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

EIGHTY-SIXTH SESSION

In re Hartigan

Judgment 1805

The Administrative Tribunal,

Considering the complaint filed by Ms Rosetta Dorothy Hartigan against the Food and Agriculture Organization of the United Nations (FAO) on 4 December 1997, the FAO's reply of 13 February 1998, the complainant's rejoinder of 17 April and the Organization's surrejoinder of 13 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant is British and was born in 1948. She joined the staff of the FAO in 1969 as a stenographer at grade G.3. She later became a secretary and reached grade G.5.

In 1989 she began to suffer severe pain in her arms and hands. Despite many medical examinations and forms of treatment her condition grew no better. The FAO terminated her appointment on grounds of health on 16 November 1992 and the United Nations Joint Staff Pension Fund has since been paying her a disability pension. She has bilateral epicondylitis (severe inflammation of the epicondyles) and tendinitis in the hands, commonly known as repetitive strain injury.

In a memorandum of 13 November 1992 to a social security officer of the FAO she blamed her disorder on work she had been doing for years on computer. She claimed compensation for occupational illness under FAO Manual section 342, which is about compensation for illness, injury or death. She claimed (1) an annuity under Manual paragraph 342.51 for "total incapacity" resulting from "injury or illness attributable to the performance of official duties"; (2) "lump-sum compensation" under 342.53 for loss of function; and (3) "additional compensation" under 342.54 for "total incapacity of a nature that obliges [the staff member] to depend for his or her essential personal needs on the attendance of another person either constantly or occasionally" where such attendance "entails expense".

On 18 January 1993 the complainant underwent examination by the director of the Institute of Forensic and Insurance Medicine of the Catholic University of the Sacred Heart in Rome. In an undated report he expressed the view that additional compensation was unwarranted and the extent of her permanent incapacity hard to assess, though "on the basis of the clinical history" he "tentatively evaluated" it at 8 per cent.

By a letter of 21 October 1993 the secretary of the Advisory Committee on Compensation Claims told the complainant that the FAO had accepted her claim to an "annuity for total incapacity for work as a result of a service-related condition" and it would be paid to her together with her disability pension from the Pension Fund. The Organization rejected her two other claims. It rejected the one to lump-sum compensation for loss of function on the grounds that such loss was not proven in her case, the doctor having identified only pain. And her claim to "additional compensation" failed on the grounds that the disorder did not make her - as Manual paragraph 342.54 required - dependent on someone else for her "essential personal needs".

In a letter of 28 October to the secretary of the Advisory Committee she made, under Manual section 342.7, a "request for reconsideration" by a medical board. She named a doctor to represent her on it.

In its report of 27 October 1995 to the Committee the board said that it had examined her on 12 April 1995 and put her permanent incapacity at 25 per cent but saw no reason to grant her additional compensation to pay for help in meeting her "essential personal needs". On 27 December 1995 she provided further information for the Committee,

explaining what her disability was and how difficult it was to meet her essential personal needs.

On 7 May 1996 the Advisory Committee endorsed the board's findings and recommended accepting the figure of 25 per cent loss of function but rejecting her claim to additional compensation. By a letter of 18 June 1996 the secretary of the Committee told her that she would be granted the lump-sum compensation for "permanent impairment (loss of function)" but not the additional compensation.

She appealed against that decision in a memorandum of 12 September 1996 to the Director-General. On 8 November 1996 the Assistant Director-General in charge of Administration and Finance rejected her appeal on the merits on the Director-General's behalf.

On 2 December 1996 the complainant appealed to the Appeals Committee pressing her claim to additional compensation.

In its report of 16 July 1997 the Committee held that the complainant needed domestic help because she had lost a quarter of her physical capacity and it recommended letting her have such compensation.

In a letter of 24 September 1997, the impugned decision, the Director-General told her that he rejected the recommendation on the grounds that the interpretation put on the Manual paragraphs had been correct and based on medical opinion.

B. The complainant finds the Organization's interpretation of Manual paragraph 342.542 too narrow and, based as it is on criteria less favourable than those it applied in at least one other case, discriminatory as well.

She objects to the Advisory Committee's interpretation of "essential personal needs". In its letter of 21 October 1993 it took the term to denote the performance of such rudimentary physical functions as "personal hygiene and ambulation" and defined them in its report as "bathing, grooming[,] dressing, eating, eliminating". The complainant submits that the term covers a much wider range of activity for which someone who is handicapped may need costly help: it is not confined to personal physical care, such restriction not being stated in the text.

She says that she was discriminated against in that a former staff member suffering from the same disorder fared better. The FAO granted the other staff member the additional compensation to help her "defray the extra expense involved for assistance with [her] daily essential needs in the home because of the impairment of [her] hands". The complainant believes that the difference in treatment is unlawful and arbitrary.

She asks the Tribunal to quash the Director-General's decision of 24 September 1997 and award her 27 million lire in lump-sum additional compensation towards the cost of the domestic help she had from November 1992 to the date of filing the complaint; another 6,240,000 lire a year in additional compensation to cover the same costs from the date of filing; and 4 million lire in costs.

C. In its reply the FAO submits that it read the Manual aright, the wording being restrictive and covering only exceptional cases.

In answer to the charge of discrimination the defendant contends that, although it did grant additional compensation to the other official suffering from the same disorder, the purpose was to make good her inability to meet essential personal needs. The complainant has not shown any such inability, and the Director-General was right to reject her claim on the strength of the medical board's and the Advisory Committee's reports. Moreover, the earlier decision came neither from the medical board nor from the Advisory Committee but from an official's own interpretation of the rules. So it is no valid precedent. And, as was said in Judgment 845 (*in re* West No. 5), "a complainant may not rely on unlawful treatment which conferred benefit on other staff members: equality in law does not mean equality in the breach of it". That holds good when the sole reason for the alleged discrimination is the misreading or misapplication of a text.

D. In her rejoinder the complainant presses both her pleas.

In enlarging on the first she contends that, even on the defendant's narrow interpretation, housework does form part of essential personal needs because it is essential to a healthy home.

As to her second plea, she submits that her case is medically just like the earlier one; the other staff member had

undergone an unsuccessful operation on one hand, whereas the doctors advised the complainant against an operation on the grounds that her condition was too serious to improve. Manual paragraph 342.542 has been in force for at least twenty years, and never has the defendant contended that its restrictive interpretation was in line with consistent practice. Where more than one interpretation is tenable in law the one favourable to the staff member should prevail.

E. In its surrejoinder the defendant maintains that the additional compen-sation provided for in the Manual is due only in quite exceptional cases and this is not one. It rejects any charge of discrimination: the two cases are, in its submission, not comparable since the other staff member was suffering from 46 per cent permanent impairment.

CONSIDERATIONS

1. The complainant, who is British, joined the FAO in April 1969 as a stenographer at grade G.3. At the material time she was a secretary and held grade G.5. On 16 November 1992 the Organization terminated her appointment on the grounds of total incapacity for work. The United Nations Joint Staff Pension Fund has since been paying her a disability pension.

2. On 13 November 1992 she applied to the Organization for compensation for service-incurred total incapacity. She claimed an annuity under Manual paragraph 342.51; "lump-sum compensation" for loss of function, under paragraph 342.53; and "additional compensation" under paragraph 342.54.

3. On 21 October 1993 the Organization granted her the annuity and on 18 June 1996 a lump-sum compensation for 25 per cent loss of function but refused the additional compensation.

4. On 12 September 1996 she lodged an appeal with the Director-General again claiming it and citing Manual paragraph 342.542, which reads:

"Where the injury or illness of a staff member has resulted in total incapacity of a nature that obliges him or her to depend for his or her essential personal needs on the attendance of another person either constantly or occasionally, and this attendance entails expense, additional compensation may be awarded in an amount not exceeding a reasonable cost for such attendance."

On 8 November the FAO told her of the rejection of her appeal.

5. On 2 December 1996 she went to the Appeals Committee. The Committee was at one in finding that, having lost a quarter of her physical capacity, she needed "domestic assistance". It pointed out that in an earlier case the Organization had awarded additional compensation to someone else with the same disorder. It recommended allowing her appeal. But the Director-General rejected it on 24 September 1997 on the grounds that the decision endorsed a recommendation by the Advisory Committee on Compensation Claims and that that Committee had acted on a report by the medical board that had examined the complainant. The decision to grant the other official's claim had not rested on the findings of any medical board and so the two cases were not "comparable ... from a medical point of view". Besides - said the Director-General - one "isolated" case warranted no "departure from the clear language" of Manual paragraph 342.542.

6. The complainant is asking the Tribunal -

(a) to quash the Director-General's decision of 24 September 1997; and

(b) to award her:

(i) a lump sum of 27 million lire in "additional compensation" towards the expenses she incurred for domestic help from November 1992 until the date of filing this complaint;

(ii) 6,240,000 lire a year in "additional compensation" as from the date of filing; and

(iii) 4 million lire in costs.

7. The dispute turns on the construction of 342.542, more particularly the term "essential personal needs". Where a text may bear more than one meaning construction consists in taking the one that best serves the draftsman's intent.

It is improper for a court to stretch the sense beyond what the words will bear: that is not just interpretation but tantamount to recasting: see, for example, the reports of the International Court of Justice, 1950, p. 229. Moreover, a basic canon of interpretation has it that as far as possible each word will be given its natural and usual meaning, not some uncommon or eccentric connotation.

8. It appears on the evidence that the complainant can move her arms and hands but not use them. The slightest manual exertion is impossible. Even brushing her teeth causes her intense pain. She cannot, for example, drive a motor car, wield a knife, peel vegetables, make a bed, grip, lift or carry anything, use public transport unless seated, cook, or wash dishes. Each of those acts is an everyday one and, taken all together, they make up part of "essential personal needs". So the complainant may be deemed incapable of meeting such needs, and help from someone else is warranted.

9. Citing articles in several medical journals, the Organization puts a narrow construction on the term "essential personal needs" in 342.542, which it says means "basic physical functions such as personal hygiene and ambulation".

10. The Organization's construction will not do. The term "essential personal needs" cannot in its usual and proper sense be confined to personal cleanliness and movement. As the complainant says, it has a wider connotation. And although, as the Tribunal has often said, it will not replace the opinion of medical experts with its own, this case hinges, not on medical opinion, but on the meaning of a rule.

11. The Organization's construction amounts to a mistake of law. The English version of 342.542 provides that additional compensation may be paid where there is dependence on the attendance of someone else for "essential personal needs", and there are no grounds for taking a narrower interpretation.

12. That being so, there is no need to entertain the plea about the grant of additional compensation to someone else with the same disorder.

13. The Tribunal cannot itself set the amounts of the additional compensation due to the complainant for the period since 13 November 1992 and for the future. It therefore sends the case back for the Director-General to decide on the amounts within six months of the date of delivery of this judgment.

DECISION

For the above reasons,

1. The Director-General's decision of 24 September 1997 is set aside.

2. The case is sent back to the Director-General, and he shall take the decisions set in 13 above.

3. The Organization shall pay the complainant 4 million lire in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Julio Barberis

Jean-François Egli

A.B. Gardner