

The Administrative Tribunal,

Considering the fifth complaint filed by Mrs S.L. d. S. against the United Nations Industrial Development Organization (UNIDO) on 22 March 2004 and corrected on 28 April, UNIDO's reply of 20 August, the complainant's rejoinder of 1 December 2004 and the Organization's surrejoinder of 9 March 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are contained in Judgment 2189 delivered on 3 February 2003. In that judgment, the Tribunal had decided that UNIDO "shall without delay establish a medical board to advise on the complainant's appeal" pursuant to Appendix D of UNIDO's Staff Rules and concerning her illness which she considered service-incurred. Appendix D stipulates that an "Advisory Board on Compensation Claims shall [...] make recommendations to the Director-General concerning claims for compensation" and that the "Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the medical board to the Director-General who shall make the final determination". Pursuant to the provisions of Appendix D, the medical board should be composed of a qualified medical practitioner designated by the complainant, the Medical Officer of the Organization or a medical practitioner selected by him or her and a third qualified member who was to be selected by the first two, and "who shall not be a medical officer of the Organization".

Between February 2003 and January 2004 an exchange of correspondence took place between the Director-General, the Secretary of the Advisory Board on Compensation Claims, the Medical Adviser of UNIDO, who is the Medical Director of the Vienna International Centre Medical Service, the member of the medical board chosen by the complainant and the complainant herself, on a number of issues. In particular, the complainant wished to include in the medical board's terms of reference a number of questions formulated by her. The Advisory Board recommended that these questions be incorporated in the material for review by the medical board but not in the terms of reference themselves; this recommendation was approved by the Managing Director of the Division of Administration on behalf of the Director-General. Referring to the medical board's terms of reference and to Appendix D, the Medical Adviser requested the complainant on several occasions to undergo a clinical medical examination conducted by him, which the Organization considered a *sine qua non* condition to the convening of the medical board. She replied arguing that a "joint assessment [...] should fall under the competence and equal responsibility of the three members of the Medical Board simultaneously" and she did not follow it up. The third member of the medical board designated by the Medical Adviser and the complainant's nominated doctor was the Chief Medical Officer of the Food and Agriculture Organization of the United Nations (FAO). The complainant's nominee to the medical board, however, took the view that the third member should have "no association either with an Organization within the UN system, or be in close association with the patient" and suggested "in the interest of neutrality" that he be replaced by an external colleague. He also raised a number of linguistic and procedural issues.

In order to resolve these legal and administrative issues, the board's meeting, scheduled for 14 November 2003, was cancelled. By a letter of 26 February 2004, the Medical Adviser invited the complainant's nominee on the medical board "to discuss the practical aspects of arranging the Board including the selection of a third doctor"; but he did not reply. The complainant filed her complaint on 22 March 2004 as an application for execution of Judgment 2189.

B. The complainant contends that the Organization has failed to execute correctly and promptly the decisions of the Tribunal in Judgment 2189. In her view, the process of referral to the medical board has not progressed adequately as the board has not even been convened; her internal appeal has, therefore, reached the point of an impasse, hence her request to the Tribunal for redress.

She argues that the Organization arbitrarily cancelled the arrangements for the convening of the medical board without providing valid reasons for doing so thereby denying her legitimate expectation of a prompt and equitable process of internal appeal. She submits that, despite her efforts, the Organization failed to reply to a number of official communications that she wrote; this failure demonstrates UNIDO's intention to abandon the internal proceedings and thwart the execution of the judgment.

The complainant asks the Tribunal to: declare her complaint receivable; order an independent medical expert opinion with a view to proceed on the merits of the case; order the production of additional documents; rule on her service-incurred illness claim; and rule on the "supplementary claims" she had made in her previous case. She seeks a monthly penalty "pending complete and faultless implementation of whatever action the future Judgment may require". She also claims damages and costs.

C. In its reply UNIDO argues that the complaint is yet another attempt by the complainant to avoid the internal appeal procedures. It has sought to execute Judgment 2189 in good faith and without delay. However, it is the complainant who has behaved unreasonably and undermined the internal procedures. It also states that some of the complainant's requests should be dismissed on the grounds of *res judicata* since they are identical to the "principal pleas" of her previous complaints, and that her remaining requests should be declared irreceivable as internal remedies have not been exhausted.

The Organization submits that a direct appeal to the Tribunal is inappropriate and that the Tribunal should not waive the complainant's obligation to exhaust internal remedies. It also submits that it did not arbitrarily cancel the medical board's planned meeting and that, although the board's terms of reference and Appendix D of its Staff Rules provide for a medical examination prior to the meeting of the board, the complainant repeatedly refused to undertake one. It adds that even her nominee on the medical board never objected to such an examination of the complainant taking place. UNIDO contends that, far from abandoning the internal proceedings, it carefully reviewed and addressed requests made by the complainant as well as the member of the board she designated. The Organization states that it made every effort to convene the medical board but that the complainant was not prepared to go forward with the scheduled meeting unless certain requests were accepted. The complainant has not, according to the Organization, shown any act or omission by it that is contrary to Judgment 2189 and which could justify her "plea" for a direct ruling by the Tribunal.

UNIDO considers that the complainant's request for a penalty would amount to forcing it to agree to every demand she makes. The request does not take into account the fact that the medical board is an independent body "that UNIDO cannot control" and it should be dismissed as well as her other requests and claims.

D. In her rejoinder the complainant contends that the rule of *res judicata* does not apply in this case because her current claims differ from those dismissed in previous judgments. She also contends that UNIDO denied her due process. She states that she has always complied with the applicable rules and concludes that she cannot be blamed for the fact that her case is still unresolved. According to the complainant, the relevant provisions require a joint examination by the members of the medical board but not by each member individually. Moreover, UNIDO could have proceeded with the convening of the medical board without the prior individual examination as all the medical information had already been provided. She alleges unwillingness on the part of the Advisory Board to "deal in conformity with the required standards of unbiased transparency". The complainant submits that she was not given "adequate substantial replies" to requests made by both herself and the member of the board she designated on various salient issues. She received no plausible evidence of UNIDO's intent to convene the medical board following the cancellation of the meeting scheduled in November 2003. In her view, UNIDO omitted to produce relevant documentation in the material to be reviewed by the board. She claims that she made the utmost efforts to "progress" towards the medical board's meeting but UNIDO followed a delaying policy.

E. In its surrejoinder UNIDO maintains that the complainant deliberately obstructed the execution of Judgment 2189, in particular by refusing to be medically examined by each member of the medical board, especially by the Organization's Medical Adviser. The Organization says that it is clear that the complainant will not submit to such an examination, thereby violating due process, objectivity and fairness.

It contends that the terms of reference issued by the Advisory Board on Compensation Claims are inclusive enough for the medical board to take into account the additional issues raised by the complainant and the member of the board she had selected and that her request to include these is an attempt to undermine the medical board's role. Furthermore, the Organization states that the complainant's requests for the production of additional documentation

in the material for review by the medical board is not justified because that documentation concerns her disability claim, not her service-incurred illness claim, and because the Advisory Board determined that the medical board itself could require the disclosure of such documentation. UNIDO asks the Tribunal to order the complainant to comply with the requirement of a medical examination by each member of the board in order to avoid “another premature complaint”.

CONSIDERATIONS

1. This complaint is in form a request for the execution of Judgment 2189, but like the complaint which led to the latter, contains a great many conclusions which are irreceivable or have already been dealt with by the Tribunal.

2. The following portions of Judgment 2189 are relevant:

“8. There is really nothing more for the Tribunal to deal with in the complaint since, with the exceptions dealt with below, all of the complainant’s other claims are either irreceivable, as having already been decided by the Tribunal, or depend upon the eventual success of her internal appeal which, of course, still has to be determined.

[...]

9. The Tribunal will order the Organization to appoint a medical board without delay.”

3. Once again, the complainant attempts to bypass the internal remedies, and have her internal appeal, which has been pending for over ten years, heard by the Tribunal on its merits. To do so, she would have to persuade the Tribunal that the failure of the medical board to take up and report on her claim and thereby allow her internal appeal to proceed was due to the wilful fault or neglect of UNIDO. While it cannot be said that UNIDO’s actions, particularly in the weeks immediately following the issuance of Judgment 2189 on 3 February 2003, were as speedy as they should have been, it is clear that at least by July 2003, the necessary preliminary steps to set up the medical board had been taken and that the delays which took place after that time were largely due to the complainant herself. In particular, from the outset, the complainant categorically and systematically refused, and continues to refuse to allow herself to be examined by either the Organization’s appointee or the neutral third member of the medical board, notwithstanding that the terms of reference of the board called for such an examination:

“The Medical Board is asked to consider the medical aspects of the claim. The members of the Board should each carry out a clinical examination of the claimant and meet to discuss their findings.”

4. Indeed, since the function of the medical board is to report to the Advisory Board on Compensation Claims – which in its turn is charged with making recommendations to the Director-General on the outcome of the complainant’s internal appeal as to whether or not the complainant’s illness is service-incurred – it simply cannot be asserted that her medical condition, both now and in the past, is irrelevant to that question.

5. She also, after her nominee to the board had agreed to the appointment of the third member and just prior to the date fixed for the board to meet, raised objections to that member on the grounds that he was the Chief Medical Officer of another international organisation. That objection has no basis in law and her requirement that a different doctor be named was directly responsible for the cancellation of the first scheduled meeting of the board and the ensuing delay. Most recently, and just prior to the filing of the present complaint, UNIDO alleges that the complainant’s own nominee to the board has failed to respond to the reasonable request of the Medical Adviser of UNIDO to meet and attempt to work out a practical method of allowing the board to carry out its work; while this allegation is denied by the complainant the evidence shows that the request was sent to the complainant’s nominated doctor by registered mail and that the latter had previously failed to reply to communications relating to this case.

6. As the history of her case, summarised in Judgment 2189, demonstrates, the complainant seems more interested in litigating rather than in attempting to resolve her difficulties with her former employer. It is deplorable that her internal appeal has still not been disposed of but, as was indicated in Judgment 2189, that is largely the consequence of her own misguided actions.

7. The obligation imposed on the Organization by Judgment 2189 to establish a medical board without delay is not wholly a one-way street. The complainant owes a duty of good faith and in the circumstances this includes not only the duty not to impede or prevent the medical board's functioning, as she did by refusing to be medically examined, but also the duty actively to collaborate with the board and to allow it to undertake its duties effectively. If the complainant had reservations about the terms of reference of the board she no doubt had the right to make them known as she did, but she could not insist on them as non-negotiable conditions precedent to the board carrying out its inquiry.

8. Likewise, while she may ask that the medical records of her disability pension application (which was accepted) be considered by the board, their relevance to her claim for service-related illness is not self-evident and she cannot insist that such records be incorporated into the board's material. What weight, if any, to give to her earlier disability claim must be left to the judgement and expertise of the board members themselves.

9. In the final analysis, if the board commits errors of law or if its procedure is fatally flawed, and the ultimate result is unfavourable to the complainant, she still retains her remedy either in the pending internal appeal or ultimately before the Tribunal. But she must first give the procedure a chance to work and not continue as she has in the past to frustrate it by constant premature references and complaints to the Tribunal.

10. Essentially, UNIDO has not, by act or omission, unreasonably delayed the convening of a medical board. The only receivable claim, for enforcement of judgment, is without merit as any unreasonable delay in convening the medical board was caused by the complainant herself.

11. While the present complaint must be dismissed, the Tribunal recalls that Judgment 2189 remains in force and the Organization is still obligated to establish a medical board. To avoid any further delay, (and because the members of the board previously appointed may not still be available) the Tribunal sets out the following guidelines which it expects both parties to respect:

- (a) the complainant shall appoint her nominee in writing within 30 days of the publication of this judgment;
- (b) the Organization shall appoint its nominee within the following 30 days;
- (c) the two so named shall within 30 days agree upon a neutral third medical doctor who may be a staff member of any international organisation other than UNIDO;
- (d) if there is failure to agree within the time allowed the appointment shall be made by the medical adviser of the ILO within the following 30 days;
- (e) the complainant shall submit herself to medical examinations by each of the members of the board within 30 days of the appointment of the third member;
- (f) the board shall meet within 60 days of the last medical examination of the complainant and shall report within a further 60 days;
- (g) any report of the medical board shall be signed by at least two members of the board and any dissenting member may file a separate report within the same time period;
- (h) the board shall be master of its own procedure and all questions whether of substance or of form shall be determined by a majority;
- (i) if a majority of the board fails to report within the time allowed, the complainant's internal appeal shall be dealt with by the Advisory Board on Compensation Claims without receiving such report.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, 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 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.