

## SIXTY-EIGHTH SESSION

### *In re FAHMY*

#### **Judgment 993**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yehia Fahmy against the United Nations Industrial Development Organization (UNIDO) on 16 May 1989 and corrected on 23 June, UNIDO's reply of 23 August, the rejoinder filed by the complainant on 2 October, the Organization's further submissions of 25 October making good an omission in its reply, its surrejoinder of 13 November and the complainant's comments of 25 November on the further submissions of 25 October 1989;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, United Nations Staff Rule 206.3, Rule 112.02 of UNIDO's Staff Rules and Articles 16 and 17 of Appendix D to those Staff Rules ("Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties");

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, an Egyptian born on 28 August 1927, worked for UNIDO from 1969 and was granted a fixed-term appointment in 1976 as a special technical adviser at the Organization's headquarters in Vienna. He had his appointment extended several times. From 1 August 1986 he served in the Investment Project Identification and Formulation Branch of the Industrial Investment Division, his supervisor being the chief of the Branch, Mr. Abdelmoneim, a citizen of the Sudan. Since he was to reach the retirement age of sixty on 28 August 1987 his last fixed-term appointment was to expire on 31 August 1987.

By early 1987 he was in poor health: on 3 March 1987 a doctor in Vienna certified heart disease, nervousness and insomnia and blamed them on "psychic strain at his place of work".

In a memorandum of 10 March 1987 to the Director of the Division he accused Mr. Abdelmoneim of harassing him and hampering his work; he asked the Director to investigate and call Mr. Abdelmoneim to order.

His health being no better, he informed the Director-General in a memorandum of 13 August 1987 that he was being treated for cardiac stenosis and osteoarthritis and could not yet cope with everyday life, let alone the formalities of retirement. He asked for the grant of what remained of his entitlement to sick leave. He had his appointment extended to 31 October 1987 "for sick leave purposes only".

On 12 October 1987 he wrote the Director-General another memorandum asking for an answer to the one of 10 March 1987 and maintaining that Mr. Abdelmoneim was, "according to medical authority, largely responsible for the severe work stress that caused my present affliction". Still no answer came and in a memorandum of 25 October 1988 he cited the earlier ones, deplored the Organization's indifference, which he said hindered his recovery and damaged his prospects of other employment, and asked for a reply.

On 29 October 1988 he wrote to the Secretary of the Advisory Board on Compensation Claims, a body provided for in Article 16 of Appendix D to UNIDO's Staff Rules. He described his ailments and blamed the stress he had been under at work on inhuman treatment by Mr. Abdelmoneim, which he described in detail. He said that he had still been ill at the end of August 1987 when he had stopped working at UNIDO, and that but for his service-incurred ailments he could have found work elsewhere. He claimed damages equivalent to full salary for five years, the period during which he might reasonably have expected to remain professionally active.

In a letter of 29 November 1988 the Deputy Director-General in charge of Administration told him that his grievances against Mr. Abdelmoneim had been investigated at the time and "duly taken into account when considering [his] request for extension beyond retirement age"; it had been felt that correspondence would serve no purpose and might even harm his health; but the matter was being referred to the Division Director again "for

attention".

On 17 December 1988 the complainant sent a letter to the Deputy Director-General saying, among other things, that the Director had failed to mention the main issues, namely that he had been separated while ill and had not been given the proper opportunity of continuing his services with the Organization; he expected an answer within a reasonable period. The Chief of the Personnel Administration Section answered on 5 January 1989 that his letter would go to the Board as his case was pending, but that an extension beyond the age of sixty, which could be made in the Organization's interests, did not apply to extensions for sick leave entitlement.

On 7 April 1989 the Secretary to the Board informed him that his case would come up that month, and indeed it did on 19 April. He filed this complaint on 16 May. In a letter of 19 June the Secretary conveyed to him the Board's view that his ailments could not be "attributed to the performance of official duties" and that the Deputy Director-General had decided on the Director-General's behalf to deny his claim. In a letter of 12 July to the Secretary he made a request for "reconsideration" under Article 17(a) of Appendix D to the Staff Rules.\* (\*"Reconsideration of the determination by the Director-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision ...".) He named a doctor to represent him on the medical board provided for under 17(b) "to report to the Advisory Board ... on the medical aspects of the appeal".

B. The complainant describes at length how Mr. Abdelmoneim humiliated him, undermined his work, sought to supplant him in responsibility for projects in Egypt with a more biddable junior officer, and tried to make him ill as a pretext for getting rid of him. By constant abuse of authority Mr. Abdelmoneim made life hard for everyone in the Branch. From early in 1987 the complainant's health went into fast decline because of "daily harassment and inhuman treatment", which the Administration's indifference compounded. The doctor's certificate of 3 March 1987 acknowledged stress at work as the cause of his ailments. By January 1988 he had had three operations on his heart, and a spinal disorder prevented him from moving or even sitting normally.

After months of waiting all he got was the Deputy Director-General's unsatisfactory letter of 29 November 1988, and the letter of 5 January 1989 from the Chief of Personnel Administration was scarcely any more helpful.

UNIDO was wrong and callous to retire him while ill and, besides, discriminated against him in that other officials have been kept on until the age of 65 or even 70.

He claims damages for wrongful termination equivalent to full salary for five years, the period during which he might reasonably have expected his appointment to continue, and 20,000 United States dollars in costs.

C. UNIDO replies that the complaint is irreceivable whether it is impugning the decision in the Deputy Director-General's letter of 29 November 1988 or, as is likelier, an implied decision to reject the claims in the complainant's own letter of 17 December.

The letter of 29 November 1988 is not a final decision within the meaning of Article VII(1) of the Tribunal's Statute. The complainant wanted investigation into his supervisor's behaviour and compensation for service-incurred illness. As to the former, the letter said that the matter was being referred again to the Division Director; besides, the complainant should have appealed to the Joint Appeals Board and, not having done so, has failed to exhaust the internal means of redress. About his claim to compensation the letter said nothing.

His complaint is also irreceivable if he is challenging implied rejection of his claims under Article VII(3) of the Statute. The letter of 5 January 1989 from the Chief of Personnel Administration, which said that his case was "pending before the [Advisory] Board", amounted to a decision to take up his claim to investigation into his supervisor's behaviour "in connection with the pending procedure" before the Board. That decision having been taken within sixty days of the receipt of his letter of 17 December 1988, and his claim to compensation having also been put to the board, Article VII(3) does not apply.

Besides, his claims are unfounded. He offers no evidence of maltreatment by his supervisor or of any link between his work and his ailments. Any extension of appointment after the age of sixty is at the Director-General's discretion. If the complainant wants employment now the Organization will consider his application like anyone else's.

D. In his rejoinder the complainant explains that he has two grievances: injury to his health due to stress at work,

and separation from service attributable to his supervisor's "bad faith" and at a time when he was ill. As to the former, he made on 12 July 1989 a request for reconsideration by the Advisory Board: although UNIDO has failed to respond within sixty days and he will be challenging the implied rejection, that claim is not now at issue.

The only material issue is the ending of his appointment in breach of UNIDO precedent and practice. The Organization has failed to decide on the claim to compensation in his letter of 17 December 1988 and under Article VII(3) he is challenging the implied rejection. The Organization's reply confuses the issues by mistakenly suggesting that the question of his treatment by his supervisor is also before the Advisory Board. The only issue put to the Board is the injury to his health, and it is not yet before the Tribunal.

The intention of his memorandum of 13 August 1987 was to ask for an extension of his appointment but, influenced by his supervisor, UNIDO mistook it for a request for postponement of retirement until he had used up entitlement to sick leave. To retire him when he had done so, and when, as everyone knew, he was still very ill, was unwarranted.

He discusses in detail the Organization's pleas on the merits and seeks to refute them in law and in fact.

E. In its surrejoinder the Organization maintains its contention that the complaint is irreceivable. It points out that the complainant's letter of 17 December 1988 does not claim payment of salary or, for that matter, of his costs but merely refers to his case before the Advisory Board. Since the claim in that letter and the claim in the complaint are not the same he has failed to exhaust the internal means of redress. Besides, the claim he put to the Advisory board and the claim in the complaint are incompatible: the former is to payment of compensation, including a disability benefit, for service-incurred ailments, whereas the latter is to extension of his appointment past the age of retirement.

The Organization enlarges on its pleas on the merits.

#### CONSIDERATIONS:

1. The complainant is impugning, under Article VII, paragraph 3, of the Statute of the Tribunal, an implied decision by UNIDO to reject a claim he had made in a letter dated 17 December 1988 on which he says he got not express decision. In the complaint form he refers to a letter of 29 November 1988 from the Deputy Director-General notifying a decision which he got the next day. His complaint is therefore ambiguous in that it refers both to an implied decision and to an express one.

2. At the date of filing the complaint - 16 May 1989 - the complainant had before the Advisory Board on Compensation Claims an internal appeal lodged under Article 16 of Appendix D to the Organization's Staff Rules and alleging that ailments he was suffering from were service-incurred. The Board's view, which was notified to him on 19 June 1989, was that his ailments could not be attributed to the performance of official duties, and the Deputy Director-General informed him on the same date that his claim was refused. He has applied for reconsideration of that decision under Article 17(a) of Appendix D and named a doctor to represent him on the medical board provided for in 17(b).

3. Not until he filed his rejoinder on 2 October 1989 did he make it clear that the present complaint differs from his claim under Article 16 of Appendix D to compensation for service-incurred ailments: it is confined to claiming compensation for termination of appointment which he attributes to his supervisor's bad faith and which came at a time when he was ill. He claims damages for the termination and an award of costs.

4. The complainant was due to be separated at the end of August 1987, the month in which he reached the age of 60. By a memorandum dated 13 August he informed the Director-General that he was not fit enough to deal with the many formalities of termination and asked the Organization to grant him what remained of his entitlement to sick leave. The Director-General granted him an extension of appointment up to 31 October 1987 which allowed him to use up almost his whole entitlement to sick leave on full pay in accordance with United Nations Staff Rule 206.3 (which applied at the time to UNIDO staff), a total of nine months over four consecutive years. He never appealed against that decision, which was made on 1 September 1987 and notified to him on 7 September, and he was terminated on 31 October 1987.

5. The complainant's administrative position was determined by that decision of 1 September 1987. Any complaint he had about separation, whether on the grounds that he was entitled to an extension or on the grounds that he

should not have been separated while ill, should, according to Rule 112.02(a), have been lodged within sixty days from the date of receipt of that decision. Since he failed to appeal within the time limit any correspondence after that date, and in particular the letter of 17 December 1988, could not serve as a basis for a receivable claim. The complaint is irreceivable because he failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Mohamed Suffian  
Mella Carroll  
P. Pescatore  
A.B. Gardner