

NINETY-SEVENTH SESSION

Judgment No. 2374

The Administrative Tribunal,

Considering the complaint filed by Ms S. S. against the Food and Agriculture Organization of the United Nations (FAO) on 18 March 2003 and corrected on 18 June, the FAO's reply of 1 October, the complainant's rejoinder of 11 December 2003 and the Organization's surrejoinder of 16 February 2004;

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

Having examined the written submissions and disallowed the complainant's request for the hearing of witnesses;

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

A. The complainant is an American national and was born in 1948. She was employed by the FAO in 1981 on a short-term appointment. From February 1982 she had a continuing contract as a Training Officer, at grade P.3. In April 1986 she joined the World Food Programme (WFP), an autonomous joint subsidiary programme of both the United Nations and the FAO, as a Personnel Officer at grade P.4. She later held the position of Chief of the Human Resources Establishment (HRE), at grade P.5. The functions she was responsible for were abolished in July 1996, and her title was then changed to Senior Personnel Officer. She became incapacitated with chronic fatigue syndrome and on 31 March 1999 was separated from the WFP, for health reasons, and received a disability benefit through the United Nations Joint Staff Pension Fund.

By a letter of 18 November 1999 the complainant submitted a claim through the Advisory Committee on Compensation Claims (ACCC) seeking compensation under Manual paragraph 342.213, on the grounds that her illness was attributable to the performance of her official duties. The claim was rejected and the matter was subsequently referred to the Medical Board. The Board reported on 31 August 2000. By a majority it found that, based on its analysis, it was "unable to state" that the complainant's medical complaints were "more likely than not" related to her job at the WFP. The practitioner representing the complainant on the Board produced a dissenting opinion, which he submitted on 26 December 2000. The two practitioners forming the majority opinion on the Board issued a "response to the dissenting opinion" on 10 April 2001. On 2 May the Chief Medical Officer submitted the report, along with the two other opinions, to the ACCC.

Reporting on 8 October 2001, the Advisory Committee concluded that the chronic fatigue syndrome the complainant was suffering from was not linked to her work and recommended rejecting her claim to compensation. By a letter of 13 November 2001 from the Secretary of the Advisory Committee the complainant was informed that the Director-General had accepted that recommendation and rejected her claim. The letter referred to the document constituting the "response to the dissenting opinion". The complainant wrote back on 16 January 2002 asking to be given a copy of that document and one was dispatched to her on 25 February 2002. Before she received it she wrote again to the Secretary of the ACCC on 26 February, stating that her letter constituted an appeal that would "be amended upon receipt and review of the requested material".

On 29 April 2002 the complainant appealed to the Director-General seeking reconsideration of the rejection of her claim for compensation. The Assistant Director-General in charge of the Administration and Finance Department replied on 28 June. Taking up procedural matters she had raised, he said the Organization was giving her the opportunity to comment on the "response to the dissenting opinion", adding that the ACCC would then re-examine her case and make a new recommendation. If she wished to do that, she was asked to confirm her acceptance of the offer within 15 days. He indicated that his letter constituted a reply from the Director-General which could be appealed against to the Appeals Committee.

The complainant did not take up the offer to submit further comments and by a letter of 25 July 2002 raised further procedural objections. In particular, she contended that as she was a former WFP staff member, the reply to her appeal should have come from the Executive Director of the WFP and not from the FAO. Furthermore, she requested that the decision rendered on her appeal should be a final one, that is “without recourse to the Appeals Committee”. The Director of the Human Resources Management Division wrote to the complainant on 9 December 2002; she recapped step by step the procedures followed, reiterating that the “proper avenue” for pursuing her case was to file an appeal with the Appeals Committee. She pointed out that, under Staff Rule 303.1311, any request to the Director-General to take a final decision on an appeal must be made in the initial letter of appeal and not after a reply has been received from the Assistant Director-General. That is the decision the complainant impugns.

B. The complainant contends that the conclusions of the ACCC and the Medical Board were based on incomplete data and mistakes of fact. In her opinion, both bodies failed to review all the pertinent documents relating to her case. The Medical Board failed to consider that she was healthy before she joined the WFP and that she became disabled because she was exposed to air pollution in her work place. She contends that there was evidence of “sick building syndrome” in the WFP building where she worked for many years. The root cause of her illness, apart from the porphyria that she suffered from, was environmental irritants at her place of work, and her exposure to infection in countries where she was sent on mission, as well as the high level of stress she faced in her job. The causes of the chronic fatigue syndrome she suffered from were thus directly linked to her unhealthy work conditions.

She believes there were procedural irregularities in the handling of her case, and that her right to due process was violated. She alleges breach of applicable Staff Regulations and Staff Rules, abuse of authority and undue delay, all of which render the findings of the ACCC, the Medical Board and the Director-General null and void. She raises inter alia the following objections. First, contrary to applicable Manual provisions, the FAO’s Chief Medical Officer, who was the Organization’s representative on the Medical Board, was not only present at the ACCC’s meeting of 26 September 2001, but also introduced her case at that meeting. Secondly, the ACCC was not provided with certain documentation supplied by her representative on the Board, which set out the facts of her case. Thirdly, although the ACCC took note of the “response to the dissenting opinion” at its meeting of 26 September 2001, at that point in time neither she nor her representative were aware of its existence and had thus been deprived of the opportunity to make a formal rebuttal of comments contained therein. Fourthly, as she was a former staff member of the WFP, the appeal she lodged with the Director-General should have been passed to the Executive Director of the WFP for reply.

Citing Judgments 1674 and 2116, she contends that the Organization has “created undue delay” in dealing with her case; that delay has exacerbated the injury she suffered and entitles her to damages.

The complainant seeks the quashing of the decision not to treat her illness as service-related, and asks that her condition be recognised as service-incurred with effect from 18 November 1999. She claims the additional compensation that she would have received if her total incapacity had been recognised as service-incurred from that date. She also claims moral damages, costs, interest on sums awarded to her until such date as they are paid in full, as well as such other relief as the Tribunal deems fit.

In the event that the Tribunal is unwilling to substitute its own judgment for that of the Organization, she requests the convening of an impartial medical review board to reconsider the evidence she has put forward. She requests the disclosure of any and all documents relevant to her case, and also asks for hearings.

C. The Organization submits that the complaint is irreceivable under Article VII(1) of the Tribunal’s Statute on the ground that the complainant has failed to exhaust the internal remedies. Despite being specifically reminded on a number of occasions of her right to appeal certain decisions, she did not submit her case to the Appeals Committee.

On the merits, it refutes her claims of procedural irregularities and contends that the Staff Regulations and Staff Rules have been complied with. Both the ACCC and the Medical Board dealt with the complainant’s case in accordance with Manual section 342 and the complainant was not deprived of due process. Taking up her allegations, it explains that in cases where a medical board has been convened, the Organization’s Chief Medical Officer is called by the ACCC as a “resource person”, but the case is always presented by the ACCC secretary. Contrary to the complainant’s assertions, all the documentation provided was properly examined by the Medical Board and the ACCC. With regard to the production of the “response to the dissenting opinion”, the FAO points

out that it ultimately realised that the complainant had not received a copy of that document before the ACCC meeting, and, as proof of its good faith, it gave her the opportunity to submit comments, but she did not avail herself of that possibility. It submits that it was normal procedure for the complainant's appeal to the Director-General to be dealt with by the FAO and not the WFP, as the FAO Staff Compensation Plan and the recourse procedures are fully administered by the FAO.

Noting that the complainant develops the causes of her illness in a detailed manner, it submits that the Tribunal may not replace qualified medical opinion with its own. She has not shown that there was any mistake or failure to consider essential facts in the medical opinion that formed the basis of the Organization's decision. The FAO holds that her claims are unfounded and that there is no basis for an award of damages.

D. In her rejoinder the complainant contends that she should not have been expected, as a result of a procedural error made by the defendant, to return yet again to the ACCC, or even to file an appeal with the Appeals Committee. She presses her plea that there was undue delay in dealing with her claims.

She puts forward two further claims for documentation. In one she wants the defendant to disclose documentation to show that the Bradford Hill criteria – used to evaluate her own case – are used to evaluate all service-incurred claims put to the FAO. In the other, she seeks disclosure of the criteria used for determining when a request for a final decision can be granted without resort to the Appeals Committee.

E. In its surrejoinder the Organization states that the complainant has not presented any evidence to show that she has done everything reasonably possible to exhaust her internal remedies. While not agreeing with the complainant's allegation of undue delays, it asserts that the complainant's own actions contributed to the length of the process.

It takes note of the complainant's new request for documentation, but states that it "would be absurd to suggest that Bradford Hill criteria are used in all cases". The use of those criteria by the Medical Board resulted from an "appropriate exercise of its medical judgment". With regard to her second request, as previously explained to the complainant, it states that any request to the Director-General to take a final decision on an appeal has to be made in the initial letter of appeal.

CONSIDERATIONS

1. The complainant disputes a decision of the FAO, which is acting on behalf of the World Food Programme (WFP). She maintains that the decision of the Director-General of the FAO not to recognise her medical condition as service-incurred should be quashed.
2. The complainant started her career with the FAO in 1981. She says that she has had various medical problems, which she describes in some detail, ever since 1984. She worked for the FAO until April 1986, when she accepted a position with the WFP as a Personnel Officer. She was promoted to grade P.4 on 28 February 1986. On 1 July 1995 she was appointed Chief of Human Resources Establishment at grade P.5.
3. Starting in 1998, the complainant developed severe symptoms of fatigue forcing her to refrain from almost all physical or mental activity. In January 1999 her case was submitted for consideration of eligibility to receive a disability pension from the United Nations Joint Staff Pension Fund and on 17 February 1999, the Secretary of the FAO Staff Pension Committee informed the complainant that the Committee had made a positive determination as to her entitlement to a disability benefit, payable following her separation from the WFP. She thereupon took retirement and has since that time been in receipt of a disability pension.
4. In November 1999 she submitted a formal claim for compensation on the grounds that her illness was directly a result of the performance of her official duties. Her claim was examined by the Advisory Committee on Compensation Claims (ACCC). It was subsequently rejected and after extensive correspondence a Medical Board was convened, and its findings were submitted to the ACCC. On 13 November 2001 the Secretary of the ACCC informed the complainant that the Director-General had accepted the Committee's recommendation to reject her claim.

On 29 April 2002 the complainant appealed against that decision to the Director-General. By a letter of 28 June the Assistant Director-General in charge of Administration and Finance replied to that appeal, taking up procedural

objections raised by the complainant, and telling her that his letter constituted a reply from the Director-General and that she could, if she so wished, appeal against it to the Appeals Committee. The complainant wrote back raising further issues. On 9 December 2002 the Director of the Human Resources Management Division wrote to the complainant summarising the action taken so far in dealing with her case. The complainant cites that letter as the impugned decision.

5. The complainant argues that she was justified in coming directly to the Tribunal because she would encounter excessive delays if she were to pursue her case through the Appeals Committee. In support of this argument, she refers to Judgments 1674 and 2116.

6. She contends that the rejection of her claim to have her illness classified as service-incurred was flawed on both substantive and procedural grounds. Her chief argument is that the Director-General's decision which was taken pursuant to the recommendations of the ACCC and the Medical Board cannot stand because the conclusions of both those bodies were flawed. According to her, both bodies based their findings on incomplete data and erroneous facts.

7. She gives several reasons why she considers her right to due process was violated. She argues that one such irregularity was the failure of the FAO to send her a copy of the "response to the dissenting opinion" prior to the meeting of the ACCC. She also argues extensively that as a former staff member of the WFP, the reply to her appeal should have come from the Executive Director of the WFP and not from the FAO.

8. Furthermore, the complainant claims that procedural and substantive irregularities have been committed by the WFP/FAO in the handling of her case. More specifically, the complainant declares that the documentation prepared by her medical practitioner was not submitted to the ACCC. The complainant also contends that the FAO's Chief Medical Officer, who was its representative on the Medical Board, attended the ACCC's meeting and that this was not correct practice.

9. The complainant seeks the quashing of the impugned decision, wants her condition recognised as being service-incurred and requests to be paid the amount she would have received had her total incapacity been deemed service-incurred in 1999; she also claims moral damages.

10. The defendant's principal argument is that the complaint is not receivable under Article VII(1) of the Tribunal's Statute because the complainant has not exhausted the internal remedies at her disposal under the applicable Staff Regulations and Rules. More specifically, the Organization submits that the complainant has no basis for claiming, as she does in her complaint, that she has done "everything reasonably possible to exhaust her internal remedies prior to seeking relief from the Tribunal". The defendant recalls that the complainant both refused the offer to reconvene the ACCC, which would have given her ample opportunity to present once again the substance of her medical case, and refused to present her case to the Appeals Committee. Consequently, the Organization invites the Tribunal to dismiss the complaint as irreceivable without entering into the merits of the case.

Alternatively, should the complaint be deemed receivable, the defendant submits that all FAO regulations and rules applicable to this case have been respected and that the complainant failed to demonstrate the occurrence of any procedural irregularities.

11. The substance of Article VII(1) of the Tribunal's Statute is reproduced in Manual paragraph 332.222, which clearly informs staff members that they "may appeal to [the Tribunal] only after having exhausted the internal means of review and appeal available under the [FAO's] pertinent regulations and rules". Furthermore, in the present case, the complainant was specifically reminded, on a number of occasions, by the Organization of her rights of appeal in accordance with the FAO's internal regulations and rules. In the letter of 9 December 2002 the Director of the Human Resources Management Division explained to the complainant that the proper avenue for pursuing her case was to file an appeal with the Appeals Committee, in accordance with Staff Rule 303.1313.

12. Furthermore, the case law the complainant relies upon in an attempt to justify her bypassing of the internal remedies are not relevant. Judgment 2116 refers to the length of the internal appeal procedure, stating that an appellant is entitled to expect a decision to be taken within a reasonable time. However, in that case, the complainant had already exhausted the internal appeal process. By contrast, in the present case, the complainant has manifestly not exhausted the internal appeal process and, indeed, has chosen not to submit her case to the

Appeals Committee at all.

13. From Judgment 1674, the complainant quotes the Tribunal as stating that “[w]here the decision-making authority carries over an appeal, the internal procedure must be deemed exhausted when the complainant has done his utmost to get things going yet no decision is likely reasonably soon”. In that case, it may be noted, the Tribunal considered that the criteria for establishing undue delay had not been met. In the present case, on the other hand, the delays are entirely due not to the Organization but to the complainant herself and to her inexplicable stubborn refusal to follow the proper procedure so frequently indicated to her.

14. The Appeals Committee would have constituted a perfectly appropriate forum for determining the merits of numerous procedural flaws alleged by the complainant, and if it had found them to have substance, could have recommended the granting of appropriate remedies. The existence of such alleged flaws, including the allegedly excessive time taken in the various procedures leading up to the time when an internal appeal could have been launched and the alleged wrong identification of the decision-making authority, is no excuse for failing to exhaust the available internal means of redress. Since that is what the complainant has done notwithstanding the numerous opportunities afforded to her, the complainant’s claims are irreceivable.

15. Since the adverse decision of the ACCC, the complainant has been offered at least three separate opportunities to seek redress in accordance with the applicable rules. First, on 13 November 2001, when the Secretary of the ACCC informed her of the Director-General’s initial decision to accept the Committee’s recommendation to reject her claim, she was also informed that she could submit an appeal to the Director-General within 90 days of the receipt of that letter. Instead of doing so, she first, on 16 January 2002, wrote back to the Secretary of the ACCC requesting documents submitted to that Committee by the Medical Board. Then on 26 February she wrote again to the Secretary of the ACCC indicating that her letter was to constitute an appeal. Since neither letter was addressed to the Director-General and the second was also out of time, she had not properly invoked the internal means of redress.

16. Then, on 29 April 2002, the complainant finally wrote a letter of appeal to the Director-General. Notwithstanding that the appeal was out of time, on 28 June 2002 the Assistant Director-General in charge of Administration and Finance informed her that the FAO was “prepared, should [she] accept” to provide her with the opportunity to submit her comments on the “response to the dissenting opinion” drawn up by the majority of the Medical Board, following which the ACCC would then re-examine her case and make a new recommendation to the Deputy Director-General.

Instead of taking up this offer, which would have re-opened her now foreclosed rights of appeal, the complainant protested that the reply should have come from an official of the WFP rather than from the FAO. Since at this point she had been separated from the WFP for over three years, this contention was mistaken.

17. Finally, on 9 December 2002 the Director of the Human Resources Management Division reminded the complainant that the FAO had been prepared to provide her with the opportunity to submit additional comments on the “response to the dissenting opinion” and to have the ACCC re-examine her case and make a new recommendation to the Deputy Director-General, accounting for these additional comments. This offer, too, was ignored by the complainant who chose instead to treat that letter as a final decision (which it manifestly was not) and instead, lodged her complaint before the Tribunal.

18. Since, notwithstanding the numerous opportunities afforded to her, the complainant has failed to exhaust the internal means of redress open to her, the complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.