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

102nd Session **Judgment No. 2578**

The Administrative Tribunal,

Considering the third complaint filed by Ms M. A. against the World Health Organization (WHO) on 7 April 2005 and corrected on 9 September, the Organization's reply of 12 December 2005, the complainant's rejoinder of 9 February 2006 and the WHO's surrejoinder of 12 May 2006;

Considering Article II, paragraph 5, 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. WHO Staff Rule 1030 reads as follows:

"1030. TERMINATION FOR REASONS OF HEALTH

1030.1 When, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member is incapable of performing his current duties, his appointment shall be terminated.

1030.2 Prior to such termination the following conditions must be fulfilled:

1030.2.1 the medical condition must be assessed as of long duration or likely to recur frequently;

1030.2.2 reassignment possibilities shall be explored and an offer made if this is feasible;

1030.2.3 participants in the Pension Fund shall have their pension rights determined.

1030.3 A staff member whose appointment is terminated under this Rule:

1030.3.1 shall be given three months' notice;

1030.3.2 may be entitled to a disability benefit in accordance with the rules of the Pension Fund;

1030.3.3 may be entitled to a disability payment in accordance with the terms of the insurance coverage provided for in Rule 720.2;

1030.3.4 shall receive a termination payment at the rates set out in Rule 1050.4, provided that the amount due under that Rule, together with any periodic disability benefits due in the 12 months following termination and payable by virtue of the provisions of Section 7, shall not exceed one year's terminal remuneration;

1030.3.5 shall always have the option of resigning."

The complainant, a French national born in 1946, joined the WHO in May 1980 after being transferred from another organisation. She had worked previously for the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT), the predecessor of the World Trade Organization, since 1974. At the material time she was working as a supply assistant at grade G.7 in the WHO's Procurement Services.

On 10 March 2003 the Coordinator of Personnel Administration informed the complainant that the Joint Medical Service had confirmed that the sick leave she had taken from 8 October 2002 to 31 March 2003 was directly related to the car accident she had had on 3 October 2002 on her way back from work. Since that accident was considered service-related by the Advisory Committee on Compensation Claims, the period concerned would not be deducted

from her sick-leave entitlements, so that she still had available 41 working days of sick leave from 1 April 2003. The Coordinator added that if the complainant was unable to return to work by 28 May, she would have exhausted her sick-leave entitlements and the Organization would then be obliged to terminate her appointment in accordance with the provisions of Staff Rule 1030. The complainant returned to work on 1 April on a half-time basis. Towards the middle of May the WHO Staff Physician recommended a further period of full-time sick leave, starting 19 May, which would be considered attributable to the aforementioned car accident.

By a letter of 14 November 2003, while the complainant was still on sick leave, the coordinator of the Personnel Administration informed her that the Organization had decided to terminate her appointment for health reasons with effect from 30 November and that she would receive a payment equivalent to three months' salary in lieu of notice. She added that the complainant had the option either of asking for the Pension Fund to examine her entitlement to a disability benefit or of resigning, which would immediately entitle her to an early retirement pension. She asked the complainant to let her know in writing by 30 November which of these options she preferred. On 4 December the complainant filed an appeal against that decision with the Director-General, saying that she was not requesting the convening of a medical board of review since she was challenging the decision only on an "administrative and legal" basis, on the grounds that the Administration had not fulfilled "any of the prior conditions required to terminate a contract". The Director of Human Resources Services replied on 23 December 2003, on behalf of the Director-General, that it was "essential that the matter be examined first by a medical board of review" and that once he had that board's opinion, the Director-General would decide whether any administrative or procedural questions remained outstanding, in which case they would be referred to the Board of Appeal. He added that it had exceptionally been decided to postpone the separation date to 1 March 2004, so as to allow her to complete a span of 30 years' contributions to the United Nations Joint Staff Pension Fund (UNJSPF).

The Medical Board of Review issued its opinion on 25 February 2004 stating that the complainant was incapable for health reasons of performing her duties. It described the reasons, assessed the degree of disability at 50 per cent (adding that in the event of work being resumed on a 50 per cent basis "regular activity [could] not be guaranteed and significant absenteeism [was] to be expected") and, lastly, replied in the affirmative to the question of whether the illnesses affecting the complainant were of long duration and likely to recur frequently. The Director-General then decided to refer the complainant's appeal to the Board of Appeal which, in a report issued in September 2004, recommended that it be rejected. By a letter of 10 January 2005, which constitutes the impugned decision, the Director-General informed the complainant that he was maintaining the decision of 14 November 2003 to terminate her appointment for health reasons.

B. The complainant contends that none of the three conditions listed in Staff Rule 1030.2 has been fulfilled. Firstly, she submits that, according to two letters of September and November 2003 sent by her regular physician, her state of health was stabilised and should enable her rapidly to resume full-time professional activity. This was confirmed in the course of a medical examination carried out in December 2004 by three independent physicians from the university hospitals of Geneva. She adds that "the after-effects of her [service-related] accident [were] not likely to be repeated and a car accident was in any case not a recurring illness". Secondly, she points out that the Administration took no steps to find her another assignment. On the contrary, the WHO showed a lack of good faith and cooperation, for instance by removing her personal printer, which forced her to use one in the corridor despite her disability and use of crutches. Thirdly, she was not sent the certificate determining her pension rights "in good time". Moreover, the first condition laid down in Rule 1030.3, namely the obligation to give three months' notice, was not met either, at least not initially.

She accuses the defendant of having mistakenly started to count her days of leave from 19 May 2003 as "normal" sick leave again and no longer as leave related to her car accident, although her absence was still due to the effects of that accident (her recovery having been, in her view, "sabotaged by the behaviour of her supervisors"). Her dismissal, based on the fact that she had exhausted her sick leave and her annual leave entitlements, was therefore "neither justified nor lawful". She accuses the WHO of being in breach of its fundamental obligations towards its staff, namely to act in good faith, to safeguard their reputation and dignity, to keep them informed of any action that may affect their rights and legitimate interests and to preserve the latter. Drawing up a long list of the Organization's failings, she concludes that these justify the award "*ex-aequo et bono*" of 100,000 Swiss francs in compensation for moral injury. Lastly, she accuses the Administration of negligence and of excessive delay in reaching a decision, on the grounds that the 13-month period that elapsed between the filing of her appeal and the Director-General's final decision was "excessively long".

The complainant asks the Tribunal to set aside the decisions of 14 November 2003 and 10 January 2005, to

"confirm [...] that her leave entitlements were not affected by her absence due to a service-related accident", to order the WHO to pay her all "her salaries and allowances due from 29 January [*recte* February] 2004 until the date of [this] judgment", to authorise her to be reinstated from the date of the judgment until June 2006, the date of her retirement or, if that is not possible, to extend payment of the aforementioned salaries and allowances until that date, to re-establish the pension rights to which she would have been entitled had there been no "dismissal decision", to award her an initial "substantial indemnity" representing damages for moral injury owing to the breach of her fundamental rights and of the WHO's obligations towards her and a second "substantial indemnity" for the delay in the internal appeal procedure. Lastly, she claims costs.

C. In its reply the Organization refers back to the conditions listed in Staff Rule 1030, which, in its view, were fulfilled when the complainant's appointment was terminated. In the first place, it points out that the complainant is suffering from multiple disabling disorders, of long duration and likely to recur frequently, which was unanimously confirmed by the Medical Board of Review in its opinion of 25 February 2004. Moreover, it was impossible to reassign the complainant to another post, given that the Joint Medical Service could not predict when her leave would come to an end, that there was no available assignment more sedentary than the one she held and that "any resumption of work would have been at best only irregular and unpredictable". Lastly, the WHO points out that the complainant was given estimates of her pension rights on 19 March, 21 May and 18 November 2003. It recalls that the complainant had indicated, in the first half of 2003, that she did not wish to apply for a disability benefit and that subsequently she never replied to the question she was asked on 14 November 2003, as to whether she would like her case to be referred to the WHO's Pension Committee in order to decide whether she would receive a disability benefit or whether she preferred to opt for early retirement. The defendant states that it did nevertheless refer the case to that Committee, which decided to grant the complainant a disability benefit with retroactive effect from 28 February 2004. As for the notice of termination of her appointment, the Organization asserts that that condition was fulfilled since, once the situation had been reassessed, the effective date of termination was postponed to 1 March 2004.

The WHO accuses the complainant of presenting a truncated version of the facts by omitting to mention the report of the Medical Board of Review which is a fundamental item. It adds that the Board's conclusions, signed by its three members, including the complainant's regular physician, and the Director-General's decision based on those conclusions, cannot be invalidated by a medical examination carried out in December 2004, that is to say more than one year after the decision to terminate her appointment, at the request of the insurers of the vehicles involved in the accident. The defendant rebuts any suggestion that the complainant was "badly treated" and points out that the shared printer was "only a few steps away" from her office. It adds, moreover, that the termination of an appointment for health reasons does not depend on the leave entitlement being exhausted, which was mentioned in the letter terminating her appointment only for information. It therefore requests that all the complainant's claims be dismissed, adding that the lengthy appeal procedure was due to her wish to involve the Board of Appeal. It was therefore not attributable to any undue delay on the part of the WHO.

D. In her rejoinder the complainant asserts that the disorders mentioned by the defendant "concern [her] medical history and not her future" and that the remaining ones are "stabilised, under supervision and under treatment". They were therefore not such as to justify either the termination of her appointment or the application for a disability benefit. The complainant contends that the award of that benefit – which she never sought but which she accepted because she was destitute – constitutes a form of "misappropriation" at her expense and at the expense of the UNJSPF. She further draws attention to the fact that after her departure her former duties were outsourced, which in her view suggests that her post was in fact being abolished, as provided for in section 1050 of the Staff Rules. She adds that duties similar to hers, in her former unit, were offered to a retired staff member of the Organization. In her view, the report submitted by the Chief of the WHO's Medical Services to the Medical Board of Review was full of inaccuracies and malicious comments which influenced the Board. The complainant maintains that the WHO has invariably related the exhaustion of her leave entitlements to the termination of her appointment for health reasons under Staff Rule 1030 and that it cannot now assert that this was mentioned only for information.

E. In its surrejoinder the defendant denies having shown any prejudice against the complainant. It explains that "the application of Staff Rule 1030 rests on an assessment by the Organization of the state of health of the staff member concerned and his or her ability to carry out his or her duties – such assessment being based on the opinion of the Chief of the Medical Services and, in the event of an appeal, on the recommendation of a medical board of review set up for that purpose in accordance with Staff Rule 1220". It adds that in the complainant's case that procedure was followed and that "[t]he complainant's personal opinion cannot replace that assessment". It contends

that the complainant's criticism both of the Chief of the Medical Services and of the Medical Board of Review is justified neither in fact nor in law. According to the WHO, the complainant's state of health was properly taken into account at all stages of the procedure and there was no flaw in the procedure nor any factual mistake or inconsistency, no essential facts were overlooked and no plainly wrong conclusions were drawn from the evidence. It also denies that the complainant's duties were outsourced. Lastly, it maintains that the time that elapsed between the complainant's appeal and the final decision was not excessive and in any case was not attributable to any undue delay on its part.

CONSIDERATIONS

1. The complainant was formerly employed as a supply assistant in the WHO's Procurement Services. Her appointment was terminated for reasons of health by a decision of 14 November 2003 based on Staff Rule 1030, according to which "[w]hen, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member is incapable of performing his current duties, his appointment shall be terminated". That decision was to take effect on 30 November 2003. It stipulated that the complainant's contract, which had expired on 1 June 2003, was extended until 30 November and that she would receive a "payment equivalent to three months' salary [...] in lieu of notice". The complainant filed an appeal against the decision of 14 November on the grounds of procedural flaws and called for her case to be referred to the Board of Appeal. On 23 December 2003 the Administration replied that a medical board of review should first be convened to examine the complainant's case, as provided for in Staff Rule 1220.2, after which, if any administrative or procedural matters remained to be settled, the case could be referred to the Board of Appeal. The effective termination date was "exceptionally" postponed until 1 March 2004, on the understanding that the complainant could remain a staff member during the period of notice, that is, until 29 February 2004.

2. The Medical Board of Review, comprising three medical practitioners, namely the complainant's regular physician, the Chief of the WHO's Medical Services and an internist rheumatologist acting as an expert and selected by the first two, considered the case on 25 February 2004. After taking into account the complainant's medical record, the disorders and illnesses she was experiencing and the consequences of a service-related car accident in which she had been involved on 3 October 2002, the Medical Board of Review concluded unanimously that the complainant was incapable for health reasons of performing her duties and that her accident-related condition should be considered as stabilised at 15 January 2004 without functional after-effects. The complainant's degree of incapacity was assessed by the majority of the Board at 50 per cent, with the rider that "regular activity cannot be guaranteed and significant absenteeism is to be expected". Lastly, to the question of whether the medical condition was "of long duration and likely to recur frequently", the Board replied in the affirmative.

3. Considering that certain administrative and procedural matters remained to be settled before a final decision could be taken, the Director-General submitted them to the Board of Appeal, making it clear that "the medical aspects of the case were not to be reconsidered by the Appeal Board, as the Medical Board of Review had completed its examination". The Board of Appeal nevertheless requested further information from the Joint Medical Service and from the Administration, as it entertained doubts regarding the complainant's state of health and considered that, according to the information it had been given, the complainant's illness was of long duration and left her unable to resume her work. In addition, the Board found that the Administration had in fact looked for a more suitable post for the complainant, contrary to her allegations, that she had been informed about her pension rights and that she had been clearly notified of her leave entitlements. It noted that, although the Administration's decision to offer three months' salary in lieu of notice expressed in the letter of 14 November 2003 did not comply with the provisions of Staff Rule 1030.3, that mistake had been made good in the letter of 23 December 2003, which had postponed the termination date until 29 February 2004, while allowing the complainant to complete 30 years of contributions to the Pension Fund. Lastly, it concluded that the Organization had "taken account of the complainant's situation in order to safeguard her rights", even though she was no longer under contract from 1 June to end November 2003, and that her claim for compensation for moral injury should be dismissed.

4. By a decision of 10 January 2005 the Director-General, in the light of the recommendations of the Medical Board of Review and the Board of Appeal, confirmed the decision of 14 November 2003 to terminate the complainant's appointment for reasons of health. The latter has filed a complaint with the Tribunal, arguing:

· that the termination of her appointment was in breach of Staff Rules 1030.1, 1030.2 and 1030.3, since she did not suffer from an illness of long duration or likely to recur frequently;

· that the possibility of reassigning her to another post was not considered and that her pension rights were not determined; and

· that the rules governing notice were not complied with.

She also contends that the Administration was wrong to consider on 14 November 2003 that she had exhausted her leave entitlements and that the WHO breached its obligations to act in good faith, to keep its staff informed and to safeguard her legitimate interests, reputation and dignity, especially by refusing to reply to her many letters concerning the renewal of her contract, by dismissing her abruptly and unlawfully when she was within two years of retirement, by accepting the adverse comments contained in the Chief of the Medical Services' report which described her as unstable, unmotivated and unfit for work, and by leaving her without income until she was forced in March 2005 to admit disability in order to receive a pension. In view of these factors and, according to her, the WHO's delay in settling the case, the complainant claims "substantial" compensation. She also seeks reinstatement or, failing that, a further award of compensation. Lastly, she asks for confirmation of the fact that "her leave entitlements were not affected by her absence due to a service-related accident".

5. The text of Staff Rules 1030.1, 1030.2 and 1030.3 is given under A above.

6. The first issue to be considered is whether the complainant was suffering from an illness of long duration or likely to recur frequently, which rendered her incapable of performing her duties. In this respect, the list of the various pathologies affecting the complainant, and the details of the periods of sick leave she was granted, particularly after 7 July 2000, both before and after the car accident she was involved in on 3 October 2002, leave no doubt regarding the conclusions of the Medical Board of Review, which considered unanimously that she was incapable of performing her duties. The Tribunal, which is not competent to replace the medical practitioners' opinions with its own, as it has recalled on several occasions since its Judgment 620, finds no obvious error of judgement and considers that the Board was properly constituted, was not bound to hear or examine the complainant personally, since her medical file was sufficiently substantiated, and showed no trace of animosity towards her in its findings. Nor is there any evidence which might cast doubt on the Chief of the WHO Medical Services' objectivity and impartiality. The complainant contends that, at the time her appointment was terminated, her medical condition had stabilised because the disorders related to her car accident no longer affected her work capacity, and she supports this argument by citing the conclusions of a report dated 22 December 2004 drawn up by medical experts from the university hospitals of Geneva at the request of the insurers for the purpose of assessing the consequences of the aforesaid accident. This report, however, concerns the after-effects of the accident and, although it concludes that the complainant's medical condition is stabilised and "does not exclude a resumption of office work on a 100 per cent basis", its conclusions do not contradict those of the Medical Board of Review, which had also found that her medical condition should be considered as stabilised at 15 January 2004. The basis for the impugned decision was not that the after-effects of the accident left her unfit for work, but that she was unable to perform her duties owing to a variety of disorders she was suffering from, which were of long duration and likely to recur.

7. To the complainant's assertion that in any case the Organization did not consider the possibility of assigning her to another post compatible with her "alleged health problems", the defendant rightly replies that there was no way it could offer her a more sedentary post than the one she occupied and that any resumption of work, even in another post, would have been at best only "irregular and unpredictable".

8. The complainant also accuses the Organization of having failed to determine her pension rights, in breach of the provisions of the above-mentioned Staff Rule 1030.3. The defendant asserts, without being seriously contradicted, that she was given estimates regarding her pension rights in March, May and November 2003 and that, despite her refusal in the first half of 2003 to have her entitlement to a disability benefit recognised, it nevertheless submitted her case to the Pension Committee, with the effect that she was granted an annual disability benefit amounting to 68,294 United States dollars with retroactive effect from 28 February 2004. In view of all these circumstances, the Organization cannot be regarded as having breached the provisions of Staff Rule 1030.3, especially since it had specifically notified the complainant, in its letter of 14 November 2003, exactly what her entitlements were, either to a disability benefit or to an immediate retirement pension if she chose to tender her resignation.

9. However, the Tribunal notes, as did the Board of Appeal, that the impugned decision of 14 November 2003 wrongly terminated the complainant's contract as from 30 November 2003, which was equivalent to giving her 16

days' notice, in breach of Staff Rule 1030.3.1, which stipulates a period of notice of three months. That breach was remedied by the subsequent decision of 23 December 2003 postponing the separation date until 1 March 2004 and allowing the complainant to remain a member of staff during the period of notice, that is, until 29 February 2004. Nevertheless, that irregularity – even though it ultimately had no adverse financial consequences for the complainant and though the fact that it was subsequently remedied means that the impugned decision cannot be regarded as unlawful – increased the complainant's feeling of uncertainty regarding her situation, which in fact had not been settled despite her reiterated requests since the expiry of her contract on 31 May 2003. Insofar as it renewed that contract retroactively only on 14 November 2003, initially with a termination date of 30 November, the Administration did not treat the complainant with due consideration and she is therefore justified in claiming compensation for moral injury. It may be noted in this respect that, contrary to what the defendant maintains, the complainant did not enlarge on the claims of her internal appeal in her complaint before the Tribunal, since she complained to the Board of Appeal that she had failed to obtain a renewal of her contract despite a request sent on 1 May 2003 and reminders of 19 May, 3 June, 5 June, 19 June and 31 October 2003. The Tribunal considers that, in the circumstances, the moral injury suffered by the complainant may be fairly assessed by ordering the defendant to pay the complainant 5,000 Swiss francs in compensation.

10. On the other hand the Tribunal dismisses the other claims: the argument about the leave entitlements which should have been due to the complainant is irrelevant, since the impugned decision is not based on the fact that she had exhausted her leave entitlement and since in any case the Administration set at 60 days, that is, the maximum provided for in Staff Rule 630.8, the entitlement due to her under that head in the settlement of her rights. Similarly, the Tribunal cannot entertain the complainant's grievances concerning the manner in which she was replaced and the fact that her requests for a separation by mutual agreement were not accepted, whereas similar requests by some of her colleagues were. Furthermore, the submissions do not show that the Organization failed to preserve the complainant's dignity or to show consideration for her in the performance of her duties, specifically by obliging her despite her disability to use a printer located in the corridor. Lastly, the delays in the procedure are not attributable solely to the Organization, which cannot be blamed in that respect.

11. It may be concluded from the above that the complainant's claims to set aside the decision of 14 November 2003, as amended on 23 December 2003, and that of 10 January 2005, and her claim to be reinstated in her former position or failing that, to be awarded compensation, must be dismissed. The Tribunal will, however, award her compensation for moral injury, which, in the circumstances, will be set at 5,000 Swiss francs.

12. As she partially succeeds, the complainant is entitled to costs set at 2,000 francs.

DECISION

For the above reasons,

1. The WHO shall pay the complainant compensation for moral injury in the amount of 5,000 Swiss francs.

2. It shall also pay her 2,000 francs in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.