T.

v.

WHO

138th Session **Judgment No. 4867**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. T. against the World Health Organization (WHO) on 3 August 2020 and corrected on 10 and 11 September, and WHO's reply of 22 December 2020, no rejoinder having been submitted by the complainant;

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 contests the determination of her leave status during her absence from work as well as the decision, taken as a result of her internal appeal, not to award her moral damages and to grant her up to 2,500 Swiss francs in legal costs.

At the material time, the complainant was holding the position of Technical Officer, P.3, in the Continuous Business Improvement (CBI) unit, Management and Administration (MGA), of the Health Emergencies Programme (WHE) at WHO Headquarters.

On 18 September 2017, the complainant went on sick leave, which was extended until 19 January 2018, based on medical certificates issued by her doctor attesting that her absence was due to a conflicting working environment.

By letter of 3 January 2018, the Human Resources (HR) Specialist informed the complainant that, according to Staff Rule 740.1.1, her sick leave absence entitlements had ended on 27 December 2017 at noon and that, should her absence continue for more than 30 days beyond that date, she would be placed on Sick Leave under Insurance Cover (SLIC) with effect from the afternoon of 27 December 2017. However, should her absence for health reasons after 27 December 2017 last for less than 30 days and she be medically cleared to return to work, any excess absence for health reasons would be charged as a one-time exception to special leave with full pay (SLWFP), in accordance with WHO eManual III.6.9.

On 10 January 2018, the complainant's legal counsel wrote to the Coordinator, Human Resources Policy and Administration of Justice (HPJ), that the complainant was ready to return to work as of 15 January 2018, emphasizing that the complainant did not want to work under her then supervisors.

By memorandum dated 25 January 2018, the Director, Staff Health and Wellbeing Services (SHW) recommended to the Director, Department of Human Resources Management (HRD), that the complainant be reassigned to a position in another unit in line with her experience and competencies.

On 26 January 2018, the Human Resources Officer, HRD, sent to the complainant the Terms of Reference for a two-month reassignment with the Career Development and Learning Unit (CDL/HRD). On 30 January 2018, the complainant's legal counsel wrote to the Coordinator, HPJ, that the complainant was willing to take up this new position as of 1 February 2018.

By memorandum of 16 March 2018, the Director, HRD, informed the complainant that SHW considered that she was medically fit to resume duty. In the memorandum, the Director, HRD, shared with the complainant the details of a three-month temporary assignment with CDL/HRD, starting on 19 March 2018.

On 3 April 2018, the complainant met with the Coordinator, HPJ. During this meeting, the complainant expressed some concerns about taking up a position with HRD and the Coordinator, HPJ, told her about

a possible reassignment option with the Library and Information Networks for Knowledge unit at Headquarters (LNK/HQ).

On 19 April 2018, the HR Specialist wrote to the complainant about the status of her absence since 27 December 2017. The HR Specialist explained that SHW had extended the complainant's sick leave until 19 March 2018 and that as a result, she had been placed on SLIC for the period from 27 December 2017 at noon to 19 March 2018. The HR Specialist added that she would be advised separately regarding the status of her absence from 20 March 2018.

In a 20 April 2018 email sent to the Coordinator, HPJ, the complainant accepted the three-month assignment with CDL/HRD that was offered to her on 16 March 2018. On 25 April 2018, the Coordinator, HPJ, replied to the complainant that this option was no longer available given the delay in providing her response.

By letter of 22 May 2018, the Director, HRD, offered the complainant three reassignment options at the P.3 grade: Planning and Performance Management Officer at the WHO Country Office in Nigeria, Planning and Performance Management Officer at the WHO Country Office in South Sudan and Grant Officer with WHE/MGA at WHO Headquarters. In her letter, the Director, HRD, explained to the complainant that a possible reassignment with LNK/HQ was no longer an option since "the concerned department could not see a way to define [her] experience as meeting the minimum requirements for the position". The Director, HRD, further stated that the complainant's "position as P3 Technical Officer in WHE/MGA/CBI [was] still available and WHE [was] willing to work with [her] in continuing on that position". On 24 May 2018, the complainant replied that she wished to remain in her position in WHE/MGA/CBI.

On 28 May 2018, the Director, HRD, wrote to the complainant that she had been made aware by the Internal Oversight Services (IOS) that the complainant had filed a harassment complaint against her first and second-level supervisors. The Director, HRD, asked the complainant to clarify why remaining in her position with WHE/MGA/CBI was her preferred option, to assess whether "a return to [her] position was in

[the complainant's] best interest". The complainant responded on 30 May 2018.

By a letter dated 4 June 2018, the Director, HRD, informed the complainant that the Deputy Director General, WHE, did not support a return to her position in WHE/MGA/CBI "due to the potentially stressful elements that appear[ed] to be associated with [her] work environment in that position". The Director, HRD, added that the Director, SHW, concurred that "a return to [her] position could lead to a relapse of [the complainant's] health condition". The Director, HRD, further stated that HRD would continue working on identifying alternative reassignment options.

By a separate letter also dated 4 June 2018, the Director, HRD, wrote to the complainant "to clarify [her] administrative status as of 20 March 2018, the day after [...] [SLIC] ended". According to the letter, 53 days of the complainant's absence would be treated as SLWFP and 20 days would be treated as annual leave.

On 25 June 2018, the complainant started a six-month temporary assignment as HR Officer with HRD's Global Internship Program. Effective 1 January 2019, the complainant's temporary reassignment with HRD was converted into a permanent reassignment.

On 17 July 2018, the complainant was provided with information about her remaining sick leave entitlements.

On 9 September 2018, following a deadline extension granted by the Director, HRD, the complainant filed a request for review of the determination of her leave status during her absence from work from 27 December 2017 afternoon to 24 June 2018, as notified by the 4 June 2018 and 17 July 2018 letters.

By memorandum of 30 November 2018, the complainant was notified of the decision, taken in response to her request for review, to maintain the decision to treat the period from 27 December 2017 afternoon to 19 March 2018 as SLIC and, regarding the period from 20 March 2018, to requalify as SLWFP 14 days of the 20 days which had been initially treated as annual leave.

On 17 July 2019, following several extensions of the deadline, the complainant lodged an appeal to the WHO's Global Board of Appeal (GBA) against the 30 November 2018 decision. In her appeal, the complainant requested that the entire period from 27 December 2017 afternoon until her return to work on 25 June 2018 be treated as SLWFP. She further claimed that WHO had breached its duty of care towards her and asked to be awarded moral damages, legal costs and interest.

In its report dated 4 March 2020, the GBA concluded that the requirements of Staff Rule 750.1 to place the complainant on SLIC from 27 December 2017 noon to 19 March 2018 were not met as the complainant was not unable to return to her duties due to illness and had been declared fit to work. It then recommended to requalify the period from 27 December 2017 noon to 19 March 2018 as SLWFP. Regarding the period from 20 March 2018, the GBA found that the periods of 28 March noon to 3 April 2018 noon (2 working days), 26 to 30 April 2018 (3 working days) and 18 May 2018 (1 working day) had been appropriately treated as six days of annual leave. The GBA further concluded that WHO had fulfilled its duty of care towards the complainant and did not find any basis for moral damages. It then recommended to award her legal costs up to 2,500 Swiss francs, subject to the provision of invoices and proof of payment, and to dismiss her remaining claims.

On 1 May 2020, the Director-General informed the complainant that he had decided to follow the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that she be paid the equivalent of six days of annual leave. She claims moral damages in the amount of six months' gross salary, as well as the reimbursement of her legal costs incurred in the internal appeals proceedings and before the Tribunal. Lastly, she seeks the payment of interest as well as such other relief that the Tribunal determines to be just, necessary and equitable.

WHO asks the Tribunal to dismiss the complaint in its entirety and submits that some aspects of the complaint are irreceivable.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above.

The Director-General's decision on 1 May 2020 allowed the complainant's internal appeal in part, as follows:

(i) the period from noon on 27 December 2017 to 19 March 2018 was converted into special leave with full pay (SLWFP); and

(ii) legal costs were awarded up to 2,500 Swiss francs, subject to the provision of invoices and proof of payment.

The complainant impugns the 1 May 2020 decision in part, to the extent that it did not:

(i) convert six days of annual leave into SLWFP, therefore maintaining the former decision of retroactive deduction of six days of annual leave;

(ii) award her compensation for moral damages; and

(iii) award her full costs of the internal appeal, capping them at 2,500 Swiss francs.

2. The complainant advances five pleas, four of them supporting her claim to be awarded moral damages, and the fifth supporting her claim to be paid the equivalent of six days of annual leave.

3. In her first plea, the complainant alleges a breach of the Organization's duty of care. She contends that:

– the Global Board of Appeal (GBA) erred in concluding that WHO fulfilled its duty of care towards her and that there was no basis for moral damages;

– WHO did not take reasonable steps to ensure a swift return to work upon expiry of her certified sick leave (CSL) under optimal conditions, that is, under a temporary or permanent assignment with different supervisors;

– despite a temporary assignment within her programme, the Health Emergencies Programme at WHO Headquarters (HQ/WHE), being feasible, it was never considered;
– the Organization took nine months to find a temporary assignment for her;
– WHO did not provide evidence of the efforts made to find a possible temporary assignment for her;
– the application of Sick Leave under Insurance Cover (SLIC) had many prejudicial effects; and
– WHO did not inform her of her leave status, entitlements and rights in a comprehensive and timely manner.

The Tribunal holds that one of the complainant's arguments is moot, namely the reference to the application of SLIC, as the complainant's leave status was reclassified by the impugned decision either as SLWFP or as annual leave.

The remaining arguments are unfounded. The Tribunal is satisfied that the GBA correctly stated that the Organization fulfilled its duty of care towards the complainant. The evidence in the file, namely the correspondence between the parties, as detailed above in the facts, shows that the Organization pursued its efforts to offer the complainant a wide range of alternative assignments, and that there was extensive consultation. More specifically:

(i) on 16 March 2018, she was offered a temporary assignment with the Career Development and Learning Unit (CDL/HRD);
(ii) on 3 April 2018, she expressed her concerns about the temporary assignment offered with CDL/HRD and on that same day she was told, as an alternative option, about a possible reassignment with the Library and Information Networks for Knowledge unit at WHO Headquarters (LNK/HQ);
(iii) on 20 April 2018, the complainant sent an email and accepted the position she had been offered on 16 March 2018, but on 20 April 2018 that position was no longer available;

(iv) on 22 May 2018, the complainant was offered three reassignment options, one of which was in Geneva, as Grant Officer with the Management and Administration unit of the Health Emergencies Programme (WHE/MGA) at WHO Headquarters;

(v) despite the complainant having declined the three reassignments options offered to her on 22 May 2018 and having elected on 24 May 2018 to remain in her position as Technical Officer, at grade P.3, in the Continuous Business Improvement unit, Management and Administration, of the Health Emergencies Programme (WHE/MGA/CBI), the Organization deemed it inappropriate as the complainant had filed a harassment complaint against her former supervisors who would remain her supervisors in that position (see letters of 28 May and 4 June 2018); and

(vi) subsequently, on 25 June 2018, she was assigned as Human Resources (HR) Officer with the Department of Human Resources Management (HRD) Global Internship Program.

The sequence of events shows that, on some occasions, the complainant either did not respond in time to reassignment offers or refused them. Therefore, the reassignment process was not unfairly prolonged by the Organization. The alleged lack of proper information is not proven, and it is contradicted by the evidence that WHO informed the complainant in writing about her leave status on 3 January, 19 April, 4 June and 17 July 2018, as already recalled above in the summary of the facts.

4. In her second plea, the complainant alleges a failure of the Organization to act in good faith. She contends that:

– the GBA erred in finding that the continuous communication on potential assignment options indicates that both parties acted in good faith for the common purpose of ensuring her return to active duties;

– the seven assignment options offered by the Organization during the nine-month period were either known to be unsuitable or were withdrawn after the complainant accepted them. Namely, four of the options were unsuitable as the complainant had never expressed

the desire to leave the duty station, and the one offered at WHO Headquarters as Grant Officer was reporting to the same second-level supervisor against whom she had complained. This situation caused her distress. The complainant thought that her job security was threatened, as when the Administration offers three reassignments and the staff member declines them, there is a possibility of termination; the complainant was offered only to leave her duty station or remain within the same team despite the impact on her health;

– the complainant wanted to resume her duties and returned to the office premises on two occasions but on both occasions she was told by the Organization to go home;

– the majority of the "continuous communication" between the complainant and the Organization about potential reassignments was about the conditions to be imposed on the temporary work reassignments offered to her.

This plea is unfounded. As already evidenced in consideration 3 above, the complainant was offered a wide range of alternative assignments. One of them became unavailable because the complainant did not accept it until more than one month after it had been offered. There is no evidence that the three reassignment offers made on 22 May 2018 were meant to prompt the complainant's refusal and to start a termination process. Moreover, there is no evidence that the fact that the Organization communicated about the conditions to be imposed on the temporary work reassignments amounted to bad faith. More generally, there is no evidence that the Organization acted in bad faith in any way towards the complainant.

5. In her third plea, the complainant alleges bias, discrimination, and retaliation against her. She contends that:

– the GBA erred in finding that the reassignment process was not unfairly prolonged by either party and in concluding that the Organization made reasonable efforts to find an appropriate reassignment for her;

– the conduct of the Organization caused her to endure substantial pain and suffering;
– the Organization knew that the working relationship with her supervisors had led to her placement on sick leave twice;
– within the nine-month duration it took for the complainant to return to active duty under different supervisors, WHO had resolved the same requests or similar ones from other staff members in the same programme (WHE), including that of another staff member within the same WHE/MGA/CBI team allegedly experiencing inappropriate behaviour by the same supervisor, in far less time and without imposing the same conditions that the Organization imposed on the complainant;
– specific actions of individuals within the Organization "demonstrated a deliberate abuse of the power they held within their positions of entrusted authority, including intimidation and retaliation through the withholding of remedies provided within the staff rules and procedures to which staff in situations affecting their health and wellbeing are entitled to access - without threat or retribution"; and
– the application of SLIC between noon on 27 December 2017 and 19 March 2018 instead of SLWFP was unlawful.

Some of the complainant's arguments are either moot, as the Organization found in her favour the classification of her leave status as SLWFP rather than as SLIC, or outside the scope of the present complaint, such as the questions concerning her first sick leave.

The remaining arguments are unfounded. Bias and abuse of authority must be proven and the complainant bears the burden of proof (see Judgment 4688, consideration 10, and the case law cited therein). Moreover, allegations of discrimination and unequal treatment can lead to redress on condition that they are based on precise and proven facts, that establish that discrimination has occurred in the subject case. Discrimination cannot be established unless it is proven that staff members in identical situations were treated differently (see Judgments 4498, consideration 27, 4238, consideration 5, and 4101, consideration 9). The complainant has not established to the Tribunal's satisfaction that

identical or similar requests of reassignment concerning other staff members in the same situation as her were addressed and allowed in less than nine months. The complainant alleges retaliation, but her allegation is generic and unsubstantiated. A mere assumption or suspicion of retaliation does not meet the requisite standard of proof, the onus of which is borne by the complainant (see Judgments 4391, consideration 13, and 4363, consideration 12).

6. In her fourth plea, the complainant alleges that the behaviour and actions of the Organization caused her extreme psychological distress. She also alleges bias against her. She contends that by not awarding moral damages, the GBA failed to recognize the impact:

(a) the behaviour of her supervisors in September 2017 had on her health;

(b) of being prevented from engaging in active duties, particularly after having approached the Organization with allegations of harassment;

(c) of WHO establishing an "untrue diagnosis of illness" and its refusal to listen to her objections, and to provide her with any information about her status and related policies; and

(d) on the complainant's health and finances of having to pursue formal litigation to obtain information. She adds that the "behaviour experienced in the preceding nine months" had "continued developments", once she had returned to active work in the new temporary six-month assignment. She further contends that she suspects that the decision, communicated to her on 4 June 2018, to apply SLWFP to the period from 20 March to 24 June 2018 was made in order to avoid the Director-General's attention being drawn to the fact that the complainant "had returned to the office [three] months earlier and was blocked by the Administration from undertaking active work upon her return on 22 January 2018". She further assumes that "[b]y retroactively applying SLIC to the [complainant's] absence for the period from 22 January – 20 March 2018, the specific individuals involved within the Administration were effectively attempting to hide their abusive mis-use of their positions of authority and malfeasant behaviour [...]".

The Tribunal holds that some of the complainant's arguments are outside the scope of the present complaint, namely the arguments related to episodes regarding her first sick leave and the Organization's conduct after her return to active work.

The remaining arguments are unfounded. Bias is unproven, as the complainant submits mere assumptions and suspicions, which are unsubstantiated. Considering that there was no breach, by the Organization, of its duty of care and good faith, and that bias and discrimination are not proven, there is no ground for awarding moral damages. Moreover, moral prejudice, which includes, inter alia, emotional distress, anxiety, stress, anguish and hardship (see Judgment 4644, consideration 7) must be proven, and the complainant bears the burden of proof. The complainant has not established to the Tribunal's satisfaction a causal link between the Organization's conduct and her suffering.

7. In her fifth plea, the complainant alleges that the classification of six days of leave as annual leave was unlawful, submitting that annual leave should not have been applied by the Organization during the period when the complainant was not provided with any information regarding her leave status. She contends that, taking into account WHO's duty of care, SLWFP status should have been applied to the entire period. In any event, such days of annual leave should not have been charged retroactively. She focuses in particular on the leave of 18 May 2018, contesting the Organization's statement that she failed to make herself available for a meeting on that day. She considers this statement defamatory. She also reiterates arguments already contained in her preceding pleas, in order to prove the moral injury that she allegedly suffered.

This plea is unfounded.

The Tribunal will not address further the complainant's allegations regarding her distress, her availability to return to work earlier, or her concerns when she was offered three reassignment options, since these allegations have already been dealt with in the preceding considerations.

The Tribunal notes that the impugned decision considered six days of the complainant's absence from work as annual leave, rather than as SLWFP, because in those six days the complainant was absent from work for personal reasons. The impugned decision reads as follows: "the periods of absence from the duty station for personal reasons during SLWFP from 28 March noon to 3 April noon (2 working days) [and] 26 to 30 April 2018 (3 working days) and [in the absence of compelling reasons, failing to make yourself available for a meeting on] 18 May 2018 (1 working day) [to discuss assignment options while on SLWFP] were appropriately treated as annual leave".

Pursuant to Staff Rules 650.1 and 650.2: "Special leave with full, partial or no pay may be granted under such conditions as the Director-General may prescribe for training or research in the interest of the Organization or for other important reasons, including family, health, or personal matters. The Director-General may, at his or her initiative, place a staff member on special leave with full pay, or exceptionally with partial or no pay, if he or she considers such leave to be in the interest of the Organization." Decisions regarding special leave are discretionary and, thus, they are subject to only limited review and can be set aside only if they have been taken without authority or in breach of the rules of form or procedure, if they are based on an error of fact or law or have overlooked essential facts, if clearly mistaken conclusions have been drawn from the facts or if there is an abuse of authority (see Judgments 4750, consideration 9, and 4101, consideration 8).

With regard to the complainant's absence from 28 March noon to 3 April noon (2 working days) and from 26 to 30 April 2018 (3 working days), the complainant has not provided the Tribunal with legal arguments, in order to refute the impugned decision, to the extent it states that during those days, the complainant was absent from work for personal reasons. Thus, the Director-General did not exceed the limits of his discretionary authority, which the Tribunal must respect in exercising its limited power of review over such matters.

With regard to her absence on 18 May 2018, the complainant alleges that she had a sound reason for not being available for a meeting on that day, and that the Organization's statement about her unjustified

absence is defamatory. However, the complainant has not demonstrated to the Tribunal's satisfaction that her absence on 18 May 2018 was justified. The statement of the Organization in this respect was truthful, objective, and expressed in a neutral way, and therefore it was not defamatory (see Judgment 4804, consideration 3). Moreover, defamation consists in a publication or a communication towards a certain number of persons, of an untrue statement, which injures a person's reputation (see Judgment 4478, consideration 8). In the present case, there was no publication or communication addressed to third parties, as the statement was made in the impugned decision, and addressed exclusively to the complainant.

The complainant's further argument that she should have been placed on SLWFP because she had not been provided with information regarding her leave status, is unfounded. In any event, the Tribunal has already found, in consideration 3 above, that the complainant was duly informed, on multiple occasions, about her leave status.

8. One of the complainant's claims is to "be completely reimbursed for her actual legal fees and costs incurred in the context of her claims before the WHO internal dispute process". According to the Tribunal's case law, such costs may only be awarded under exceptional circumstances (see, for example, Judgment 4665, consideration 10), which are not present in the instant case. Moreover, in the impugned decision, the complainant was awarded legal costs up to 2,500 Swiss francs, subject to the provision of invoices, and she does not provide any evidence that her actual costs were higher than this amount.

Thus, this claim is rejected.

9. In conclusion, the complainant's pleas are unfounded and all her claims will be rejected, including the one for costs, and her complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 April 2024, Mr Patrick Frydman, 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.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER