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

NINETIETH SESSION

***In re* Toa Ba** **Judgment No. 2017**

The Administrative Tribunal,

Considering the complaint filed by Mr Joseph Toa Ba against the World Health Organization (WHO) on 24 August 1999 and corrected on 28 March 2000, the WHO's reply of 5 July, the complainant's rejoinder of 10 August and the Organization's surrejoinder of 11 October 2000;

Considering Articles II, paragraph 5, and VII 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, a national of Côte d'Ivoire who was born in 1952, joined the WHO in the Bondoukou sub-sector in Côte d'Ivoire in October 1974 as a blackfly "collector" (blackfly are vectors of onchocerciasis) in the Onchocerciasis Control Programme. He remained in that job until May 1978, and was then employed as an equipment operator until 31 December 1992, when his post was abolished. As from 1 January 1993, he continued to work as an equipment operator under several special services agreements, the last of which ended on 31 December 1994.

In a communication of 5 August 1994, the complainant explained to the Director of the Joint Medical Service that he had contracted an illness "caused ... by onchocerciasis" during his service as a collector and claimed payment of his medical expenses. In the following months, he underwent various medical examinations. In a letter of 14 January 1998, the Director of the Programme informed him that the Advisory Committee on Compensation Claims had examined his case and concluded that it was unlikely that his eye problems were related to onchocerciasis. The results of the above examinations found a "weakening of eyesight due to an optic atrophy", the cause of which could not be determined. The Advisory Committee therefore recommended rejecting the complainant's claim and the Director-General endorsed that recommendation.

In a communication dated 23 February 1998, the complainant sent the Headquarters Board of Appeal a "statement of intention to appeal" seeking the re-examination of his claim to the payment of his medical expenses. In a letter of 4 March, the Secretary of the Board indicated that two remedies were available to him: he could either seek referral to a medical board if he intended to challenge the above recommendation on medical grounds, or appeal to the Headquarters Board of Appeal if he intended to claim breach of administrative rules. In the latter case, he should send the Secretary of the Board, before 14 April 1998, a statement of his intention to appeal, clearly indicating the rules which had been breached. In view of the difficulties encountered by the complainant, the Secretary suggested that he should contact the President of the Staff Association of the WHO's Regional Office for Africa. In a communication of 25 March, the complainant requested the latter to indicate the procedure to be followed. He repeated his request in a letter of 25 May. On 16 July he wrote to the Secretary of the Board of Appeal recounting his unsuccessful approaches to the President of the Association and again notifying his intention to appeal against the Advisory Committee's recommendation. The Administration of the WHO was advised on 27 July 1998 of this intention to appeal. The Board of Appeal submitted its report to the Director-General on 23 February 1999. It recommended the rejection of the appeal because it found no bias or failure of the Advisory Committee to examine the facts in full. Moreover, it found no mistake in the application of the Staff Rules and Regulations or the terms of the complainant's contract. The Director-General accepted the Board of Appeal's recommendation and so informed the complainant in a letter of 6 May 1999, which is the impugned decision.

B. The complainant considers that his illness is attributable to his activities as a collector. He believes that he has been subjected to "ingratitude" on the part of the WHO which cannot, in order merely to resolve the problem, "rid itself of a sick man because he is no longer in service".

The complainant also challenges the change in status which he underwent when his post was abolished on 31 December 1992. He emphasises that he then signed a special services agreement, involving a reduction in wages and a loss of all his former benefits, with the sole aim of obtaining the means to pay for his treatment.

The complainant claims compensation for the deterioration in his health and for loss of salary.

C. The Organization replies that the complaint is irreceivable and devoid of merit. If the complainant intended to appeal to the Headquarters Board of Appeal against the rejection of his claim that his eye problems were service-incurred, he should have filed his appeal within the statutory time-limits, that is "by 23 March 1998 at the latest". However, his statement of intention to appeal was not sent until 16 July 1998. Moreover, if he intended to challenge the medical findings, he should have requested the referral of his case to a medical board, which he did not do. In subsidiary pleas the WHO affirms that the correct procedure was followed for the examination of a compensation claim for an illness attributable to the performance of official duties. Indeed, under the terms of the WHO Manual, for an illness to be deemed service-incurred, there must be a direct link between the illness and the performance of those duties. According to the case law, the burden is on the complainant to prove service-incurred illness or, at the very least, the balance of probability that it is service-incurred must be in his favour. In the view of the WHO, this has not been demonstrated in the present case, as the evidence shows that there is little probability that the complainant's eye problems, consisting of an optic atrophy the cause of which cannot be determined, are related to onchocerciasis.

The WHO contends that any challenge to the special services agreements concluded by the complainant is not within the jurisdiction of the Tribunal under the terms of these agreements. In the first place, the agreements state that the signatory is a "contractor", who, not being considered a staff member, does not have the right to appeal to the Tribunal. The agreements also contain an arbitration clause which excludes any other remedy. Any claim concerning this type of agreement is therefore irreceivable. Furthermore, if the complainant intended to challenge one of the agreements, he should have appealed to the Regional Board of Appeal within the time limits. He did not do so and he is contesting them for the first time in his complaint to the Tribunal. Subsidiarily, the WHO explains that the complainant's appointment was ended "in strict conformity with the applicable rules" and that, having "freely consented" to the special services agreements which he is challenging, the complainant has no valid grounds for impugning them.

D. In his rejoinder the complainant submits that his complaint is receivable since the Headquarters Board of Appeal agreed to examine his internal appeal. He says that when he took up his job he was not suffering from any illness. As he worked for years in a field involving a risk of blindness, the WHO cannot refuse to take his eye problems into account. In this connection, he requests the Tribunal to order the production of the medical reports on his condition.

The complainant contends that the WHO should not have proposed special services agreements to an employee such as himself who had performed "high-risk work". He submits that its sole purpose in so doing,

was to economise. He asks the Tribunal to recognise as "mitigating circumstances" the fact that he did not challenge the agreements in time.

E. In its surrejoinder the WHO presses its arguments. It says that the absence of illness on taking up duties affords no grounds for concluding that any subsequent illness is service-incurred. It adds that it will produce the complainant's medical reports if the Tribunal so wishes.

CONSIDERATIONS

1. The complainant joined the WHO in October 1974 and was assigned to the Onchocerciasis Control Programme, where he was responsible for collecting the insects which are the vectors of that disease. In May 1978 he became an equipment operator. On 31 December 1992 his post was abolished but he continued to work as an equipment

operator until 31 December 1994 under several special services agreements.

By a letter of 5 August 1994 the complainant informed the Director of the Joint Medical Service that he had contracted an illness "caused ... by onchocerciasis" and claimed payment of his medical expenses. The Director-General, following the opinion of the Advisory Committee on Compensation Claims, rejected his claim. The complainant was informed of that decision on 14 January 1998. On 23 February he sent the Headquarters Board of Appeal a statement of his intention to appeal against the decision. On 4 March the Secretary of the Board informed him of the remedies available to him: either a medical board, if he wished to challenge the Advisory Committee's recommendation on medical grounds, or the Headquarters Board of Appeal, if he intended to claim breach of administrative rules. After receiving this letter, the complainant sent a second notification of his intention to appeal to the Board on 16 July 1998. The Director-General, following the Board's recommendation, dismissed the internal appeal and so informed the complainant on 6 May 1999.

On the special services agreements concluded in 1993 and 1994

2. (a) Article II, paragraphs 1 and 5, of the Statute of the Tribunal limits its competence to disputes arising out of the relationship between an organisation and its officials.

In the case at bar the complainant enjoyed the status of official from October 1974 to the end of December 1992. From 1 January 1993 to 31 December 1994 he was employed on the basis of special agreements, which contained an arbitration clause providing for an "arbitral panel" composed of three members.

The Tribunal's jurisdiction is therefore limited to the effects of the relationship between the WHO and the complainant from October 1974 to the end of December 1992.

(b) The complainant criticises the WHO for having made him sign the special agreements.

There is no need to consider whether all or some of his grievances can be linked to the relationship between the WHO and the complainant when he was an official. His objections were not raised in the internal procedure; in any case his claims on that score would be irreceivable under Article VII(1) of the Tribunal's Statute, for failure to exhaust the internal remedies.

On the dismissal of the complainant's claim to recognition of his illness as service-incurred

3. The rules invoked by the WHO are as follows. Staff Rule 1230.8.3 provides that:

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

Annex E to Part II, section 7, of the WHO Manual establishes that:

"28. ...

(e) The Director-General's determination on a claim for compensation under these rules shall - provided that the procedure set out in paragraph 29 has been followed in the event of a conflict of opinion on the medical aspects - be regarded as a final action, referred to in Staff Rule 1230.8, subject to appeal to the Board of Appeal at headquarters.

29. (a) In the event of a conflict of opinion on the medical aspects of the relationship between an illness or injury and the performance of official duties on behalf of the World Health Organization, the Director-General may refer the case for advice to a medical board composed of three duly qualified medical practitioners, one of whom shall be chosen by the Director-General, one by the staff member, and the third by the two practitioners so chosen. The costs of such a board shall be borne by the Organization.

(b) A medical board composed as provided in subparagraph (a) above shall also be consulted if the staff member concerned, or surviving dependants, so request. This request must be made in writing within three months of the date when the Director-General's decision was notified to the staff member. In this case, if the original decision is confirmed, the claimant shall bear the medical fees and expenses of the practitioner chosen and half the medical fees and expenses of the third practitioner. If, however, the Director-General alters the original decision in favour of the claimant, the whole of the medical fees and expenses shall be borne by the Organization ..."

As the WHO says, in a dispute concerning a claim to compensation for illness, the channels of appeal differ according to the nature of the staff member's challenge to a decision by the Director-General:

- the Board of Appeal is competent where the appellant's claim is based on the legal grounds envisaged under Staff Rule 1230.1;

- the case must be referred to the medical board envisaged in paragraph 29 above where the dispute is of a medical nature.

4. The WHO objects to the receivability of the complaint.

(a) Its first plea is that the notification of the intention to appeal to the Headquarters Board of Appeal was late, thereby making the internal appeal irreceivable.

That position is contrary to the one taken by the Board of Appeal, which found the appeal receivable, and to that of the Director-General, who endorsed the Board's recommendation by taking the impugned decision.

(b) The WHO also appears to be arguing that the complainant did not follow the correct procedures for internal appeals: he took the matter to the Headquarters Board of Appeal even though it was not competent to examine a challenge on medical grounds, which in practice lay within the competence of the medical board.

5. The argument that the internal appeal was late must fail.

In the first place, the WHO failed in its duty of good faith toward its staff member: before the Tribunal it pleads that his internal appeal was late; yet it accepted precisely the opposite during the internal procedure and examined his internal appeal after finding that it had been submitted in time. Moreover, the fact that it examined his appeal shows that the requirement to exhaust the internal remedies was met.

Secondly, the reasons put forward by the Board of Appeal are pertinent. The complainant's letter of 23 February 1998, written after he was informed of the Director-General's decision by a letter of 14 January 1998, meets the conditions for a notification of intention to appeal. In substance, the complainant was also challenging the medical conclusions on which the Director-General's decision was based.

6. The case law has it that an organisation must interpret the statements of a staff member in good faith and that, as part of its duty to spare the staff member unnecessary injury, it may also be called upon to provide procedural guidance and help to put right a mistake (see Judgment 1734, *in re* Kowasch, under 3(g)).

Viewed from that standpoint, an internal appeal lodged with the wrong authority in an organisation may serve to meet a deadline; that authority will simply forward it to the competent body (see Judgment 1832, *in re* Durand-Smet No. 2, under 6).

In this case, the Director of the Programme and the Secretary of the Headquarters Board of Appeal did give the complainant fairly detailed indications. But he plainly misunderstood them, as he filed his internal appeal with the Headquarters Board of Appeal instead of requesting the convening of a medical board. It was clear that the alleged injury did not correspond to any of the circumstances set out in Staff Rule 1230.1, but that it was of a medical nature, since the complainant was claiming that, contrary to the opinion of the Director-General, there was an established causal link between his work as a collector and his eye condition. On the basis of the case law recalled above, the Board of Appeal and the Director-General should have considered that the alleged injury came under the appeal procedure envisaged in paragraph 29 quoted above. As they did not forward the complainant's internal appeal to the competent body, they must be deemed not to have fulfilled their obligations.

7. The Director-General is invited to take a new decision. The notification of intention to appeal, which was filed in time, must be regarded as constituting in practice a medical challenge to the opinions expressed concerning the existence of a causal link between, on the one hand, the activity performed by the complainant from October 1974 to May 1978 for the Onchocerciasis Control Programme and, on the other, his eye condition.

DECISION

For the above reasons,

1. The case is sent back to the Director-General of the WHO for a new decision in accordance with 7 above.

2. All the other claims are dismissed.

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.