112th Session **Judgment No. 3095**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mrs K. J.L. against the World Health Organization (WHO) on 6 May 2010 and corrected on 19 June, WHO's reply of 12 October, the complainant's rejoinder dated 12 November 2010 and the Organization's surrejoinder of 15 February 2011;

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

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

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

A. Facts relevant to this case are given in Judgments 2839 and 2840, delivered on 8 July 2009, and Judgment 2895, delivered on 3 February 2010, concerning the complainant's first and second complaints. Suffice it to recall that the complainant, a former staff member of WHO, resigned in September 2005. As she was then on sick leave, her separation was deferred until 1 January 2007, when the Organization's Director of Health and Medical Services (HMS) considered that she was fit to resume work, on the basis inter alia of her own doctor's reports. In her second complaint the complainant objected to the fact

that she had not undergone a medical examination upon separation from service. Following the delivery of Judgment 2840 in July 2009, WHO invited her to be examined by a United Nations physician. She accepted this offer and was examined by Dr V. the following month, but she also asked to undergo a psychiatric examination.

In light of Dr V.'s report, which indicated that the opinion of a psychiatric specialist should indeed be sought, WHO decided that the complainant should be examined by a psychiatrist designated by the Organization, who had no prior connection with the case. By an e-mail of 16 October 2009 it informed her that Dr R. was available to examine her and asked her to confirm her availability. WHO made it clear that the purpose of such examination would be to determine her current health status, not to review her health status at the time of separation. The complainant replied that she would refer the matter to the Tribunal.

Having obtained a copy of Dr V.'s report, on 18 November 2009 she requested an immediate determination as to whether she was deemed fit or unfit for work. In this regard she pointed out that the examination performed by Dr V. was supposed to be an end-of-service examination. WHO replied on 19 and 23 November 2009 that no such determination could be made until she had undergone a psychiatric examination. On 9 February 2010, following the delivery of Judgment 2895, the complainant again asked for a determination as to her medical fitness on the basis of Dr V.'s findings, which, in her view, was required by the said judgment. By an e-mail of 12 February 2010, WHO informed her that it did not agree that such determination was required by Judgment 2895. That is the impugned decision.

B. The complainant contends that WHO has repeatedly refused to acknowledge her illness, thereby breaching its Staff Rules as well as its duty of care. In so doing, it committed an abuse of power and contributed to the deterioration of her condition. She alleges in particular that the Director of HMS was fully aware of her illness when she "decided to terminate" her contract in December 2006 without the mandatory comprehensive exit medical examination. When the Organization allowed her to undergo that examination

in August 2009 and the results confirmed that she was not fit for separation, the Director of HMS still refused to make a determination of her state of health. In the complainant's view, this constitutes evidence of the improper motives behind WHO's treatment of her separation from service. She suggests that the Organization purposely delayed the exit medical examination so as to ensure that, three and a half years after her breakdown, there would be no more traces of her service-incurred illness and she would therefore be unable to claim compensation for it. When WHO finally agreed to conduct the medical examination, it was merely attempting to render her second complaint moot.

Additionally, the complainant asserts that WHO concealed the exit medical examination results, despite her repeated requests for feedback from the Director of HMS. In her view, the Organization had a duty to inform her of these results as a matter of urgency in light of the seriousness of her condition, and that waiting almost three months before doing so constitutes further evidence of the improper motives underlying the decision of the Director of HMS. She accuses the latter of interfering in medical examinations conducted in 2006 by attempting to persuade the psychiatrist who examined her to change his prognosis. She points out that all the successive medical examinations conducted between November 2005 and August 2009 are consistent in their diagnosis of her condition and that it was unreasonable for the Organization to refuse to provide a medical classification of her condition until she had been examined by yet another doctor. She contends that, in appointing another specialist of its own choice, the Organization committed an abuse of power. Moreover, the decision to appoint a psychiatrist based in Switzerland, even though she could not travel alone because of her condition, coupled with the threat that, should she fail to undergo that examination, compensation might be denied, constitutes not only an abuse of power but also a violation of the Organization's duty of care.

The complainant asks the Tribunal to quash the exit medical clearance issued upon separation, and seeks further relief on the basis

that she was unlawfully separated whilst unfit for work. She also claims damages and costs.

C. WHO replies that the claims put forward in the present complaint are *res judicata* in view of Judgments 2839 and 2895. The complainant is seeking to reopen issues which have already been the subject of final and binding decisions by calling on the Tribunal to rely on Dr V.'s report as a basis for declaring that she was not medically fit upon separation. The Organization stresses that in Judgment 2839 the Tribunal stated that this was "not an appropriate case for reinstatement", whilst in Judgment 2895 it held that "the complainant's claim for reinstatement of her sick leave [was] not appropriate in the circumstances" and upheld her separation from service. WHO adds that a medical examination conducted almost three years after her separation from service and for a distinct purpose has no bearing on the question of her medical fitness upon separation and therefore does not give rise to a new fact that would warrant reopening these issues. It also considers this complaint manifestly irreceivable on the ground that it is time-barred, as the complainant was first informed on 19 November 2009 that no determination of her medical fitness would be made on the basis of Dr V.'s report.

The defendant argues that the complaint is clearly devoid of merit. In particular, the examination conducted by Dr V. in August 2009 was never intended to establish any new separation date. Its principal purpose was to establish the complainant's current state of health, and this was made clear to her on a number of occasions. In light of Dr V.'s comment in his report that the opinion of a psychiatrist was required, it was reasonable for the Organization to postpone making a determination of her current state of health until such time as a specialist psychiatric opinion had been obtained. In fact, the complainant herself had asked to undergo a psychiatric examination and it is the complainant's own refusal to be examined by the psychiatrist designated by WHO, in spite of considerable efforts made by the Organization to accommodate her preferences, which has delayed such a determination.

Similarly, the results of the medical examination were not concealed from the complainant. On the contrary, she was kept regularly informed and was promptly provided with a copy of the report when she asked for it. It further denies that the report was deliberately withheld to prevent her from submitting it in proceedings before the Tribunal and notes that she could have sought leave to file further submissions if she considered that it contained new and relevant information.

Additionally, WHO categorically denies that it has at any time acted to prevent the complainant from obtaining the necessary medical assistance for her condition, or that it has interfered with any treatment she has sought to receive. The Organization has recognised her illness as service-incurred and has informed her of her entitlements, including the reimbursement of medical expenses. It strongly rejects the complainant's unsubstantiated and offensive claims that the Director of HMS and other members of the Administration acted improperly and with personal prejudice in the determination of her medical fitness.

D. In her rejoinder the complainant presses her pleas. She denies that her complaint is time-barred and contends that, while WHO indeed confirmed in November 2009 that it would provide her with a medical determination of her current state of health once a report from a mental health specialist had been received, the impugned decision of 12 February 2010 constitutes a new and final decision not to provide her with any medical determination at all. When the Tribunal issued Judgment 2895 on 3 February 2010, it was not aware that the results of the medical examination she underwent in August 2009 and to which it referred in consideration 26 had been kept secret from her and that a few days later the Director of HMS would refuse to provide any medical determination whatsoever. She asserts that WHO has not only violated its Staff Rules in denying her the mandatory exit medical examination for three years, but is now in fact refusing to accept and make use of any of the medical evidence accumulated since 2005. In so doing it has unlawfully placed her in a situation

of legal limbo without any disability benefit or other form of compensation for the five years since her career was interrupted owing to a service-incurred illness.

E. In its surrejoinder WHO maintains its position. It reiterates that the complainant is seeking to challenge findings of fact and the ruling set out in Judgment 2895, adding that her efforts to contest these matters in the present proceedings are improper and tantamount to an abuse of process.

CONSIDERATIONS

1. The background to the facts of this complaint may be found in Judgments 2839, 2840 and 2895. In the latter judgment, under 23, the Tribunal concluded that WHO's "unilateral decision to 'waive' the exit medical examination constitute[d] a violation of Staff Rule 1085". In August 2009, prior to the delivery of that judgment, the complainant underwent a medical examination by Dr V., a United Nations physician designated by WHO, who concluded that the complainant "suffere[d] from depression and post-traumatic stress disorder, both to a severe degree".

2. In summary, on the basis of this medical finding, the complainant claims that on 9 February 2010 she asked WHO to make a determination as to whether she was fit or unfit for work. In her response of 12 February 2010 the Director of Human Resources Services stated: "simply put, WHO does not agree that [Judgment 2895] requires such a determination to be made". That decision is impugned in the complaint before the Tribunal.

3. WHO submits that the complaint is irreceivable on the grounds that the response of 12 February 2010 is not the "real" decision regarding the complainant's request. It asserts that the latter had been effectively informed of the Administration's decision prior to that date. In support of its assertion, it relies on an earlier exchange of e-mails between the complainant and the Director of HMS.

4. In particular, in an e-mail of 18 November 2009, the complainant asked the Director of HMS to classify her as fit or unfit for work on the basis of Dr V.'s report. The relevant parts of her request read as follows:

> "I have noted on the WHO periodic medical examination form that you have omitted to fill in your conclusion as Director [of HMS] on page one, to the results of what is indicated to be an 'end of service examination'.
>
> I hereby request to be informed of your final decision as to whether you maintain me as physically cleared or not. If you decide to maintain me as 'medically fit', I will appreciate you clarifying on what basis."

5. The Director of HMS responded to this request on 19 November and again on 23 November 2009, stating on both occasions that no conclusion could be drawn on the complainant's current state of health until she had undergone a psychiatric examination. On 9 February 2010 the complainant made the request referred to above, arguing that her entitlement to such a determination was a natural consequence of Judgment 2895. As already indicated, WHO replied to this request on 12 February 2010.

6. The Organization contends that its e-mail of 12 February did not constitute a new decision open to challenge within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal and did not trigger the time limit prescribed in paragraph 2 of the same Article. Furthermore, in its view, Judgment 2895 imposed no obligation on WHO to make a new determination as to her fitness or unfitness for work. It also argues that its November and February e-mails all concerned the same decision, namely that WHO would not reach a conclusion on the complainant's current health until she had undergone a psychiatric examination. In view of the date of its decision, WHO submits that the ninety-day time limit for filing a complaint impugning that decision was not complied with and, accordingly, the complaint should be dismissed as irreceivable.

7. The complainant asserts that the Organization's e-mails of 19 and 23 November 2009 and of 12 February 2010 do not convey the same decision. She argues that whereas the e-mails of November

convey the decision that "it [was] not possible" for WHO to draw a conclusion on her current state of health "until [she had] undergone a psychiatric examination" – which was, in her view, a decision to delay rendering a determination as to her fitness or unfitness for work until she had undergone a psychiatric examination – the e-mail of 12 February 2010 is framed differently as it merely states "simply put, WHO does not agree that [Judgment 2895] requires […] a determination to be made [with regard to your state of health]". She takes the position that this latter e-mail constituted a new and final decision not to provide her with a medical classification regardless of whether she underwent a psychiatric examination.

8. The complainant also asserts that by failing to make a determination as to her medical fitness when it received the psychiatrist's certificate issued by a clinic in Sweden in May 2010, WHO confirmed the finality of its decision of 12 February 2010 not to provide her with any medical classification at all.

9. In the Tribunal's view, the text of the e-mail of 12 February 2010 does not lead to the conclusion that the Organization renounced the position it had communicated to the complainant in its e-mails of November 2009, namely that it would render a determination as to her fitness or unfitness for work, only after she had undergone a new psychiatric examination. The text of the e-mail simply disputes the complainant's assertion that Judgment 2895 required WHO to make a determination as to whether the complainant was fit or unfit on the basis of the medical information it already possessed. As the Organization points out, the complainant's request of 9 February 2010 for a determination of her state of health specifically refers to her interpretation of Judgment 2895. It was in response to that assertion that in its e-mail of 12 February 2010 the Organization stated "[w]ithout addressing the issue in full, WHO does not agree that [Judgment 2895] requires such a determination to be made".

10. The Tribunal observes that apart from its reference to Judgment 2895, the complainant's request of 9 February 2010 for a determination of her medical status is in substance identical to her request of 18 November 2009 for a determination of her medical fitness on the basis of Dr V.'s report.

11. As to the complainant's argument based on the Organization's lack of response following the medical report issued by a clinic in Sweden, the Tribunal takes the view that, as stated in that report, its purpose was to address the question of existing and ongoing invalidity and not the question of the complainant's fitness for work.

12. The Tribunal concludes that WHO's e-mail of 12 February 2010 does not constitute a new decision but simply a reiteration of the decisions of 19 and 23 November 2009. As the complainant did not challenge these decisions within the period laid down in Article VII, paragraph 2, of the Statute of the Tribunal, the present complaint was filed outside the prescribed time limit and is therefore time-barred.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

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

Delivered in public in Geneva on 8 February 2012.

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