Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 3)
v.
ITU

138th Session **Judgment No. 4831**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr K. H. against the International Telecommunication Union (ITU) on 23 December 2021, ITU's reply of 18 March 2022, the complainant's rejoinder of 20 June 2022 and ITU's surrejoinder dated 21 July 2022;

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

Having examined the written submissions;

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

The complainant challenges the rejection of his claim for compensation for service-incurred illness.

Facts relevant to this case are to be found in Judgments 4515 and 4516 on the complainant's first and second complaints, delivered in public on 6 July 2022. Suffice it to recall that the complainant joined ITU on 1 December 2014 under a two-year fixed-term contract, which was extended several times, at grade D.1. On 14 October 2019, he was informed of the Secretary-General's decision to suspend him from duty with full pay effective from the same date on the grounds that allegations of misconduct had been reported to the Ethics Office against him and that a formal investigation would be undertaken. The complainant was requested to return all ITU items and devices put at his disposal and to cooperate fully in the investigative process. His

access to the ITU resources was suspended and he was no longer authorized to access ITU premises unless expressly invited by the investigator during the process.

On the same day, the complainant – who argues that his public ejection was "extremely humiliating" and "came as a great shock" and had an immediate adverse impact on his health – contacted a public medical service for an emergency intervention. He was then examined by his treating doctors. During 2020, several medical reports were issued in which it was found that he was medically unfit to work or participate in the investigation process.

On 7 July 2020, the complainant submitted a claim for service-incurred illness, citing the events of 14 October 2019 and the exacerbation of his medical situation over the course of 2020. Considering that there was no specific procedure for addressing such claims within ITU, he used the United Nations Staff Mutual Insurance Society form and requested that his claim be assessed pursuant to Appendix D to the United Nations Staff Regulations and Rules. On 12 August 2020, after receiving guidance on the proper forms and channels to be followed within ITU, he submitted an amended "Incident Form" and a "Professional Illness - Accident report" to the ITU's Chief of the Safety and Security Division. On 4 November 2020, ITU – which had accepted that the complainant's claim be exceptionally handled by the Claims Compensation Unit of the United Nations Office at Geneva (UNOG) under Appendix D to the United Nations Staff Regulations and Rules – apologized for the delay in treating his claim and informed him that it had only been sent to UNOG the day before. On 11 November, ITU requested him to provide additional medical documentation for the processing of his claim, which he did the following day.

By a letter of 9 December 2020, the complainant received the recommendation from UNOG's Claims Compensation Unit – dated 7 December 2020 – in which it was found that his claim was "not receivable" on the ground that his allegations could not be reviewed by the Claims Compensation Unit in the absence of "a definitive finding in the form of a conclusion in an [Office of Internal Oversight Services]

report, or an independent investigation report, or a [United Nations] Ethics Office report, or a ruling by the competent tribunal, that [ITU] failed in its duty of care". On 21 January 2021, the complainant's treating doctor issued a new medical certificate indicating that the complainant's illness was service-incurred, had resulted from his public suspension from duties on 14 October 2019 and was ongoing due to the subsequent irregular treatment by ITU. He reiterated this view in a medical certificate of 26 March 2021.

On 22 January 2021, the complainant requested a review of the 9 December 2020 letter "rejecting his claim for compensation for his service-incurred illness". He asked that the "decision" contained in the said letter be quashed in its entirety with all legal effects flowing therefrom, that it be declared that his ongoing illness was service-incurred, that he be awarded material, moral and exemplary damages, costs, and that he be paid 5 per cent interest on all amounts. His request for review was rejected on 8 March 2021 on the main ground that the challenged "decision" was not final as it merely concluded that the conditions needed for the claim for compensation to be found receivable were not met.

On 7 May 2021, the complainant lodged an appeal against the 8 March decision reiterating the claims formulated in his request for review.

The Appeal Board issued its report on 11 October 2021 in which it concluded that there were not enough elements to conclude that the complainant's medical condition was service-incurred and that the process followed to deal with his claim was appropriate. It recommended that the appeal be dismissed in its entirety. By a letter of 13 October 2021, the Secretary-General decided to accept the Appeal Board's conclusions and recommendations and dismissed the complainant's appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision with all legal effects flowing therefrom, to find that his ongoing illness beginning on 14 October 2019 was service-incurred and to award him material damages, as well as moral and exemplary damages in the amount of 250,000 Swiss francs. He also seeks costs for

the internal appeal proceedings and the proceedings before the Tribunal. Finally, he requests that all amounts bear interest at the rate of 5 per cent per annum from 7 July 2020 until the date of payment, and such other relief as the Tribunal may deem necessary, fair and just.

ITU asks the Tribunal to dismiss the complaint as unfounded. It further states that, should the impugned decision be set aside, it would not result in the automatic recognition of the complainant's illness as service-incurred, but in the remittal of the matter for final determination.

CONSIDERATIONS

1. The complainant was informed of the Secretary-General's decision to suspend him from duty with full pay with immediate effect by a letter which the Chief of the Human Resources Management Department (HRMD) delivered to him in person on 14 October 2019, pending an investigation into misconduct against him initiated by ITU. The complainant alleges that, at that time, the Chief of HRMD, without any prior notice, suspended him in circumstances which shocked and humiliated him and had an immediate adverse impact on his health causing him to suffer from service-incurred illness for which he seeks compensation. He argues, for example, that the Chief of HRMD "publicly and humiliatingly" escorted him out of the building in full view of his (the complainant's) personal assistant, who was clearly stunned by what occurred, as well as of other employees who were leaving work, and that the manner in which the Chief of HRMD treated him at the gate in front of security personnel and other employees left him "horribly embarrassed and humiliated". The complainant further alleges that the impact of the treatment forced him to call a public medical service for an emergency intervention on the same day and that he was subsequently treated by his treating doctors over the next two years. He also complains that he was immediately cut off from all forms of communication with ITU staff members who were prohibited from communicating with him. He argues that the manner in which the Chief of HRMD treated him at the time of his suspension breached the ITU's duty of care towards him and seeks compensation for "the moral harm

caused to him by ITU's intentional and/or negligent behavior" in this regard. The complainant provides medical certificates and reports from his treating psychiatrist, from a doctor at the public medical service he contacted on 14 October 2019 and from an expert in psychiatry whom ITU had appointed to assess his ability to participate in the investigation process which had been undertaken and which forms the basis for his suspension from service. He states that his illness was service-incurred and resulted from his suspension and the related incidents of 14 October 2019.

2. In his internal appeal, the complainant requested the Appeal Board to find that his illness was triggered by the events surrounding his suspension and was therefore service-incurred, and to award him material damages resulting therefrom, as well as moral and exemplary damages for the injury he suffered because of "ITU's intentional and/or negligent behavior", the improper rejection of his claim for compensation for the alleged service-incurred illness and the failure to deal with his request for compensation in a timely manner. In recommending that the Secretary-General dismiss all of the complainant's requests – which the Secretary-General accepted in the impugned decision – the Appeal Board agreed that the United Nations Office at Geneva (UNOG)'s process for determining claims for service-incurred illness, contained in Appendix D to the United Nations Staff Regulations and Rules, was appropriate for dealing with the complainant's claim and that both parties should accept the outcome reached by UNOG's Compensation Claims Unit. It also found that the information provided (including the medical reports and certificates upon which the complainant relied) did not contain enough elements from which to conclude that the complainant's illness was service-incurred.

3. In seeking to set aside the impugned decision, the complainant advances the following grounds of challenge:

(1) UNOG erred when it found that his claim for compensation for service-incurred illness was "not receivable".

(2) The Appeal Board's conclusion that there were "not enough elements to conclude that [his] medical condition [was] service-incurred" constitutes an error of law and amounts to a failure to take account of relevant facts.

(3) ITU's failure to pay the complainant reasonable compensation for service-incurred illness constitutes a breach of its duty of care towards him.

(4) The fact that the final (impugned) decision was not signed by the Secretary-General renders it null and void.

4. Consistent precedent, contained, for example, in consideration 8 of Judgment 3361, states that the Tribunal cannot substitute its own views for the medical opinions on which an administrative decision, such as the present one, is based. The Tribunal is, however, fully competent to assess whether the procedure that has been followed was correctly carried out, especially as regards respect for the adversarial principle or the right to be heard, and to examine whether the reports used as the basis for that administrative decision contain any substantive error or inconsistency, overlook essential facts or draw erroneous conclusions from the evidence (see also Judgments 3994, consideration 5, 3689, consideration 3, 2361, consideration 9, and 1284, consideration 4).

5. As a precursor to considering the foregoing grounds of challenge, two procedural requests must be addressed.

6. ITU's request either to review together or to join this complaint with the complainant's first, second, fourth and fifth complaints is rejected. The request in relation to the first, second and fifth complaints is moot as they were the subject of Judgments 4515, 4516 and 4578, delivered in public on 6 July 2022 (the first and second complaints) and 28 November 2022 (the fifth complaint), whilst the present complaint and the complainant's fourth one do not raise similar issues of fact and law.

7. The complainant's request for oral proceedings is also rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and the relevant evidence.

8. Concerning the first ground of challenge the complainant advances, according to which UNOG erred when it found that his claim for compensation for service-incurred illness was "not receivable", the Tribunal firstly notes that it is apparent that the recommendation from UNOG's Claims Compensation Unit constitutes a "repor[t] used as the basis for an administrative decision" under the case law cited in consideration 4 above, given that the Secretary-General based his final decision on it (as well as on the Appeal Board's report) and, accordingly, the Tribunal is competent to examine its legality. Secondly, the Tribunal notes that UNOG's Claims Compensation Unit had stated, in effect, that, having reviewed the information the complainant had provided in his claim for compensation for service-incurred illness based on the events of 14 October 2019, the claim was "not receivable at [that] time" in the absence of a definitive finding by an independent authority, such as the Office of Internal Oversight Services, the United Nations Ethics Office, or a competent tribunal, that the Organization had failed in its duty of care. It is obvious that the Claims Compensation Unit thereby merely affirmed that it was not in a position to make a determination on the complainant's illness as being service-incurred. However, UNOG's Claims Compensation Unit did not close the door on the claim, as it made it clear that, if additional information were supplied, it would be able to resume the processing of the subject claim. It is moreover notable that, in the impugned decision, the Secretary-General did not use the terms "not receivable". In fact, the Appeal Board did not deal with the issue whether the claim was receivable in the classical meaning used in the case law. It stated that the complainant's diagnosis should be complemented by an investigation, concluding, in effect, that "there [were] not enough elements to conclude that the [complainant]'s medical condition [was] service-incurred" and that "UNOG's process related to claims attributable to service-incurred illnesses (Appendix D) [was] an appropriate approach to deal with the

[complainant]'s request, and [that] both parties should then accept the outcome from the [United Nations] Compensation Claims Unit". This was essentially repeated by the Secretary-General, as he endorsed the Appeal Board's report.

It follows from the foregoing that the first ground of challenge is unfounded.

9. The fourth ground of challenge the complainant advances is also unfounded. He cites the Tribunal's statement in consideration 5 of Judgment 4139 according to which decisions must be taken by the competent authority. He also refers to Staff Rule 11.1.1.5, which relevantly states that the Secretary-General shall take the final decision within 60 days of receiving the Appeal Board's report. However, the Tribunal's case law, stated, for example, in consideration 4 of Judgment 4506, recognizes that the decision of the executive head of an organisation may be communicated to the official concerned, as is common practice, by means of a letter signed by the head of human resources management, provided that it is clear from the terms of that letter, or, at least, from consideration of the documents in the file, that the decision in question was indeed taken by the executive head herself/himself (see also Judgment 4291, consideration 17, and the case law cited therein). This principle is satisfied in this case as the terms of the impugned decision make it clear that the decision was taken by the Secretary-General. Additionally, the Chief of HRMD expressly signed the impugned decision for the Secretary-General. The complainant's further submission that the impugned decision is null and void because the Appeal Board's report – on which it was based – was not signed by all the members is also unfounded as, in any event, it was indeed signed by the Chairman, as well as by the other two members, albeit that these members signed the report digitally.

10. Regarding the second ground of challenge, whilst the Appeal Board did not doubt that the events of 14 October 2019 could have shocked the complainant, it stated that the actions complained of had to be taken in light of the applicable rules given the allegations of misconduct against the complainant that were to be investigated. The

Appeal Board however, with apparent focus on a possible breach of the duty of care, stated that it did not see any negligent act that could have caused a foreseeable risk of injury to the complainant and that, in communicating to him his suspension from duty, the Administration did not breach its duty of care towards him. It therefore expressed the view that the complainant's illness did not result from anything he had done in the course of the service he rendered as an employee of ITU or from any task ITU asked him to perform but stemmed from the implementation of lawful administrative actions, which, accordingly, could not be construed as causing service-incurred illness. This conclusion of the Appeal Board was legally founded. The Tribunal notes that, in consideration 13 of Judgment 3649 it found that, although, by its very nature, a staff member being escorted from her or his office by officers and being escorted out of the workplace is a humiliating experience, such a course of action is admissible in the absence of any conduct of the officers that would exacerbate the humiliation, and that moreover, the disabling of a staff member's email account and the denial of access to certain floors and facilities are simply matters of sound business practice on the part of an organisation. The Appeal Board had however noted that this was not the end of the matter as, at the complainant's request, ITU had agreed to refer the matter to UNOG, pursuant to ITU's Staff Rule 6.2.4 on "Compensation for death, injury or disability attributable to service".

11. Staff Rule 6.2.4, which refers to the provisions of Appendix D to the United Nations Staff Regulations and Rules, relevantly stated that, "[i]n the event of [...] injury [...] attributable to the performance of official duties on behalf of [ITU], reasonable compensation may be granted to a staff member or his beneficiaries to supplement the benefits provided for in the Regulations of [ITU] and the United Nations pension schemes as well as the staff health insurance scheme provided to staff members by ITU, taking into account the family circumstances of the staff member". Article 1.7 of Appendix D to the United Nations Staff Regulations and Rules provides that a determination on whether an illness is directly causatively related to an incident is to be made by the Medical Services Division for consideration by the Advisory Board on

Compensation Claims. Prior to its recommendation of 7 December 2020, UNOG's Claims Compensation Unit had reviewed the medical certificates and reports issued by the doctor of the public medical service which the complainant contacted on 14 October 2019, the complainant's own treating psychiatrist (Dr V.) and by an expert in psychiatric health (Dr S.) whom ITU had appointed. Whilst the Appeal Board confirmed from those certificates and reports that the complainant was ill, it stated that they yet needed to be evaluated in the context of the actions of 14 October 2019 to determine whether there was a causal link between them and the complainant's illness.

Given the purview which Article 1.7 of Appendix D to the United Nations Staff Regulations and Rules conferred upon UNOG and the Tribunal's limited power of review in medical matters mentioned in consideration 4 of this judgment, the Tribunal rejects the complainant's request that it (the Tribunal) finds that, consistent with the opinions of the doctors who provided certificates and reports regarding his medical situation, his ongoing illness was service-incurred.

12. It is notable that, in its report, the Appeal Board noted that a certificate issued by Dr V. on 26 March 2021 (subsequently to the recommendation from UNOG's Claims Compensation Unit) stated that the complainant's health had improved since February, but that he suffered another psychological shock when he received the findings of the investigation report into the allegations of misconduct against him. The Tribunal notes that, given that this medical certificate was issued in March 2021, that is to say, long after the incidents of 14 October 2019, it was open to the Appeal Board to consider that it did not, in itself, have sufficient weight to support the complainant's allegation that his illness was caused by the Chief of HRMD's actions of 14 October 2019.

Importantly, whilst it is true that a determination on whether the complaint's illness was service-incurred or not should normally have been made at the material time, in the specific circumstances of this case, and because the complainant did not provide sufficient evidence thereon, the Tribunal considers that it was reasonable for the Claims

Compensation Unit to conclude, as it did, that it was not in a position to verify the allegations on which the complainant's claim was based and that, without a definitive finding that the organisation had breached its duty of care, it could not process his claim.

In a case such as the present, it was not sufficient for the complainant to simply assert, on the strength of a series of emails from his own physician, that his illness was service-incurred because it was, according to him, directly caused by the events of 14 October 2019. In notifying the complainant of the opening of an investigation for misconduct and of his suspension pending the outcome of that investigation, and in accompanying him outside the building, the organisation was implementing administrative decisions provided for in its legal framework. It was incumbent on the complainant to show that, in the way these decisions were implemented, ITU did not respect its duty of care, with the result that his illness was not solely due to the inherently unpleasant nature of the decisions in question. This would have required him to submit a specific claim to ITU as to the way he had been treated on 14 October 2019 and to possibly request that an investigation be undertaken. As he failed to do so, UNOG's Claims Compensation Unit reasonably concluded that it was not in a position to make a medical determination, whilst allowing the possibility of reviewing the matter in the event that further information was provided. By confirming this approach in its conclusion, which the complainant challenges in his second ground of challenge, the Appeal Board did not err, as the complainant submits. Additionally, as there is no evidence that ITU breached its duty of care towards the complainant, the third ground of challenge is also rejected.

13. In the foregoing premises, the complaint will be dismissed. The Tribunal is satisfied with the Appeal Board's conclusions and recommendations, as endorsed by the Secretary-General in the impugned decision, having considered that there are no flaws in those conclusions and recommendations.

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, Sir Hugh A. Rawlins, 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

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER