

S. (No. 2)

v.

FAO

123rd Session

Judgment No. 3745

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S. S. against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 2014 and corrected on 29 September and 8 October 2014, the FAO's reply of 29 January 2015, the complainant's rejoinder of 12 March and the FAO's surrejoinder of 13 May 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the FAO's refusal to recognise his partial permanent impairment as service-incurred and to award him compensation corresponding to the rate of that impairment.

Facts relevant to this case are to be found in Judgment 3744 relating to the complainant's first complaint. For the purposes of this second complaint, suffice it to recall that in September 2009 the complainant fell from a staircase while on duty, after which he remained on sick leave for nearly two years. On 2 November 2009 the Secretary of the Advisory Committee on Compensation Claims (ACCC) informed the complainant that his accident was within the scope of Manual paragraph 342.2.13(a) and could thus be recognised as service-incurred, entitling him to

reimbursement of his “authorised related reasonable medical expenses”. On 21 June 2012 the complainant was notified of the decision to terminate his appointment for health reasons pursuant to Staff Regulation 301.9.14 and Staff Rule 302.9.22. He separated from the FAO on 25 June 2012.

On 5 December 2011 the company engaged by the FAO to examine staff members’ compensation claims informed the FAO Medical Service that it had assessed the complainant’s impairment to be 4 per cent of the whole person, based on 3 per cent for vestibular disorders and 1 per cent for facial disorders and/or disfigurement. On 24 July 2012 the complainant, who had not yet been informed of this assessment, enquired whether his claim for the evaluation of his permanent impairment had been considered, noting that he had thus far not received any compensation in that respect. On 29 August 2012 the Secretary of the ACCC informed him that the level of his permanent impairment had been determined to be 4 per cent of the whole person, but that no compensation was payable, because he had a pre-existing medical condition relating to dizziness and vertigo and therefore his condition was not directly and exclusively linked to his service-incurred accident.

On 4 December 2012 the complainant lodged an appeal with the Director-General against the decision not to grant him any compensation for permanent impairment. He argued that his health condition was service-incurred and he should therefore be paid the sum corresponding to the rating of his impairment or an equitable compensation. His appeal to the Director-General was rejected and on 10 April 2013 he filed an appeal with the Appeals Committee. In its report dated 25 November 2013, the Appeals Committee observed that, in the challenged decision, no distinction had been drawn between the two different aspects of the complainant’s impairment and that, while the complainant’s pre-existing medical condition appeared to be relevant with respect to the vestibular disorders, it was not clear whether the denial of compensation in respect of the 1 per cent impairment resulting from facial disorders was also based on his pre-existing medical condition. It recommended that the Secretary of the ACCC clarify the reason for the decision not to compensate the complainant for his 1 per cent permanent impairment for facial disorders

or, in the absence of any such reason, that the complainant be compensated accordingly. It otherwise recommended that the appeal be dismissed.

By a letter of 19 May 2014, the Director-General notified the complainant that he had decided to accept the Appeals Committee's recommendation and thus to refer his case back to the Secretary of the ACCC for verification and appropriate action in relation to his 1 per cent impairment, and to inform him in due course of his final decision on his compensation claim. On 18 August 2014 the complainant filed the present complaint with the Tribunal, impugning the decision contained in the Director-General's letter of 19 May 2014.

The complainant's case was subsequently referred back to the ACCC and further to its recommendation, the Director-General decided to award him compensation for his 1 per cent partial permanent impairment for facial disorders and/or disfigurement.

The complainant asks the Tribunal to declare that his total work incapacity is the result of an injury attributable to the performance of official duties and that his health condition is a direct consequence of the service-incurred accident of 18 September 2009. He claims payment of the sum that corresponds to the rating of his impairment, i.e. compensation for permanent loss of function assessed at 4 per cent, as well as payment of compensation for the physical ailments, including frequent spells of dizziness and emotional suffering, which are exclusively attributable to his accident of 18 September 2009. Alternatively, he claims payment of an equitable compensation, as well as material and moral damages for negligence on the part of the FAO, since it failed to take reasonable measures to prevent the risk of accident. The FAO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The FAO submits that the complaint is irreceivable because the Registrar of the Tribunal had requested the complainant to effect corrections to it by 29 September 2014, and, subsequently by 6 October 2014, but that he sent the corrections on 8 October 2014. However, the Registry's

file shows that the Registrar gave the complainant until 9 October 2014 to submit the final correction, which he submitted on 8 October 2014.

2. The present complaint is expressly filed against the Director-General's decision dated 19 May 2014. On the complainant's internal appeal, the Appeals Committee had recommended that "the Secretary, ACCC clarify whether it had been decided not to pay the [complainant] any compensation under Manual paragraph 342.5.3 for his 1% permanent impairment for 'facial disorders and/or disfigurement' due to his 'pre-existing medical condition relating to dizziness and vertigo', or whether an error had been committed in this regard, in which case the Secretary, ACCC should explain the reason why the [complainant] was not compensated for his 1% permanent impairment for 'facial disorders and/or disfigurement' or, in the absence of any such reason, compensate the [complainant] accordingly". The Committee also recommended that "this appeal be otherwise dismissed in its entirety". By decision of 19 May 2014, the Director-General notified the complainant that he had accepted the Appeals Committee's recommendations and would have referred the matter back to the Secretary of the ACCC for clarification and rectification. This was therefore not a final decision on the question of the degree of the complainant's impairment.

The facts reveal, on the referral, the ACCC clarified its decision. Thus, in a letter dated 2 December 2014, the Secretary of the ACCC informed the complainant that the Director-General had decided to award him compensation for his 1 per cent partial permanent impairment for facial disorders and/or disfigurement. The Director-General sent his final decision which confirmed this on 26 January 2015. This was after the present complaint was filed.

3. The Tribunal therefore determines that the claim in the present complaint, which seeks to challenge the decision concerning the degree of the complainant's permanent impairment, is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute. The Tribunal has explained the principle as follows in Judgment 2912, under 6, for example:

"According to Article VII, paragraph 1, of the Statute, '[a] complaint shall not be receivable unless the decision impugned is a final decision and the

person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations'. The only exceptions allowed under the Tribunal's case law to this requirement that internal means of redress must have been exhausted are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure, where there is an inordinate and inexcusable delay in the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see, for example, Judgments 1491, 2232, 2443, 2511 and the case law cited therein, and 2582)."

Accordingly the complainant's claim for compensation for permanent impairment and the related claims for relief will be dismissed.

4. In any event, the Tribunal considers that the complainant's claim which seeks to challenge the decision on the degree of his permanent impairment and for related compensation is unfounded. The Tribunal will not substitute its own determination for the medical findings upon which that decision was based and finds no misuse of authority, error of law or of fact, as the complainant contends, either in the decision or in the process by which it was made. Neither is there any discernible arbitrariness in the decision not to recognize that the subject injury was service-incurred, as the complainant contends. It was because the FAO recognized the possibility that the injury might have occasioned some degree of permanent impairment and wished to make a definitive determination on it that it initiated the process to determine the degree of permanent impairment.

5. The complainant's other claim in the present complaint states that the FAO breached its duty of care towards him by "failing to take reasonable measures to prevent a foreseeable risk of injury" to him. By way of related relief, the complainant requests the Tribunal to "recognise [his] right to receive the payment of material and moral damages for the negligence of the [FAO] that did not prevent the risk of the accident and has failed to take reasonable measures to prevent the risk of injury" to him. The complainant states that it is common in the mature legal system to provide compensation on a "no-fault" basis to employees who

suffer injury in the workplace and that the law of the international civil service can do no less.

6. It is determined that this claim for breach of duty of care is irreceivable as the complainant did not exhaust the internal remedies available to him and there was no final decision in relation to it as Article VII, paragraph 1, of the Tribunal's Statute requires. The complainant first made a claim on this ground in his appeal to the Appeals Committee without first having made a request for review to the Director-General. The Appeals Committee observed this and stated as follows:

“22. With regard to the [complainant's] claim that the [FAO's] negligence caused or contributed to his service-incurred injury, the Committee reviewed the appellant's appeal to the Director-General carefully, and agree that he had not raised this issue in that appeal, and had thus failed to exhaust internal remedies. It therefore decided that this claim was not receivable. The Committee also observed that over three and a half years had passed between the [complainant's] fall and the time he had first raised the issue.”

7. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ