115th Session **Judgment No. 3196**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mrs S. L.d.S. against the United Nations Industrial Development Organization (UNIDO) on 11 January 2011 and corrected on 21 January, UNIDO's reply of 18 April, the complainant's rejoinder of 3 June and the Organization's surrejoinder of 8 September 2011;

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 to be found in Judgments 1464, 1834, 2189, 2458 and 2753. Suffice it to recall that, pursuant to Judgment 2458 on the complainant's fifth complaint, a medical board was established to consider and report to the Advisory Board on Compensation Claims (hereinafter "the Advisory Board") on the medical aspects of the complainant's internal appeal seeking compensation for service-incurred illness under Appendix D to the Staff Rules. It comprised Dr D., appointed by UNIDO, Dr T., appointed by the complainant, and Dr V., agreed upon by the other

two members as chairman of the medical board. The members of the medical board unanimously decided to seek a psychological assessment of the complainant. The psychologist considered in her report that the complainant's condition should be considered as a consequence of harassment at the workplace. However, in its report dated 6 April 2006 the medical board found that, given the passage of time and the conflicting accounts of the work situation, it was difficult to give a medical opinion on the question of attributability. The medical board's report together with the psychologist's assessment were forwarded to the Advisory Board, which concluded in April 2006 that there was no evidence to support a recommendation that the Director-General change his original decision of 12 October 1994 not to deem the complainant's illness attributable to the performance of official duties and to deny her compensation under Appendix D.

On 9 June 2006 the complainant was informed that the Managing Director of the Programme Support and General Management Division (hereinafter "the Managing Director") had approved the Advisory Board's recommendation on behalf of the Director-General. She then wrote to the Director-General, asking him to confirm whether he endorsed the recommendation of the Advisory Board and, if so, to authorise her to have direct recourse to the Tribunal. She also asked to be provided with a copy of the medical board's original report, amongst other documents. By a letter of 22 August 2006 the Managing Director confirmed that, as the duly authorised officer and on behalf of the Director-General, he had approved the Advisory Board's recommendation and sent her a copy of the medical board's report as well as the minutes of the Advisory Board.

By a letter dated 19 February 2009 the Secretary of the Advisory Board asked the complainant to pay the sum of 750 euros, corresponding to half of the fees and expenses invoiced by Dr V. for his participation in the medical board. This request was made in accordance with Article 17(d) of Appendix D, which provides that, "if the original decision is sustained" following a review by the medical board, the Advisory Board and the Director-General, "the claimant

shall bear the medical fees and the incidental expenses of the medical practitioner whom he or she selected and half of the medical fees and expenses of the third medical practitioner on the medical board". On the invoice, Dr V. specified that the fees in question included 750 euros for the "preparation of a comprehensive medical report". In a letter dated 10 September 2010 the complainant asked to be provided with Dr V.'s medical report, asserting that both Dr V. and Dr T. had confirmed that this report had been submitted to UNIDO. On 14 October 2010 the Secretary of the Advisory Board replied that, so far as concerned the disclosure of the medical report, "the matter ha[d] been closed as per Judgment No. 2753".

On 5 November 2010 the complainant wrote to the Director-General requesting a review of the implied decision to refuse the disclosure of Dr V.'s medical report. The Secretary of the Advisory Board replied by a letter dated 20 December 2010, explaining that there was only one medical board report and that it already had been disclosed to the complainant on 22 August 2006. The Secretary stated that no other medical report existed and that this fact had been confirmed by Dr D. as well as by Dr V. in his letter dated 5 November 2006 to the complainant's legal counsel. The complainant impugns the "implicit rejection" of her request for disclosure of Dr V.'s medical report.

B. The complainant contends that the invoice dated 24 July 2008 from Dr V. constitutes new evidence which proves that a comprehensive medical report of 30-32 pages written by Dr V. exists. She states that her request for disclosure of the report was implicitly rejected by UNIDO in its letter of 14 October 2010. She then submitted a request for review of that decision, in accordance with the Staff Regulations and Staff Rules, but UNIDO refused to take a decision on the merits of her request. In her view, the Organization's letter of 20 December 2010 constitutes an implicit decision to reject her request for review as well as an implicit waiver of the requirement to exhaust internal means of redress. She therefore considers that her seventh complaint is receivable.

The complainant asks the Tribunal to order the disclosure of Dr V.'s "comprehensive medical report", to rule on the merits of her Appendix D claim and to recognise her illness and disability as service-incurred. She also asks the Tribunal to set aside the decision to terminate her appointment with effect from 15 February 1996, and she seeks reinstatement with full benefits and entitlements until the "normal" age of retirement. She claims compensation in accordance with the provisions of Appendix D, payment of her pension contributions as from the date when her participation in the Pension Fund was discontinued, reimbursement of health insurance and life insurance contributions, material and moral damages, costs, and compound interest of 10 per cent per annum on all amounts due.

C. In its reply UNIDO points out that the complainant's allegations concerning the existence of a lengthy report by Dr V. which the Organization has failed to produce were extensively discussed in its reply to her sixth complaint. It submits that the so-called "new evidence" does not confirm the complainant's allegations, as Dr V.'s invoice merely refers to a comprehensive medical report, and not to a 30-32 page document. In the Organization's view, the invoice is immaterial and cannot justify reopening her case, especially in light of Dr V.'s own denial of the existence of such a report. Further, in Judgment 2753 the Tribunal ruled that her sixth complaint was irreceivable as it was time-barred. UNIDO argues that even if the alleged new evidence could be found to have a bearing on the outcome of the case, the present complaint would still be irreceivable as a result of the authority of *res judicata*. Moreover, to the extent that the present complaint can be viewed as a challenge of the administrative decision to request payment of half of the fees and expenses of Dr V., UNIDO submits that it is irreceivable for failure to exhaust internal means of redress, because the complainant did not lodge an appeal with the Joint Appeals Board against the decision of 20 December 2010 before filing her complaint with the Tribunal.

The Organization considers that the complainant's refusal to pay the 750 euros claimed is unreasonable and unjustified, and it asks the

Tribunal to order her to pay that sum together with interest calculated from 19 February 2009, when she was notified of the amount due.

D. In her rejoinder the complainant presses her pleas. She maintains that her complaint is receivable and asserts that UNIDO has fraudulently manipulated documents and misrepresented the facts. She reiterates that Dr V.'s comprehensive report cannot be the same document as the report sent to her by UNIDO, and she quotes extensively from her sixth complaint to rebut UNIDO's allegation that no other medical report exists.

E. In its surrejoinder UNIDO maintains its position in full and points out that the complainant's arguments on receivability are incoherent and illogical. It asks the Tribunal to sanction the complainant for abuse of process, in view of her "reckless and utterly baseless" allegations of fraudulent manipulation and misrepresentation.

CONSIDERATIONS

1. In her letter of 5 November 2010 to the Director-General, the complainant construed the letter of 14 October from the Secretary of the Advisory Board on Compensation Claims as an implicit rejection of her request of 10 September 2010 for the disclosure of a medical report, and she asked that that decision be reviewed. She argued that the request for disclosure of Dr V.'s medical report was based on "new evidence that came to light in UNIDO's letter of 19 February 2009", and that the fact that UNIDO had paid Dr V.'s invoice in full constituted further evidence of the existence of the said report. The Secretary replied in a letter dated 20 December 2010, reiterating that, firstly, the only medical board report that exists was communicated to the complainant on 22 August 2006 and that it was the medical board report signed by the three doctors of the medical board; secondly, that the fact that no other report exists had been confirmed by Dr D. as well as by Dr V.; thirdly, that the invoice to which she referred in her letter of 5 November 2010 covered the participation of Dr V. in the medical board. The Secretary therefore

requested that the complainant "urgently settle the invoice" communicated to her on 19 February.

2. The complainant impugns that decision in her seventh complaint before the Tribunal, arguing that her letter of 5 November 2010 should be considered as a letter of appeal in accordance with the Organization's Rules. She submits that UNIDO has not taken a "reasoned decision on the merits" of her request, and that the above-mentioned letter of 20 December 2010 amounts to "a refusal to take a decision and a refusal to enter into any further correspondence" on the matter. According to the complainant, that letter should therefore be considered as "an implicit rejection of the claim" as well as an "implicit waiver" of the requirement that internal means of redress be exhausted prior to bringing a complaint before the Tribunal. She also submits that "[a]n adjudication by the Tribunal on the merits of [her] claims for relief should not be barred by *res judicata*".

3. The Organization replies that the complaint should be dismissed as irreceivable on the grounds of *res judicata* as the allegations regarding the allegedly undisclosed medical report were "extensively discussed" in the context of the complainant's sixth complaint, which was dismissed by the Tribunal as irreceivable in Judgment 2753. Asserting that only one medical report exists and that the complainant has already been given a copy of it, the Organization contends that the "alleged new evidence does not confirm the complainant's allegations", that it is "immaterial and cannot justify reopening her case", and that even if its consideration could have had a bearing on the outcome of the case, it would not have rendered her sixth complaint receivable.

4. Further, the Organization notes that the complainant did not file an internal appeal before the Joint Appeals Board against the decision contained in the letter of 20 December 2010, as required by Staff Rule 112.03(b). In its view, she has therefore failed to exhaust the internal means of redress, rendering her complaint irreceivable. The defendant requests the Tribunal to dismiss her complaint as such,

to order the complainant to pay the outstanding amount of 750 euros with interest, and to sanction the complainant for abuse of process.

5. The Tribunal is of the opinion that the complaint is irreceivable for failure to exhaust the internal means of redress. Indeed, Staff Rule 112.02 on the procedure for initiating an appeal clearly states that, where a staff member wishes to make an appeal against the answer received in response to a request for review of an administrative decision, "the staff member shall submit his or her appeal in writing to the Secretary of the Joint Appeals Board within 60 days from the date of receipt of the answer". As this is the complainant's seventh complaint before the Tribunal, and taking into account the fact that the Tribunal reminded the complainant in Judgment 2458, under considerations 3 and 9, of her duty to exhaust all internal means of redress prior to bringing a complaint to the Tribunal, it is unacceptable that she should once again attempt to bypass the internal means of redress available by feigning ignorance of the requirement. The complainant's letter of 5 November 2010 does not include any request for a waiver of that requirement in order to appeal directly to the Tribunal, and the letter of 20 December 2010 contains no "implicit waiver" of that requirement. Accordingly, the argument that that letter contained an implicit decision to waive the requirement that the complainant first exhaust the internal means of redress is untenable.

6. The Tribunal notes that, although the complainant specifies that she is impugning an implicit decision, her claims also include a request to review earlier decisions regarding her Appendix D claim and the termination of her appointment. Even if the complainant had exhausted all internal means of redress, the present complaint would still be barred by *res judicata*. Her contention that a new fact (i.e. the invoice dated 24 July 2008, which refers, among other things, to the preparation of a "comprehensive medical report") justifies a review of these matters is unfounded. The invoice in question does not prove that Dr V. had prepared a separate report for the medical board. In fact, it lends credence to the Organization's statement that the invoice

to which the complainant referred in her letter of 5 November 2010 "covered the participation of [Dr V.] in the medical board". Indeed, if the fee was for a separate report, then there should also be a fee for Dr V.'s involvement in the preparation of the joint report by the medical board, as otherwise it would appear that he participated for free in the proceedings of the board. Considering this, the invoice cannot be taken as proof of the existence of a separate 30-page report, written in German, by Dr V.

7. It should be pointed out that, as the complainant is no longer employed by the Organization, it is outside of the Tribunal's remit to order the complainant to pay the amount due under Article 17(d) of Appendix D to the Staff Rules. However, in accordance with the Tribunal's case law, the Organization may deduct the amount of 750 euros owed by the complainant from any future payment made to her by UNIDO, plus interest at the rate of 5 per cent per annum from 19 February 2009. Although the complaint must be dismissed, the Tribunal will not entertain the Organization's counterclaim to sanction the complainant for abuse of process. Indeed, whilst her unsubstantiated allegations of fraudulent manipulation and misrepresentation are inappropriate, they do not prove bad faith in and of themselves, and as such do not constitute an exceptional circumstance meriting the imposition of costs on the complainant (see Judgment 1962, under 4).

DECISION

For the above reasons,

1. The complaint is dismissed.

2. UNIDO's counterclaim to sanction the complainant for abuse of process is also dismissed.

3. UNIDO is authorised to deduct the amount of 750 euros, plus interest at the rate of 5 per cent per annum from 19 February 2009, from any current or future payments due to the complainant, as indicated under 7 above.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet