FIFTY-NINTH ORDINARY SESSION

In re MANDIL

Judgment No. 770

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Salah Hussein Mandil against the World Health Organization (WHO) on 24 July 1985, the WHO's reply of 18 October, the complainant's rejoinder of 22 November and the WHO's surrejoinder of 20 December 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 720.1, 730 and 1230.1.1 and 1.3 and WHO Manual provision II.7, Annex A (the Staff Health Insurance Rules), paragraphs 30, 200.1 and .2 and 490.3, and Annex E (the Rules governing Compensation), paragraphs 6, 9, 14, 26(b) and 32(c);

Having examined the written evidence;

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

A. The complainant, a citizen of the Sudan, joined the WHO in 1974. On 7 October 1979 he and another WHO official left Geneva by Swissair on mission to Peking. The aeroplane crashed at Athens airport, and both of them were badly injured. The complainant had and has chronic and severe back pains and lumbar dysfunction. From November 1979 until June 1981 and from October 1981 he underwent physiotherapy. After a surgical operation on 24 May 1982 he was in convalescence until 1 August 1982. The doctors found that by March 1984 his condition was stable.

Swissair paid his medical expenses in full until their liability ceased, after two years, on 7 October 1981. Thereafter the WHO Staff Health Insurance Fund agreed to meet four-fifths of his expenses. The Fund met in November 1982 claims he made in September.

On 19 October 1982 the Secretary of the Advisory Committee on Compensation Claims wrote to him observing that under WHO Manual provision II.7, Annex E, he might have claimed compensation for "injury which may be attributable to the performance of official duties" but under paragraph 26(b) should have done so within six months; the Director-General might nevertheless allow a claim thereafter under the proviso in 26(b); though invited to claim, he had not replied; and he was asked to explain why. On 26 October he answered that nothing should be done without his approval and that he was negotiating with Swissair. On 27 January 1983 he concluded an agreement with the airline company whereby in return for a sum he has not revealed he waived all claims against them. On 15 March the Advisory Committee drew up a recommendation to the Director-General. It observed that the complainant had declined to make a claim on the grounds that he was seeking compensation from Swissair. It recommended, among other things, entertaining no future claim from him and, to protect the WHO "against any possible future claims", asking him to supply the text of the agreement with Swissair. The Director-General accepted the recommendations on 25 March. On 27 April 1983 the Secretary so informed the complainant, and on 2 May he wrote in protest to the Chairman of the Committee saying that its report was based on incomplete or incorrect facts. On 10 June the Secretary answered that the Director-General's decision of 25 March was final.

On 20 September 1983 the complainant submitted new claims to medical expenses. The Staff Health Insurance Fund forwarded them to Swissair, who on 14 November refused to meet them, citing the agreement. The Surveillance Committee of the Fund wrote to the complainant on 16 January 1984. It pointed out that under Rule 200.1 of Manual provision II.7, Annex A, the Fund "does not reimburse that part of the costs incurred which has been or will be reimbursed under another insurance"; the Committee must see the text of the agreement with Swissair before consenting to payment; he might also have to return sums paid by the Fund in November 1982.

On 14 March 1984 he wrote to the Chairman of the Advisory Committee. He said his case had been mishandled and asked that his accident be treated as service-incurred, the Director-General waiving the six-month time limit if need be. He asked that the Fund meet in full all outstanding and future claims to medical expenses, that bills hitherto paid in part be paid in full and that he be awarded the compensation due under Annex E. He supplied the text of the agreement, omitting the amount of the settlement, and affirmed that the sum did not cover medical

expenses. On 19 April 1984 the Legal Adviser said that the Director-General considered the matter closed, having notified his decisions on 27 April 1983. On 17 July the Director of Budget and Finance sought advice from the Internal Auditor on the correctness of earlier payments of medical expenses. The Director-General authorised investigation. In answer to a letter of 10 August 1984 from the complainant repeating his claim of 14 March the Director-General wrote on 24 August: "No further action regarding this case can be taken until you submit to Internal Audit the full text and amount of your settlement with Swissair." On 25 September he appealed to the Board of Appeal against that decision. On 15 November 1984 the Internal Auditor reported that recovery was "no longer under question" and his pending claims ought to be met. In its report of 6 March 1985 the Board recommended, among other things, that the Fund meet his claims and that he be allowed to claim compensation "according to the normal procedures".

The Director-General rejected the latter recommendation by the decision now impugned which he took on 22 April 1985 and which was notified on 29 April.

The letter of 22 April also said that the Surveillance Committee would look into his claims to medical expenses. The Secretary of the Committee wrote to him on 10 May 1985: for lack of the full text of the agreement the Committee could not ascertain whether the settlement with Swissair covered medical expenses, and the Fund must therefore recover the sums paid to him in November 1982 and reject the pending claims. Deductions have since been made from his monthly pay.

B. The complainant states that his appeal comes under Rule 1230.1.3 because there has been "failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules, or the terms of his contract". Since under Manual provision II.7, Annex A, paragraph 30, staff members participate in Staff Health Insurance "as a condition of their employment", the wrongful denial of his claims falls within 1230.1.3. He alleges breach of Staff Rule 730: "A staff member ... shall be entitled to compensation in the event of ... injury ... attributable to the performance of official duties..." Admittedly he did not claim in time medical expenses under Manual provision II.7, Annex E, paragraph 9, or compensation for partial disability under paragraph 14. But the purpose of the six-month time limit is to have the Director-General promptly informed of an accident, and in this case the accident was public knowledge from the start. Besides, the WHO did not get in touch with him formally for three years. It treated the other injured official far more considerately. The handling of his own case was arbitrary dilatory and negligent. The WHO was in breach of its duty to respect his dignity and good name and spare him unnecessary distress. He got no personal or administrative attention during years of severe pain and suffering. He was humiliated by the WHO's investigating his medical claims, though it had the text of his agreement with Swissair. Leaks and gossip have irreparably harmed his good name. The salary deductions are insulting nor do they fall within any of the cases in which deductions may be made and which are listed in paragraphs 6 and 32(c) of Annex E. He asks the Tribunal to quash the decision of 22 April 1985 and order the WHO to meet in full his claims to medical expenses due to the service-incurred accident, allow him to claim compensation for permanent partial disability examine the claim according to the generally followed procedures, decide whether and if so what compensation is due, and pay him 100,000 United States dollars as moral damages and $5,000 towards his costs.

C. In its reply the WHO seeks to correct the complainant's account of the facts. It observes that he refused to claim compensation for disability. The Secretary of the Advisory Committee sent him the claim forms through his administrative assistant shortly after the accident, and he was repeatedly reminded about making a claim. Besides, the WHO had no reason to fear for his health until he had his operation; after all he was never off work until February 1982. In his letter of 22 April 1985 the Director-General, though rejecting the Board's recommendations, said he would reconsider the question of compensation provided the complainant communicated the full text of the settlement, including the sum paid; failing that the WHO must assume he had got compensation from Swissair. He refused the further opportunity presumably because he wants to keep the full amount received from Swissair, contrary to paragraph 32(c) of Annex E: "Insofar as amounts recovered by or on behalf of the staff member ... relate to heads of damage in respect of which compensation is due under this Annex, these amounts shall be applied in the first instance to reimbursing amounts already paid by the organization and to reducing the liability of the Organization in respect of future payments". The compensation from Swissair must have covered heads of damage under the WHO's rules on compensation, the only unclear point being the proportion of the compensation allocated under each head. The sum is relevant because a large amount would suggest all heads had been fully covered. The other official injured in the accident was treated otherwise because the facts were different: he claimed compensation on 13 March 1980, and he submitted the full text of his settlement with Swissair to the Organization for approval. The Internal Auditor's report, favourable to the complainant and critical of the WHO, was based on misunderstandings of fact and of the law. His case was treated as confidential and known only to

very few.

The WHO submits that the claim to compensation is irreceivable, and the fact that the Board of Appeal took it up on the merits does not preclude the plea before the Tribunal. What he challenged in his appeal of 3 September 1984 was the decision of 27 April 1983, that of 24 August 1984 was mere confirmation, the appeal was time-barred and the internal means of redress were not exhausted. Although the time limit in paragraph 26(b) of Annex E is applied flexibly, it is reasonable to enforce it where the official refuses to make a claim. Besides, the complainant even declined the Director-General's offer to reconsider the matter.

As to the claims to medical expenses, the complaint is premature because it was not the decision of 22 April 1985 that finally rejected them. In any event they are devoid of merit. Until the complainant declares the amount of the settlement the WHO is entitled to presume that the sums claimed were covered by Swissair. Someone who wants a decision to be set aside must produce evidence to support his demand. He is not entitled to double reimbursement, the applicable rules being paragraphs 200.2 and 490.3 of Annex A.

D. In his rejoinder the complainant submits that the WHO's account is tendentious. He discusses at length its pleas on the receivability and merits of his claim to compensation and on the merits of his claims to medical expenses. He advances several reasons why his internal appeal was in time, in particular that the decision of 24 August 1984, which he was challenging, was not mere confirmation but based on new facts. He maintains that the unfair treatment of him is inspired by personal hostility, in particular on the part of the Chairman of the Advisory Committee on Compensation Claims, who is also the Assistant Director-General in charge of Administration and Finance. He observes that once it learned the full gravity of his disability the Organization did its utmost to deter him from seeking reparation. It gave him no new opportunity to claim because it set an unacceptable condition. It made a notorious inquiry into the honesty of his previous claims and hushed up the Auditor's findings in his favour. The only possible explanation of its attitude is "personal prejudice" within the meaning of Staff Rule 1230.1.1.

E. In its surrejoinder the WHO goes over further details of fact and enlarges on its earlier submissions on receivability and on the merits. While acknowledging that there may at times have been fault on both sides, it submits that the impugned decision made it plain that it would entertain a claim to compensation provided it had evidence to show there would not be double compensation. It dismisses his charges of personal prejudice as "pure rhetoric" and not supported by a shred of evidence.

CONSIDERATIONS:

1. The complainant joined the staff of the WHO on 14 January 1974 and holds the post of Director of the Division of Information Systems Support with the grade of D2.

On 7 October 1979 he sustained injury to the back in an aircraft accident while on official mission for the WHO. On the advice of his physician he undertook an intensive programme of physiotherapy from November 1979 until June 1981 when, again on doctors' advice, the treatment was stopped in order to determine whether his condition had become stable. In October 1981 physiotherapy was recommenced, his condition having deteriorated. In May 1982, following consultations between his medical advisers, he underwent an operation to correct two crushed vertebral discs. He resumed duty on 1 August 1982.

In September 1982 the complainant submitted medical bills for reimbursement under the WHO Staff Health Insurance scheme Reimbursement at the rate of 80 per cent as provided for under the Staff Health Insurance rules was effected in November 1982.

On 20 September 1983 the complainant submitted two new medical bills for reimbursement. Reimbursement was refused.

On 14 March 1984 he presented a claim to the Advisory Committee on Compensation Claims appointed under the Compensation Rules in Annex E to the WHO Manual. He requested:

(a) that his injuries be recognised as service-incurred, the Director-General being asked, if need be, to waive the six-month limit;

(b) that related medical bills already refunded by the WHO Insurance on an 80 per cent basis be settled up to 100 per cent;

(c) that pending and possible future medical bills relating to the injuries likewise be settled on a 100 per cent basis;

(d) that his incapacity be estimated by the Director of the Joint Medical Service and that compensation be granted on that basis.

On 19 April 1984 the WHO referred to the acceptance by the Director-General of a recommendation by the Advisory Committee that no claim in respect of the aircraft accident of 7 October 1979 be received from the complainant and stated that the Director-General considered the matter closed.

On 25 September 1984 the complainant appealed to the Headquarters Board of Appeal against the refusal of his requests. The Board recommended that the complainant's health insurance claim be met in accordance with the rules of the Staff Health Insurance and that he be permitted to make a formal claim to compensation. The Director-General rejected the recommendation by a letter of 22 April 1985 to which further reference is made below.

Preliminary

2. The complainant requests that a former staff member of the WHO and, like the complainant, a survivor of the aircraft accident of 7 October 1979 be called as a witness to "confirm and complete" the facts relating to the accident and to his own treatment and also to the compensation he received from the airline company and from the WHO Staff Health Insurance.

The Tribunal denies this request by reason of the conclusion stated in 7 below.

The compensation scheme

3. Under the provisions of Staff Rule 730, a staff member is entitled to compensation in the event of illness, injury or death attributable to the performance of official duties on behalf of the WHO, in accordance with rules established by the Director-General. These rules appear in Annex E to the WHO Manual. Rule 26 provides:

"(a) The Director-General shall be informed as soon as possible of any illness or injury which may be attributable to the performance of official duties on behalf of the World Health Organization.

(b) No claim for compensation under this Annex shall be considered unless it is submitted within six months of the injury the manifestation and diagnosis of illness, or death, provided that where the Director-General is satisfied that a claim has been made at a later date for valid reasons it may be accepted for consideration."

It is conceded by the complainant that no notice was given to the Director-General of any injury sustained while performing official duties. It is also conceded that no claim for compensation was submitted by him within six months of the injury.

Rule 32 of Annex E provides:

"(a) If the Director-General has reason to believe that a third party may be under a legal liability to pay damages for an illness, injury or death for which compensation is due under this Annex, he may require the staff member concerned or the staff member's survivors to take action to enforce such liability or to assign the right of action to the Organization.

(b) The staff member or his survivors shall give the Organization all necessary assistance in prosecuting any such action. The staff member or his survivors shall not settle any such action or any claim against a third party without the consent of the Director-General.

(c) Insofar as amounts recovered by or on behalf of the staff member or his survivors relate to heads of damage in respect of which compensation is due under this Annex, these amounts shall be applied in the first instance to reimbursing amounts already paid by the Organization and to reducing the liability of the Organization in respect of future payments."

Rule 32 thus applies the doctrine of subrogation to the compensation scheme and makes it clear that the WHO's compensation scheme is one of indemnity only and does not permit the staff member to profit from his loss.

The health insurance scheme

4. Rule 720.1 makes it compulsory for each staff member to participate in the Staff Health Insurance and to contribute to it. The benefits provided include reimbursement for medical and nursing services at the rate of 80 per cent of cost, subject to certain exceptions including one that the insurance does not reimburse that part of the costs incurred which has been or will be reimbursed by another insurance, social security or similar scheme. It is, in effect, a scheme of indemnity insurance.

Claims to reimbursement must be made within six months of the date of receipt of the bill for the services rendered and not later than eighteen months from the end of the period of treatment. There is a Surveillance Committee at headquarters which is empowered, among other things, to disallow claims which it does not consider bona fide and to limit payment of claims which are excessive. There is an appeal in respect of any claim to the Medical Review Committee, whose decision is final.

The conduct of the parties

5. It emerges from the dossier that shortly after the accident the airline company informed the complainant that it would accept and fully reimburse all medical bills. In consequence he paid his medical and physiotherapy bills from his own funds and was reimbursed by the company.

In November 1979 and again in July 1980 the WHO took up with the company the question of recovering from the airline the sums paid to the complainant during sick leave following the accident. These initiatives produced no result.

In a letter of 5 August 1982 to the WHO the airline company's lawyers drew attention to Article 29 of the Warsaw Convention, as amended at The Hague on 28 September 1955, which imposes a limitation period of two years from the accident for any claim against the airline, and stated that despite the fact that the complainant was now unable to pursue any remedies against the company, it was prepared to conclude a reasonable settlement with him.

On 19 October 1982 the Secretary of the Advisory Committee wrote to the complainant:

"Furthermore, I understand you do not wish to make a claim under the WHO compensation rules. However, for the sake of clarity and in view of the fact that no precedent exists (to my knowledge) for a staff member waiving such a claim in order to make an independent settlement with a third party, I should be grateful to receive at your earliest convenience a written statement concerning your position so that it may be submitted to the Advisory Committee on Compensation Claims for its consideration..."

The complainant wrote in answer that he did not make a claim on the WHO within the six-month period. He was unaware of such a limit and did not think that a claim was necessary since the airline undertook to cover his medical expenses. He added that he would keep the WHO informed of any progress in the "bonne volonté" dialogue between the lawyer retained on his behalf and the airline.

On 27 January 1983 the complainant signed a discharge in favour of the airline company in which he abandoned all claims against the company in consideration of the payment to him of a sum of money, the amount of which he has never disclosed.

On learning on 4 March 1983 of the settlement the WHO took the view that in order to protect itself against future claims and in order to deal with the complainant's request for reimbursement of medical expenses it had to be informed of all of the terms of the settlement. In his letter of 22 April 1985 the Director-General stated that, notwithstanding his decision to reject the recommendation of the headquarters Board of Appeal, he would be prepared to reconsider whether or not the complainant would be permitted to make a claim if, not later than 31 May 1985, the complainant gave the Advisory Committee a written undertaking that he would (i) upon its request give the full text, including the amount concerned, of the settlement with the airline company, and (ii) provide the Committee with any clarification or corroborating material it might require. The Director-General pointed out that in the absence of such co-operation it was to be assumed that the complainant had received full compensation for all the consequences of his accident. The complainant did not respond to the offer.

The allegations of procedural defects

6. It is contended for the complainant that the WHO violated the Compensation Rules by not contacting him directly until three years after the accident. The WHO replies that the claim forms were sent to his administrative assistant for his attention. He argues that his administrative assistant has not been designated as the medium of communication on Staff Health Insurance matters and that he should have been directly contacted or written to on such a strictly personal matter.

In the opinion of the Tribunal this contention is unsound. First, the transmission of claim forms by way of the administrative assistant is no more than normal office routine. Secondly, as a director of a division of the WHO the complainant knew or ought to have known the requirements of the compensation rules in the Manual.

The complainant further contends that the Advisory Committee on Compensation Claims acted in breach of the rules by considering his case without reference to a medical report. The complainant is mistaken. Under Rule 28 of the compensation rules the Director-General may refer a case for advice to a medical board where there is 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 WHO. There is no such conflict of opinion in this case.

The WHO argues that the impugned decision of 22 April 1985 merely confirmed a previous decision on which no appeal was taken and therefore the complaint is irreceivable insofar as it relates to a claim under the compensation rules. On 15 March 1983 the Advisory Committee drew up a recommendation to the Director-General that no claim under the compensation rules should in future be accepted from the complainant in respect of the accident. The Director-General accepted the recommendation and the complainant was so informed.

Rule 29(a) of the compensation rules states:

"An Advisory Committee on Compensation Claims shall be established to make recommendations at the request of the Director-General concerning claims for compensation under these rules."

On 15 March 1983 there was no claim before the Advisory Committee and therefore no legal foundation for the Committee to make a recommendation or for the Director-General to make a decision. Accordingly, the WHO's objection to receivability fails.

The claims before the Tribunal

7. The complainant seeks an order quashing the impugned decision insofar as it rejects the Board of Appeal's recommendations that his health insurance claims be reimbursed and that he be permitted to make a formal claim to compensation.

The Director-General was justified in rejecting the recommendations because the complainant refused to disclose the amount he had received from the airline company under a settlement in respect of "bodily, material (including medical and pharmaceutical expenses) or moral injury". As the health insurance provides for payment only by way of indemnity the complainant is not entitled to reimbursement if he has already been fully reimbursed by the airline company.

The reasoning in regard to the first claim applies equally to the second, which also fails.

The third claim is for an order requiring the Director-General to accept a claim under the compensation scheme outside the prescribed time-limits. The Director-General has discretion in such an application and according to its case law the Tribunal may not set his decision aside unless it was taken without authority or violated a rule of form or of procedure, or was based on a mistake of fact or of law or if essential facts were overlooked or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts. No such defect having been shown, this claim too is dismissed.

The complainant's fourth claim is to compensation for moral prejudice by reason of damage to his reputation. The Tribunal considers the claim to be without foundation.

The Tribunal makes no order on the claim to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.