V.

v.

UNESCO

128th Session **Judgment No. 4173**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. V. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 May 2016 and corrected on 21 June, UNESCO's reply of 6 October 2016, the complainant's rejoinder of 3 January 2017, corrected on 16 January, UNESCO's surrejoinder of 27 April, the complainant's additional submissions of 1 August and UNESCO's final submissions of 16 November 2017;

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 assign her to another duty station.

By a memorandum of 19 March 2014 the complainant, who was a Liaison Officer, grade P-4, at UNESCO's New York Office (United States of America), was informed that the Director-General had decided to relocate the duties and responsibilities of her post to the Montevideo Office (Uruguay) to meet programmatic requirements. She had also decided to assign her, effective 1 July 2014, to that post. On 28 March

she was informed of the change of her employment conditions, and that her contract was extended for 24 months from her date of transfer.

On 22 May the complainant wrote to the Director-General requesting her, on the basis of the Updated Policy on Geographical Mobility in Administrative Circular AC/HR/32 of 30 October 2013 (hereinafter "the Geographical Mobility Policy"), to waive the reassignment decision on the ground that she and her husband were suffering from a serious illness for which they were undergoing medical treatment in the United States. She added that on 17 July 2014 she would be within three years of retirement and that paragraph 9 of the Circular provided that geographical mobility did not apply to staff who were within three years of retirement. The Chief Medical Officer (CMO), to whom the matter had been referred, concluded on the basis of available information that the complainant's assignment to Montevideo was possible although not ideal. On the basis of that conclusion the Director-General confirmed, on 24 June 2014, the decision to assign the complainant to Montevideo. A few days later, the complainant took sick leave for another illness. An exchange of communications ensued between the Administration, the complainant (or her representative) and the CMO, which resulted in postponing the date of her assignment to Montevideo.

On 5 September 2014 the complainant was informed that, on the basis of the assessment made by the CMO, the Director-General had decided to maintain her assignment to Montevideo. However, she was authorized to stay in New York while on sick leave and for medical reasons for a period of up to one year starting from 1 September 2014. Her medical condition would be monitored by the CMO periodically on the understanding that she would be required to report for duty at the Montevideo Office prior to the expiry of that one-year period should her medical condition permit, as per the assessment of the CMO. The arrangement did not constitute a rescission or deferment of her assignment to Montevideo. As from 1 September 2014, she was administratively attached to the Montevideo Office.

On 7 November she submitted a notice of appeal and, on 3 December, she submitted her detailed appeal to the Appeals Board challenging the decision of 19 March 2014 to assign her to Montevideo.

She asked that the assignment decision be suspended while her appeal was pending. She sought the setting aside of the decision of 19 March and that of 5 September. She also asked to be reinstated in her post of Liaison Officer in New York or that the decision to assign her to Montevideo be deferred for two years starting 1 September 2014 and that she be reinstated to her post in New York during such deferment. In March 2015 the complainant asked the Chairperson of the Appeals Board to expedite her appeal.

On 28 April 2015 she was informed that the Director-General, while maintaining the decision to assign her to Montevideo, had decided to authorize her to stay in New York while on sick leave and for medical reasons for another six months, that is to say until 31 March 2016. By letter of 30 December 2015 her treating physician informed the CMO that she was fit to work provided she stayed in New York.

On 11 February 2016 the complainant was informed that, based on the latest medical information received from her treating physician, the CMO had concluded that she would not be able to report for work at the Montevideo Office within the next six to twelve months. Under these circumstances the Director-General had decided to place her on leave without pay from the date she exhausted her sick leave entitlements. In the meantime, necessary steps would be taken to initiate her termination for reasons of health under Staff Regulation 9.1.

On 20 May 2016 the complainant filed a complaint with the Tribunal against the implied rejection of her claims explaining that UNESCO had not filed its reply concerning the appeal she had lodged in November 2014.

The complainant asks the Tribunal to quash the decision of 5 September 2014 implicitly confirming the decision of 19 March 2014 to transfer her to Montevideo and to "arbitrarily" place her on sick leave while remaining in New York. She also asks the Tribunal to order that she be reinstated in her P-4 post as Liaison Officer in New York; alternatively, if the Director-General's decision is not quashed, she seeks authorization, for medical purposes, to work full time and remotely while in New York. In addition, she claims compensation for the loss of salary, pension, annual leave and medical insurance resulting

from the "arbitrary" placement on sick leave. She also claims compensation for the loss of her home leave entitlements and her annual leave. She increases the amount in the rejoinder. She further seeks moral damages and costs.

UNESCO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress or, in the alternative, as devoid of merit.

CONSIDERATIONS

1. The complainant held the position of Liaison Officer, a P-4 post, at UNESCO's New York Office. Due to a constrained budget situation, UNESCO undertook steps to reform and streamline the central and program support services that led to an overall reorganisation and a new staffing strategy. As part of the reorganisation process, in June 2013, the Director-General decided to restructure the Sector for External Relations and Public Information (ERI) into to two divisions, the Division of Member States and Partners (MSP) and the Division of Public Information (DPI). In the new structure, one of the MSP's six teams responsible for the Latin America and Caribbean Section was located in the Montevideo Office. As a result of this restructuring, the Director-General decided to relocate the Liaison Officer P-4 post the complainant encumbered to the Montevideo Office. On 19 March 2014 the complainant was informed that as a result of the restructuring of the ERI, the Director-General had decided to relocate the duties and responsibilities of the Liaison Officer post the complainant encumbered to the UNESCO Montevideo Office. The same memorandum informed the complainant of the Director-General's decision to assign her to the Montevideo Office to take up the duties of her post effective 1 July 2014.

2. On 22 May 2014, the complainant submitted a protest against the 19 March 2014 decision in which she requested a waiver of her reassignment pursuant to the Geographical Mobility Policy on the grounds of medical hardship and that she was within three years of retirement. On 28 May, the CMO asked the complainant to provide

information from her treating physicians for the purpose of providing medical advice concerning her reassignment. While the complainant was in the process of collecting the requested information, on 24 June the Director of the Bureau of Human Resources Management (HRM) informed her by memorandum that the CMO had reviewed her situation and would assist her in identifying appropriate treatment for her and her spouse in Montevideo. The memorandum states that the decision to relocate the post she encumbered was not taken pursuant to the Geographical Mobility Policy. Rather, it was based on the urgency of the need to meet programmatic requirements. For this reason, the Director-General confirmed the decision to relocate the Liaison Officer post to Montevideo and to assign the complainant to her post effective 1 July 2014. As a result of the stress arising from the 24 June decision and the prospect of a relocation to Montevideo in view of her and her husband's chronic medical conditions, the complainant became ill and went on sick leave on 26 June.

3. Over the next two months, there were multiple exchanges between the complainant and her counsel and the Director and other officials of HRM and the CMO. In these exchanges, the counsel submitted the medical reports and clarifications requested by the CMO concerning, among other medical concerns, the complainant's and her husband's serious chronic medical condition that required monitoring and treatment. During this same period, the complainant's date of reporting to the Montevideo Office was moved to 15 July and 31 July 2014.

4. On 5 September 2014, the Director of HRM informed the complainant that based on the CMO's assessment, the Director-General decided to maintain her assignment to the Montevideo Office. However, the Director-General authorized the complainant to stay in New York while on sick leave and for medical reasons for a period up to one year starting on 1 September 2014. The Director-General added that the complainant's medical condition would be monitored by the CMO periodically and that she would be required to report to the Montevideo Office prior to one year should her medical condition permit. Relevantly, the Director of HRM went on to state: "Please note that

this arrangement is approved by the Director-General for medical reasons only and shall not constitute a rescission or deferment of your assignment to UNESCO Montevideo Office. As from 01 September 2014, you are administratively attached to UNESCO Montevideo Office and report to the Director of UNESCO Office in Montevideo [...]. You will receive a [Notification of Personnel Action] reflecting this administrative arrangement."

5. On 7 November 2014, the complainant filed a notice of appeal against the Director-General's 19 March 2014 assignment decision that the Director-General maintained on 5 September 2014. On 3 December 2014, the complainant filed her detailed appeal with the Appeals Board. On 20 May 2016, the complainant filed the present complaint in which she impugns the implied decision to dismiss her internal appeal. UNESCO submits that the complaint is irreceivable as the complainant did not exhaust the internal means of redress as required in Article VII, paragraph 1, of the Tribunal's Statute. At this point, it is convenient to note that UNESCO's submissions on receivability start from the assertion that in the present complaint the complainant impugned two "different decisions", namely: (1) the Director-General's "decision of 19 March 2014 confirmed on 5 September 2014, to relocate her post to the UNESCO Montevideo Office"; and (2) "the series of decisions that allowed [the complainant] to stay in New York while on sick leave in order to receive medical treatment". This is incorrect. Having regard to the complainant's notice of appeal, the detailed appeal and the complaint form, it is clear that the only decision impugned in the present complaint is the Director-General's decision to assign the complainant to the Montevideo Office.

6. Regarding the delay itself, UNESCO submits that based on the complex facts and the Administration's need to obtain clarity concerning the complainant's ongoing medical and administrative situation, the Appeals Board extended the time for the Administration to submit its detailed reply for legitimate reasons. Moreover, the complainant has not "contested [these] reasons provided by the Organization explaining the delay." UNESCO's position is problematic for several reasons.

In its reply before the Tribunal, UNESCO states the following in relation to its requests for extensions of time:

– On 23 December 2014 the Organization requested a three-month extension to submit its reply to the Appeals Board. The request was granted on 31 December 2014.
– Pending an updated assessment from the CMO, on 3 April 2015 the Organization requested a three-month extension to submit its reply to the Appeals Board. The request was granted on the same date.
– On 30 June 2015 the Organization requested a three-month extension to submit its reply to the Appeals Board. The request was granted on 1 July 2015.
– Pending the clarification of the administrative situation of the complainant, on 1 October 2015 and 22 December 2015 the Organization requested three-month extensions to submit its reply to the Appeals Board. The requests were granted on the same dates accordingly.
– Pending the clarification of the complainant's administrative situation, on 4 April 2016 the Organization requested a three-month extension to submit its reply to the Appeals Board. The request was granted on the same date.

7. These articulations of the reasons for the requests for extensions of time, however, do not accurately state the reason given in the requests for extensions of time. According to the materials UNESCO filed with its pleadings, none of the requests to the Chairperson of the Appeals Board for extensions of time were based on a pending updated assessment from the CMO or the clarification of the complainant's administrative situation. In fact, as noted in consideration 6 above, the copies of the seven requests for extensions of time UNESCO filed with its reply in this proceeding all state the same reason for the request, the Administration's workload. As well, the Appeals Board's seven notifications informing the complainant of the three-month extensions of time indicated that they were due to the Administration's workload. Additionally, although the reply in the present proceeding was filed with the Tribunal on 6 October 2016, the 4 July 2016 request for an

extension of time stated to also be on the ground of the Administration's workload was not included in the above list. Of greater significance is the fact that the complainant was never informed of the Administration's reasons for the requests for the extensions of time as now stated in its pleadings. She only became aware of these reasons when she received UNESCO's reply in this proceeding.

8. On 9 March 2015 the complainant wrote to the Chairperson of the Appeals Board requesting him to expedite her appeal and not to delay the hearing of the appeal any further. It was a compelling account of her dire circumstances and the extensive negative consequences she was experiencing as a result of the assignment decision. Given the content of the letter, it would be expected that at a minimum the Chairperson would have acknowledged receipt of the request. However, the complainant never received a reply to her letter. Nor did the Chairperson take any steps in relation to the complainant's request. For example, the Administration was never informed at any point in time that further extensions would not be granted. The Chairperson simply went on to grant six additional three-month extensions of time that over all resulted in a twenty-one month extension of time in the internal appeal process.

9. The specific reasons UNESCO advanced in its pleadings for the delay, namely, the Administration's need to "obtain clarity on the Complainant's ongoing medical and administrative situation", are also problematic. In Judgment 3037, consideration 11, the Tribunal recalled "the principle that the lawfulness of a measure must be appraised as at the date of its adoption. In consequence thereof all subsequent facts are irrelevant (see Judgment 2365, under 4(c))." As the reasons given by UNESCO for the delays all concern matters that post-dated the Director-General's 5 September 2014 confirmation of the earlier 19 March 2014 decision, they are irrelevant in relation to the determination of the lawfulness of the challenged decision. As at 5 September, all the facts necessary for UNESCO to defend the challenged decision were known. As such, they do not provide a legitimate explanation for the delay in the internal appeal. In relation to the same reasons, UNESCO's assertion that the complainant has not "contested [these] reasons provided by the

Organization explaining the delay" is rejected given that the complainant was never informed of the reasons until she received its reply to her complaint.

10. UNESCO's statement in its surrejoinder of 27 April 2017 that the "[c]omplainant's appeal before the Appeals Board is still pending" is also problematic. Paragraphs 13 and 14 of the Statutes of the Appeals Board relevantly provide that upon receipt of the detailed reply the Chairperson and the Director-General shall appoint members of the Board to hear the appeal and the appellant is to be notified of their names. The Secretary of the Board must convene the Board to hear the appeal as soon as possible and no later than two months after the receipt of the detailed reply. Thus, the Appeals Board would have been, in the ordinary course, convened no later than 23 October 2016. According to the record, none of these steps were taken and as of 16 November 2017, the date of the close of the written procedure in the present complaint, the steps still had not been taken. Even though the complainant had filed a complaint with the Tribunal, this did not absolve the Chairperson and the Director-General of their respective obligations to appoint Board members to hear the appeal and the Appeals Board of its statutory obligation to convene the Board. Given that in breach of the provisions in the Statutes of the Appeals Board, no steps were ever taken in the internal appeal process after the filing of the detailed reply, it cannot be said that the appeal was still pending. It is equally clear that a determination of the appeal would not be made, let alone, in a reasonable time.

11. It is observed that the complainant challenged the lawfulness of the 19 March 2014 decision and the subsequent confirmation of that decision in good faith. At that point in time, the case was not factually complex and could have been dealt with within a reasonable period of time. By any standard, the delay in the internal appeal was unreasonable and inexcusable.

12. As stated in Judgment 3531, consideration 4, the Tribunal has "consistently held that international organisations have a duty to ensure that internal appeals are conducted with due diligence and with due

regard to the duty of care owed to staff members (see, in particular, Judgment 2522)". It is recognized that the time an appeal might reasonably take will usually depend on the specific circumstances of a given case. At the same time, as the Tribunal stated in Judgment 3688, consideration 6, citing Judgment 2904, consideration 15:

> "According to well-established case law, '[s]ince compliance with internal appeals procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed' (see Judgment 2197, under 33)."

13. In this case, UNESCO's actions in relation to the internal appeal process constitute a breach of its duty to ensure that the internal appeal was conducted with due diligence and its duty of care owed to the complainant. Additionally, not only did it breach its obligation to ensure that the appeal procedure moved forward with reasonable speed, it effectively precluded the complainant from exercising her right of appeal. In these circumstances, the Tribunal concludes that the complainant exhausted the available means of redress and her complaint is receivable. The Tribunal does not doubt that the reasons given by the complainant on 9 March 2015 concerning the negative consequences of the delay were genuine. The Tribunal also does not doubt that the subsequent delay would have had a continuing negative impact as indicated by the complainant. Accordingly the complainant is entitled to moral damages for the unreasonable delay in the internal appeal process.

14. As to the merits of the complaint, the complainant submits that her assignment to the Montevideo Office was unlawful. The complainant takes the position that as the decision to assign her to the Montevideo Office was taken pursuant to the Geographical Mobility Policy the decision was governed by that policy. The complainant argues that her assignment to the Montevideo Office was contrary to the Geographical Mobility Policy which prohibits the transfer of staff members within three years of retirement and authorizes the deferment or waiver of the transfer of staff members based on medical or personal/family issues. This position is unfounded. As set out in consideration 1, the decision to assign the complainant to the Montevideo Office was taken as a result of the restructuring of the ERI and not the Geographical Mobility Policy.

15. Staff Regulation 1.2 relevantly provides that "[s]taff members are subject to the authority of the Director-General, and to assignment by him or her, with due regard to their qualifications and experience, to any post in the Organization". Thus, upon accepting an appointment the staff member agrees to serve in any post to which she or he is assigned. In the present case, the Director-General in the exercise of her statutory authority assigned the complainant to the duty station to which her post was relocated. As a staff member is administratively attached to her or his post, the complainant was obliged to comply with the assignment decision. It must also be observed that one of the consequences of a refusal to comply with an assignment decision, is that the concerned staff member no longer has a post and that may well lead to the termination of the staff member's appointment. It follows that the assignment of the complainant to the Montevideo Office was lawful.

16. It is evident from a reading of the medical reports that required monitoring and treatment for the complainant's chronic medical condition were not available in Montevideo and, therefore, the complainant had to remain in New York, one of the few locations in the world with access to the medicines used in the treatment of the condition. Although the complainant's treating physician declared her fit to work, this was conditional on the complainant remaining in New York for monitoring and treatment. Thus, it cannot be said that the complainant was fit to take up the duties and responsibilities of her post. As a result, UNESCO postponed the date the complainant had to report for duty in Montevideo and permitted the complainant to remain in New York on sick leave and upon the exhaustion of her sick leave entitlements allowed her to remain on special leave without pay until the date of her retirement so as to not interfere with her pension under the United Nations Joint Staff Pension Fund. In the circumstances, contrary to the complainant's assertions, it cannot be said that UNESCO breached its duty of care or acted arbitrarily in its dealings with the complainant.

17. In conclusion, the complainant is entitled to an award of moral damages for the egregious delay in the internal appeal process in the amount of 10,000 United States dollars. As the complainant was partly

successful, she is entitled to an award of costs in the amount of 3,000 United States dollars.

DECISION

For the above reasons,

1. UNESCO shall pay the complainant moral damages in the amount of 10,000 United States dollars.
2. UNESCO shall pay the complainant costs in the amount of 3,000 United States dollars.
3. All other claims are dismissed.

In witness of this judgment, adopted on 22 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ