff member cannot have retroactive effect from a date prior to the date on which it is notified to her or him. She infers that the principle of non-retroactivity was infringed given that the decision was adopted on 11 December 2019, with retroactive effect.

(v) The decision to deny the complainant's sick leave and annual leave entitlements and to place her, retroactively, on administrative leave was a disguised disciplinary action. The administrative leave without pay was a measure that either anticipated or pre-empted the outcome of the investigation, which ended in her summary dismissal.

(vi) The impugned decision with aggravating effects on the complainant constitutes an act of retaliation for her prior legal claims against the Organization. Firstly, she was punished for having been a whistleblower "in the face of the toxic UNAIDS work culture and for having reported a sexual assault by UNAIDS former [Deputy Executive Director], which directly led to a damning Report of the Independent Expert Panel". Secondly, the decision lacks objective grounds. Thirdly, whilst she always acted in good faith providing the requisite medical documentation, the Organization failed to properly inform her that her request for sick leave had not been approved. Fourthly, the decision was motivated by bias, malice and ill will against her, as can be inferred by a number of elements. Namely, the complainant was placed on administrative leave after the investigation against her had already been concluded. In addition, she was the subject of an investigation whilst she was on sick leave. Moreover, the decision on her leave entitlements deprived her of several months of salary.

5. The complainant requests that the Tribunal order the Organization to disclose "all communications between [WHO Staff Health and Wellbeing Services (SHW)] and [the department of Human Resources Management (HRM) of UNAIDS] regarding the [c]omplainant's sick leave and/or annual leave status between 12 June and 11 December 2019". The President of the Tribunal requested WHO to provide a copy of the following information and documents:

(1) the SHW HRM email addressed to the complainant, scheduling an appointment on 15 November 2019, the proof that it was received by the complainant, and the complainant's answer, if any;

(2) the correspondence between SHW HRM mentioned in paragraph 2 of the 11 December 2019 decision;

(3) the complainant's request for annual leave from 12 June 2019 to 30 August 2019 and the Organization's approval;

(4) the exact number of days of the complainant's annual leave from 12 June to 30 August 2019;

(5) the exact number of days of the complainant's annual leave from 2 September to 8 October 2019; and

(6) the total number of annual leave days to which the complainant was entitled at the relevant time (2019).

The complainant was given the opportunity to comment on this documentation.

The Tribunal is satisfied that the documents disclosed by the Organization pursuant to the Tribunal's disclosure order are sufficient to reach a just decision on the case, and any further request by the complainant is an impermissible fishing expedition.

6. At the outset, it is appropriate to point out that the scope of the present complaint is limited to the question of the nature of the complainant's leave from 12 June 2019 until her summary dismissal on 13 December 2019. Many questions raised by the complainant are either outside the scope of the present complaint or irreceivable, as follows.

Firstly, the complainant dwells at length on the question of the receivability of her internal appeal in connection with the alleged non-reception of the express decision on her request for administrative review. The Tribunal notes that the matter is not contested before the Tribunal and that, as it will become apparent, the Tribunal does not need to examine the issue of receivability, as the complaint is unfounded.

Secondly, any questions related to the complainant's harassment complaint and her disciplinary dismissal are the subject matter of the complainant's first, third, and fourth complaints and, thus, they will not be addressed in the present judgment.

Thirdly, the Tribunal considers that the complainant's claim to be awarded the child allowance for her newborn son in an amount of 2,000 Swiss francs calculated from December 2018 to December 2019 is irreceivable for lack of a challengeable administrative decision. Even assuming that the complainant requested the child allowance in her 19 September 2019 email addressed to SHW, in any event, the 11 December 2019 decision did not address this request. It is true that the complainant advanced the claim for the child allowance in her administrative request for review of the 11 December 2019 decision and in her internal appeal, nonetheless, there was no administrative decision to be reviewed and to be appealed. Thus, both the decision on her request for administrative review and the decision on her internal appeal lawfully considered this claim to be irreceivable.

7. Since the complainant's six "arguments" are repetitive and overlapping, the Tribunal will examine them as a whole, in a logical order.

8. It is appropriate to recall the relevant Staff Rules.

According to Staff Rule 630.7:

> "A staff member who is ill during a period of annual leave shall, subject to the provisions of Staff Rule 740, have that portion of his absence considered as sick leave upon presentation of a satisfactory medical report and approval by the Staff Physician."

Staff Rule 740.2, in the relevant part, read:

> "Any absence of more than three consecutive working days which is to be charged as sick leave must be supported by a certificate from a duly recognized medical practitioner stating that the staff member is unable to perform his duties and indicating the probable duration of the work incapacity. Where the work incapacity continues beyond one month, a medical report from the treating physician is required."

Pursuant to Staff Rule 740.3, medical reports are to be provided periodically and on the request of the Staff Physician, as follows:

> "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 Staff Physician so decides."

In accordance with paragraph 90 of section III.6.9 of the WHO e-Manual, medical certificates are subject to the approval of SHW, who may request supplementary information.

9. The complainant's contention that she is entitled to an amount of money equivalent to 82 days of annual leave relies, in brief, on four different arguments:

(i) her request that her annual leave from 12 June to 30 August 2019 be converted to sick leave had been accepted by the Organization (first and second pleas);

(ii) in any case, her request for sick leave should have been accepted because she had provided the requisite "medical report" and not mere "medical certificates" (first and second pleas);

(iii) she was entitled to sick leave from 2 September 2019 until her disciplinary dismissal on 13 December 2019 (first and second pleas);

(iv) her placement on administrative leave without pay was unlawful (third and fourth pleas).

These arguments will be examined in the following four considerations.

10. As to the complainant's first argument summed up in consideration 9 above, the Tribunal notes that her contention that the Organization did actually convert her absence from 12 June to 30 August 2019 to sick leave is a mere assumption, and is not proven. The Organization never approved her request that annual leave be converted to sick leave, because the complainant failed to submit the requisite medical report. SHW requested her to provide a medical report, by email of 19 June 2019, and reiterated this request by email of 9 October 2019. She was also reminded of this request by HRM's email of 26 September 2019, clearly stating:

> "I understand from our WHO [SHW] that they have received all your medical certificates, including the one for September. I also understand that SHW reached out to you and asked [you] to provide them with medical reports from your doctor but have not received any further documentation. Please make sure you get back to SHW separately on this as it is only the Staff Physician that can approve sick leaves. Further, please note that HRM will be in a position to cancel your existing confirmed Annual Leave request, i.e. 12-Jun-2019 to 30-Aug-2019, and replace it with a Certified Sick Leave, upon receipt of SHW's approval only."

Since the complainant did not provide the Organization with the required medical report, there was no approval by SHW of her request for sick leave. In her rejoinder, the complainant further notes that the Organization had never sent her a written request accompanied by a letter to be sent to her medical practitioner, as per paragraph 105 of section III.6.9 of the WHO e-Manual, and as it had done previously, in 2017. The Tribunal recalls that pursuant to paragraph 105 of section III.6.9 of the WHO e-Manual, in the version in force at the relevant time, considering that the complainant was first requested to provide a medical report on 19 June 2019: "Where a medical report is required, SHW/RSP will send a written request to the staff member and include a letter to be transmitted to the medical practitioner. It is the staff member's responsibility to ensure that the request is immediately transmitted to the medical practitioner and to follow up to ensure the medical report is received by SHW/RSP [...]" The complainant was requested by SHW to provide a medical report by emails of 19 June 2019 and of 9 October 2019. Even if it were proven that these emails did not "include a letter to be transmitted to the medical practitioner",

this circumstance would have no bearing on the outcome of the case, considering that the complainant was, in any case, able to ask for a medical report from her physician. The reference to the procedure followed on one previous occasion in 2017, when SHW requested the medical report directly to the complainant's physician, is misconceived, considering that this procedure is followed when a staff member is already on certified sick leave, and this is not the case here. In any case, paragraph 105 of section III.6.9 of the WHO e-Manual did not require that SHW directly request the medical report to the staff member's physician. On the contrary, it established that it is the staff member's responsibility to ensure that the request be immediately transmitted to the medical practitioner.

The complainant's contention that she was never informed of the non-approval of her request is misconceived, as both HRM's 26 September 2019 email and SHW's 9 October 2019 email confirmed that, to date, the sick leave had not been approved and that it would not be approved until and unless a medical report was provided by the complainant. No further information was required, also considering that, by an email sent to her on 1 November 2019, the complainant was invited to attend the meeting which had been scheduled with SHW on 15 November 2019 and she failed to do so. She neither acknowledged receipt of the invitation nor attended the scheduled appointment. In her further written submissions, the complainant contends that she never received the 1 November 2019 email by which she was summoned to a meeting with the Staff Physician and that the Organization has not proven that she received such email. The Tribunal notes that the 1 November 2019 email was sent to the complainant's official email address, to which she received regular office communications and from which she sent communications to the Organization. Thus, it can reasonably be inferred that she actually received the email in question. In any event, it was her responsibility to check the communications sent to her, especially in cases such as this, regarding a request for leave, because she could not assume it had been approved. Moreover, the complainant was able to check the status of her leave in WHO's electronic system, namely whether it was changed from annual leave to sick leave. Thus, she was in a position to know that her leave status had

not been changed, and this means that her request had never been approved. The complainant cannot rely on some phrases contained in the 11 December 2019 decision, stating that "SHW was unable to approve your requests for certified sick leave beyond 30 August 2019" and "[c]onsequently, sick leave cannot be granted beyond 30 August 2019", to infer that sick leave had been granted until 30 August 2019. Although the Tribunal cannot avoid noting that these phrases may appear ambiguous and misleading, these phrases must be read in the context with other sentences of the decision. The decision states that the complainant's absence from 2 September 2019 onwards would be treated as annual leave from 2 September to 8 October 2019, and as administrative leave (without pay) from 9 October onwards. If the whole period from 12 June to 30 August 2019 had been recognized as sick leave (as the complainant assumes), it would have been illogical to state that annual leave credits had been exhausted with the annual leave granted from 2 September to 8 October 2019. The statement that the annual leave granted from 2 September to 8 October 2019 exhausted the complainant's annual leave entitlements, implicitly but logically relies on the circumstance that the complainant had already been on annual leave, and not on sick leave, from 12 June to 30 August 2019.

11. As to the complainant's second argument summed up in consideration 9 above, she focuses on the 28 October 2019 *"[c]ertificat médical"* contending that, having regard to its content, it was a "medical report" and not a mere "medical certificate". The Tribunal notes that the complainant did not provide the Organization with the original medical certificates, but only with photographs, sent by emails, which apparently reproduce a number of medical certificates, dated 7 June 2019, 28 June 2019, 28 July 2019, 28 August 2019, 24 October 2019 and 12 November 2019. These photographic reproductions were sent in addition to the 28 October 2019 *"[c]ertificat médical*". The Organization, in its reply, remarks that the complainant did not send the original certificates, but only their photographs; however, it does not question their authenticity. It is undisputed that the 28 October 2019 *"[c]ertificat médical"* was received by SHW. The parties only disagree on the nature of such *"[c]ertificat médical"* which, according to the Organization,

cannot be considered as a "medical report". The Tribunal notes that all the medical certificates, other than the 28 October 2019 one, stated that the complainant was unable to work full-time, sometimes adding that she was able to travel. The 28 October 2019 *"[c]ertificat médical"* has a wider content, indicating, albeit very concisely, a diagnosis and a therapy. It is addressed to the Staff Physician of WHO (Dr H.), and states that the patient "[...] appears to be suffering from post-traumatic stress disorder, with anxiety attacks, panic attacks and worsening sleep disorders during the month of June 2019. This has necessitated time off work and psychological treatment by a psychiatrist since that time."[*] The Tribunal notes that, even without considering the name of this document, which is "medical certificate" and not "medical report" and having regard to its actual content, the 28 October 2019 medical document, although it contains a diagnosis and a therapy, is too vague to be considered a "medical report" rather than a "medical certificate". According to paragraph 90 of section III.6.9 of the WHO e-Manual "[a] medical report, contains detailed medical information including details of diagnosis and treatment and will only be seen by medical staff who are bound by the normal professional provisions related to medical confidentiality". Instead, the 28 October 2019 medical document makes reference to the period of June 2019 and not to the entire period, and it does not contain details about diagnosis and treatment. Thus, it is not "detailed" in the meaning required by paragraph 90 of section III.6.9 of the WHO e-Manual. The complainant, in an attachment to her rejoinder, has provided the Tribunal with a "medical statement" issued on 16 February 2022 by the same physician who signed the 28 October 2019 *"[c]ertificat médical"*, in which the physician stated that she had sent a *"rapport médical"* dated 28 October 2019 to the attention of the Staff Physician of WHO. The Tribunal deems that such a "medical statement" issued more than two years after the relevant facts, has no bearing on the outcome of the case. The 28 October 2019 document was named *"[c]ertificat médical"* and therefore the statement, contained in the 16 February 2022 document, that the 28 October 2019 document was, instead, a *"rapport médical"*, is not reliable. However, the Tribunal

[*] Registry's translation.

also considers a further and decisive circumstance. Even if it were to be accepted that the 28 October 2019 document was a "medical report" (and it is not accepted), it would not be sufficient for the granting of the certified sick leave. Indeed, pursuant to Staff Rule 740.3:

> "In any case of a staff member's claiming sick leave, he [...] shall be examined by the Staff Physician [...] if the Staff Physician so decides."

In the present case, the complainant was summoned, by email of 1 November 2019, to a visit with the Staff Physician to be held on 15 November 2019, but she ignored it. Therefore, the "claimed" sick leave could not become a "certified" sick leave, in the absence of the required visit. In conclusion, there is no persuasive evidence that the complainant provided the Organization with the requisite medical report. The Organization lawfully denied her request to be recredited her annual leave used in the period from 12 June to 30 August 2019, considering that, in the absence of a medical report, the complainant's annual leave from 12 June to 30 August 2019 had neither been converted to sick leave, nor should it have been.

12. The complainant's third argument summed up in consideration 9 above – that she was entitled to sick leave from 2 September 2019 until her disciplinary dismissal on 13 December 2019, is unfounded. She did not provide the Organization with the requisite medical report. For the reasons already stated in consideration 11 above, the 28 October 2019 *"[c]ertificat médical"* is not tantamount to a "medical report".

Her contention that she was never requested, beyond 30 August 2019, to provide a medical report, and that she was not bound to provide it, unless expressly requested, also fails. The above-quoted staff rules must be interpreted within the meaning that an illness lasting more than three consecutive working days and up to one month must be justified with a "medical certificate", whereas incapacity to work continuing beyond one month must be justified with a "medical report". The concerned staff members are required to provide the medical documentation at their own initiative, in light of the wording of the staff rule: "[a]ny absence of more than three consecutive working days [...]

must be supported by a certificate"; "[w]here the work incapacity continues beyond one month, a medical report [...] is required" (Staff Rule 740.2). Pursuant to Staff Rule 740.3, only the further periodic medical reports must be provided on request of the Staff Physician. Thus, the complainant errs in asserting that the medical report required by Staff Rule 740.2 must be provided only if requested by the Staff Physician. In any case, the complainant was asked to provide a medical report on 9 October 2019, and this request cannot be interpreted as limited to her absence from 12 June to 30 August 2019, since on 9 October 2019 she had been absent from work for a further period exceeding one month (from 2 September). The 9 October 2019 email states: "I continue to receive sick leave notes. I am not in a position to endorse your sick leaves without a full detailed and comprehensive medical report". Thus, it is clear from the wording used, that SHW was requesting a medical report for the whole period, including the one from 2 September 2019 onwards. As to the complainant's contention that the Organization's request to provide a medical report did not include, in attachment, a letter for the complainant to send to her medical practitioner, as per paragraph 105 of section III.6.9 of the WHO e-Manual, and as it had previously done, in 2017, it is sufficient to recall the Tribunal's arguments already expressed in consideration 10 above. In brief, even if the 9 October 2019 email did not include such a letter, this circumstance would have no bearing on the outcome of the case, as the complainant was able to ask her physician for a medical report. In her rejoinder, the complainant contends that she received her salary in the period from September to December 2019 and this proved that her request for sick leave had been accepted. This is a mere assumption. There was no decision placing her on sick leave from 2 September onwards; the only decision governing her leave status was the 11 December 2019 decision, which denied sick leave and placed her on annual leave and on administrative leave.

13. As to the complainant's fourth argument summed up in consideration 9 above, regarding her placement on administrative leave without pay, it is appropriate to recall the relevant staff rules and the

Tribunal's case law on the suspension of staff subject to disciplinary proceedings.

Pursuant to Staff Rule 1120:

> "1120.1 In a case of alleged misconduct involving a staff member, if it is considered that the staff member's continued performance of functions is likely to prejudice the interests of the Organization, the staff member may be placed on administrative leave pending a conclusion on the allegation of misconduct. Such administrative leave may be with or, exceptionally, without pay.
>
> 1120.2 At the time of administrative leave under this Staff Rule, the staff member shall be given a written statement containing the reason for the administrative leave, his status during the administrative leave, and its probable duration. The statement may also specify the conditions under which the staff member may have access to WHO premises, equipment and documents.
>
> 1120.3 Administrative leave under this Staff Rule, with or without pay, shall not be considered a disciplinary measure. If misconduct is not established, the administrative leave shall end immediately. If the staff member is placed on administrative leave without pay and misconduct is not established, the amount withheld shall be promptly paid."

The Tribunal's firm case law holds that suspension decisions adopted in the course of disciplinary proceedings, including a decision to place a staff member on administrative leave with or without pay, are discretionary decisions, which are subject only to limited review. Such a review is limited to questions of whether the decision was taken without authority, was in breach of a rule of form or procedure, was based on an error of fact or law, involved an essential fact being overlooked or constituted an abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see Judgments 4674, consideration 19, and 4612, consideration 3). However, as a restrictive measure on the staff member concerned, the suspension must have a legal basis, be justified by the needs of the organization, and be taken with due regard to the principle of proportionality. A staff member does not have a general right to be heard before a decision to suspend is taken (see Judgment 4612, consideration 3).

The measure of administrative leave without pay was consistent with Staff Rule 1120.1 and with the Tribunal's principles regarding the proportionality of the suspension. It can be inferred that the complainant's position was viewed as exceptional. In the circumstances, this was reasonable. The complainant's contention that she was not and could not have been in a position to prejudice the interests of the Organization, as she was not performing any functions for the Organization at the time, because at the relevant time she was on "service-incurred sick leave", is misconceived. Indeed, it is based on the assumption that she was, at the relevant time, on sick leave for service-incurred illness. Instead, at the relevant time, there was no acknowledgment of a service-incurred illness. Even to date, there is no evidence in the file that her illness has been recognized as service-incurred. In addition, she could not be considered on sick leave, due to the lack of the requisite medical report. Nor might the fact that she was absent from work with no leave impede the Organization from suspending her from service pending disciplinary proceedings.

The contention, contained in the complainant's fourth plea, that her placement on administrative leave was unlawfully retroactive is unfounded, having regard to the specific circumstances of the case. Retroactivity in this case was justified by the need to regularize the complainant's leave status, as she had been absent from work as from 2 September 2019 with no entitlements.

The Tribunal also notes that her placement on administrative leave was consistent with the Organization's duty of care, and achieved a reasonable balance between the interests of the Organization and those of the complainant. Once the Organization had assessed that the complainant was not entitled to sick leave, it placed her on annual leave for as long as possible. After the exhaustion of her annual leave credit, she had no other entitlements to justify her absence. The Tribunal also notes, based on a comparison of Staff Rules 650 and 1120, that special leave with or without pay can be granted only when it is in the interest of the Organization, and it is, moreover, less advantageous – in terms of entitlements regarding pension and sickness insurance – for the staff member than administrative leave. The other available option was to

consider that she was on unauthorised absence which was, again, less advantageous for the staff member.

14. Turning to the complainant's contentions, throughout her third, fifth, and sixth pleas mainly, that the conduct of the Organization concerning her leave entitlements amounted to an abuse of authority and retaliation, and that the measure of administrative leave was a disguised disciplinary sanction, the Tribunal considers them devoid of merit. The 11 December 2019 decision and the impugned decision were based on an objective need to regularize her leave status, as she was absent from work from 12 June 2019 onwards, never went back to work before her disciplinary dismissal on 13 December 2019, and did not properly justify her absence. In such a situation, the complainant's contentions are mere assumptions, which remain unproven. The Tribunal's firm case law holds that the party asserting abuse of authority, bias and improper motive must prove it (see, for example, Judgments 4524, consideration 15, 4467, consideration 17, 4146, consideration 10, 3939, consideration 10, 2264, consideration 7(a), and 2163, consideration 11). Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification (see Judgment 4688, consideration 10).

The same principle regarding the burden of proof is applicable to retaliation: it is incumbent on the complainant to establish that actions or conduct complained of were retaliatory (see Judgment 4363, consideration 12). Along the same lines, the existence of a hidden disciplinary measure cannot be inferred from mere conjecture and could not be accepted unless it were proven (see Judgment 2907, consideration 23), and the complainant bears the burden of proof (see Judgment 4515, consideration 11).

15. Since the main claims of the complainant are unfounded, also her claims for moral and exemplary damages, for costs of the present proceedings, and for interest on all amounts owed, are without legal basis and are rejected.

16. In conclusion, as all the pleas are either unfounded or irreceivable and all the claims are rejected, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER