

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
FAO

128th Session

Judgment No. 4177

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. N. K. against the Food and Agriculture Organization of the United Nations (FAO) on 12 April 2018, the FAO's reply of 30 July, the complainant's rejoinder of 20 September and the FAO's surrejoinder of 5 November 2018;

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 decision to terminate her fixed-term appointment for health reasons.

The complainant joined the FAO at its Headquarters in Rome, Italy, on 2 January 2017 under a one-year fixed-term contract. Prior to her appointment, she had been medically cleared, but had disclosed a chronic medical condition, reported to be treated and stable at the time.

On 16 January the complainant's supervisor became concerned for the complainant's well-being as a result of her behaviour and contacted the Division Director regarding the situation, who in turn contacted the Director of the Office of Human Resources (OHR). In late February, the Staff Counsellor advised the complainant to take sick leave and to return to her home country. On 1 March she was placed on sick leave

and a non-urgent medical evacuation was approved enabling her to travel to her home country and to remain there for treatment.

On 26 May 2017 the Chief Medical Officer (CMO) informed OHR that the complainant could return to work on the condition that her workplace be in her home country. On the same day the complainant travelled back to Rome against the advice of the CMO.

On 30 May the complainant requested to undergo an independent medical evaluation (IME). The IME report of 29 June found that she was not fit to perform her duties. It recommended granting her at least two additional months of sick leave to ascertain the effectiveness of a new treatment and found that the risk of relapse was high if she were to resume her duties in Rome.

On 10 August 2017 the CMO recommended the termination of the complainant's appointment for health reasons under Staff Rule 302.9.22 and Manual paragraph 314.2.31, which was approved by the Assistant Director-General on the same day.

By a letter of 11 August the complainant was informed of the decision to terminate her appointment for health reasons with effect from 26 August 2017 (the date on which she would exhaust her sick leave entitlements) on the basis of the CMO's recommendation of 10 August, no suitable position having been identified in her home country.

On 15 August the complainant requested that a medical board be convened in accordance with Staff Rule 302.9.23 and Manual paragraph 314.2.36. She also requested to be placed on sick leave without pay. She was informed on 8 September that she would be placed on special leave without pay from 28 August until the submission of the Medical Board's report.

The Medical Board issued its report on 28 November 2017. A majority of its members concluded that, at the time of the exhaustion of her sick leave in August 2017, the complainant had been fit for duty in Rome, provided that she strictly complied with her new medical regimen initiated one month earlier. The minority recommended that the complainant be transferred to her home country to work in order to benefit from family support and monitoring.

By a memorandum of 20 December 2017, the CMO forwarded a copy of the Medical Board's report to the Assistant Director-General, maintaining her earlier recommendation to terminate the complainant's appointment on the following grounds: that the complainant had demonstrated a pattern of non-compliance with her treatments in the past; that the Medical Board had determined the complainant's fitness to work solely on the basis of the assessments provided by the complainant's treating doctor but had performed no personal direct clinical examination, and the three members had never met together to exchange their opinions; and that while the Medical Board was not unanimous on the diagnosis, even the majority diagnosis did not provide any guarantee that the pathology would remain stable.

By a letter of 12 January 2018 the complainant, who had remained on special leave without pay, was informed that it had been decided to terminate her appointment for health reasons, with effect from the date of its delivery (15 January 2018). That is the impugned decision.

On 13 March 2018 the complainant lodged an internal appeal with the Appeals Committee against the decision to terminate her appointment, in accordance with Manual paragraph 314.2.39 which provides that "[a] staff member who is dissatisfied with a decision to terminate his/her appointment for health reasons has the following appeals machinery available: (a) for the legal, procedural, and, if he/she has not requested that a medical board be convened, medical aspects of the case: the FAO Appeals Committee [...]; (b) for the medical aspects of the case, if he/she has requested that a medical board be convened: the Administrative Tribunal of the International Labour Organisation". She filed a complaint before the Tribunal on 12 April 2018 against the decision of 12 January 2018.

The complainant asks the Tribunal to issue an "exhaustive decision [on her case] to avoid pursuing two cases for a single remedy". On the merits she asks the Tribunal to set aside the impugned decision and to order her reinstatement or, alternatively, to grant her compensation in the amount of one year of salary and allowances from the date of her separation from service (15 January 2018). She claims "sums due to her as salary and allowances during the period in which she was placed on

special leave with half pay and without pay”, 20,000 euros in moral damages and 5,000 euros in costs.

The FAO argues that the complaint is only receivable with respect to the medical aspects of her case pursuant to Staff Rule 302.9.23 and Manual paragraph 314.2.39 and requests the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant took up a one-year fixed-term appointment with the FAO at its Headquarters in Rome, Italy, at grade P-1, as a statistician on 2 January 2017. On 21 October 2016, as part of the FAO’s selection and recruitment procedure, she underwent an Entry Medical Examination according to which her occupational health status was classified as “fit to work, 1b”. The classification 1b indicates that the staff member is fit to work but presents a medical condition that requires medical follow-up.

2. Shortly after the complainant had taken up her work in Rome she sought medical assistance. On 16 January 2017, the complainant’s supervisor in the Statistics Division (ESS) sent an e-mail to the Director, ESS, expressing her concern for the complainant’s well-being (based on the complainant’s unusual behavior) and requesting a medical and psychological assessment for her. She also asked that the complainant be removed from her team.

3. On 22 and 27 February 2017, the Staff Counsellor met with the complainant and suggested that it might be necessary for the complainant to temporarily return to her home country for treatment in a familiar environment. On 1 March 2017, the complainant was again seen by the Staff Counsellor and was placed on certified sick leave. She was also informed that the Organization had approved a non-urgent medical evacuation enabling her to travel to her home country where she could receive treatment with her family’s support and to remain there for a period of two months.

4. On 12 March 2017 the complainant returned to her home country accompanied by her brother, who had come to Rome to assist her. She underwent treatments with the doctor who had been treating her since 2016 (Dr M.), who prescribed a medical regimen along with regular follow-up appointments with him. After a month, the complainant showed remarkable improvement and her medication was adjusted accordingly and Dr M. suggested that she would be fit to resume duty in Rome at the end of her sick leave period, provided she continued to be followed by a specialist in Rome. In a report dated 24 May 2017, Dr M. confirmed that the complainant had recovered from her relapse but he expressed doubts as to whether she would be compliant with her medication while living on her own in a foreign country. He underlined that the complainant had had issues regarding adherence in the past.

5. By an e-mail of 25 May 2017, the CMO informed the complainant of the Health Services' recommendation to OHR that she remain on sick leave for a further two weeks and that the Organization look into the possibility of finding a suitable position for her in her home country. The CMO noted that "it [was] in [the complainant's] best interest, safety and health wise, and in the interest of the organization, to recommend that [she] not return to work in Rome". She advised OHR that the complainant was fit to return to work, "provided that [the complainant] remain in an environment where [she was] close to [her] family – and friends – and [could] regularly consult with [her] treating doctors".

6. In an e-mail dated 26 May 2017, the CMO notified OHR that, following a series of medical assessments and regular interactions with the complainant, the complainant's condition had "significantly improved, thanks to a close medical monitoring by her local treating doctors, compliance with treatment, and strong family support". However, it was also noted that the complainant "remain[ed] at risk of relapse should she not be compliant with her treatment". The CMO therefore recommended that the complainant "could return to work only at the condition that her workplace [be] in her home station" and that if it was not possible to find a suitable position in her home country, then "provisions related to unfitness for duty on medical grounds should be considered". The complainant returned to Rome that same day and reported for work

on 29 May 2017, asserting that she was fit for duty and asking to retake the ESS technical test that she had failed upon entry on duty.

7. On 30 May 2017 the complainant requested an independent medical evaluation (IME). This request was approved in accordance with Staff Rule 302.6.217, as notified to the complainant in an e-mail of the same day. The complainant was also reminded that as she was still on sick leave, she was not supposed to work or engage in any activity within FAO premises but that she was welcome to avail herself of the counselling services.

8. Dr P. was appointed by the FAO to conduct the IME. This examination took place in Rome on 7 June 2017. Dr P. requested that the complainant undergo a specialized medical evaluation, which was performed on 16 June 2017. In his IME report, dated 29 June 2017, Dr P. substantially concurred with the diagnosis of the complainant's treating doctor in Rome (Dr K.), though he also proposed a possible alternative diagnosis. He noted that the complainant's current condition was "ill" and that aside from her main medical diagnosis, she was also possibly undergoing a toxicity reaction to one of her medications and that it would take at least two months on a new medical regimen "to begin to manifest clinical improvements compatible with [the complainant's] level of employment". Dr P. stated that he did not believe she was currently fit to perform her duties but that "once her medical regimen is adjusted and her diagnosis clarified [...] she should start by working in a post in her home country" and that "provided there is compliance and lack of relapse, one may envision placement in a nearby country". With regard to the risk of relapse upon returning to work in Rome, Dr P. stated that "given her social isolation, her history of non-compliance, her lack of insight and the absence of a solid therapeutic relationship the risk is high". He recommended a minimum two-month continuation of the complainant's sick leave and noted that the complainant did not, at that time, meet the disability criteria as she had not been fully diagnosed and therefore adequately cared for, and that it was "highly likely [that] she [was] suffering from side-effects of her current regimen" which interfered with the complainant's "own honest efforts to do well".

9. By memorandum of 10 August 2017, sent to the Assistant Director-General through the Officer-in-Charge, OHR, the CMO stated that “in view of the [complainant’s] condition, as there is no suitable post available in the staff member’s home country [...] it is recommended that the staff member’s appointment be terminated for health reasons pursuant to Staff Rule 302.9.22 and Manual paragraph 314.2.31(a)”. She sought approval to initiate the action to terminate the complainant’s appointment. By letter of 11 August 2017, the Officer-in-Charge, OHR, gave the complainant notice of the termination of her appointment. By letter dated 15 August 2017, the complainant disputed the characterization of her health status and requested the convening of a medical board in accordance with Staff Rule 302.9.23. She also requested to be placed on sick leave without pay. The FAO granted the complainant special leave without pay “from 28 August until 15 October 2017 or until the Medical Board will have submitted its report and recommendations, whichever comes first”.

10. The Medical Board was composed of Dr P., who had assessed the complainant on 7 June 2017, Dr K., the complainant’s treating doctor in Rome who had seen the complainant on three occasions in the period from June to September 2017 (i.e. before and after the new treatment), and Dr F., the Chairperson chosen by the two other doctors, who did not assess the complainant personally. In a report dated 28 November 2017, the majority of the Medical Board (Dr F. and Dr K.) found that the complainant was fit to return to duty in Rome provided she continued to comply with her medical regimen (taking her medication and attending regular appointments with Dr K.) and provided she received the support of friends and family. The majority noted that the complainant had “reached a point of wellbeing and insight that hadn’t been reached in the past. Also her family is committed in supporting [the complainant] the best they can.”

11. In a memorandum dated 20 December 2017 the CMO noted that, “having conferred with both the Organization’s nominated doctor and the Chairperson”, she did not support the Medical Board’s conclusions and confirmed her previous recommendation of 10 August 2017 that

the complainant was unfit to perform her duties at Headquarters. She based her recommendation on the following reasons. First, she noted that the complainant's medical history showed that the complainant had "demonstrated lack of compliance with her treatments, [...] jeopardizing her different employments". Second, she stated: "I have strong reservations regarding the manners in which the proceedings of the Board were conducted: in fact, the Board opined on the [complainant's] fitness to work based solely on the assessments provided by the [complainant's] treating doctor. There was no personal direct clinical examination performed by the Chairperson who never saw the [complainant] in person, while the other member of the Board [nominated by the FAO] had visited the Staff member once, but one month prior to the period when the new treatment started. Furthermore, the three doctors of the Board never met altogether to exchange their opinions either in person or via teleconference. I believe such rather limited consultation process may have had an impact on the conclusions reached by the majority of the Board." Thirdly, the CMO noted that "the majority diagnosis, even if confirmed, does not necessarily entail a benign nature of the illness and a good prognosis, namely, it does not provide any guarantee that the pathology would remain stable, be easy to treat and monitor. The Board's minority view indicated a different diagnosis with a poorer prognosis and confirmed the difficulty in ensuring long term compliance in the absence of factors such [as] a solid social support. Indeed, the improvement of the [complainant's] symptomatology reported by her treating doctor was observed over a very limited period of time, less than two months, as treatment started on 24 July 2017. Its effectiveness was therefore not clinically monitored over a sufficiently prolonged period, while it is a scientifically well documented fact that improvements in the condition of the majority diagnosis occur, when they do, over several months, even when the treatment is optimal, and that relapses are commonplace, often despite compliance with treatments." In light of those considerations, the CMO concluded that she was not convinced that the complainant was "fit to sustain long term employment without incurring [...] significant risks of relapses which would be prejudicial to her own health and safety, besides being against the interests of the Organization".

12. The complainant was notified of the termination of her appointment by letter dated 12 January 2018. Attached to that letter was the Medical Board report, dated 28 November 2017, and the recommendation of the CMO to the Assistant Director-General dated 20 December 2017. In the 12 January letter the Officer-in-Charge, OHR, noted *inter alia* that it had been confirmed that there were no current vacant positions commensurate with the complainant's qualifications and health condition within the Organization in or near her place of permanent residence in her home country. He informed the complainant that in view of the CMO's medical advice and Manual paragraph 314.2.37, the Assistant Director-General advised that "[she] consider[ed] that [the complainant's reintegration] to the FAO team at Headquarters may carry high risks for [the complainant] and the Organization" and recommended that her appointment be terminated. Following that recommendation, the complainant's appointment was terminated.

13. The complainant impugns the 12 January 2018 decision insofar as it relates to the medical aspects of the case, and in an appeal before the Appeals Committee, lodged on 13 March 2018, for the legal and procedural aspects of the case (in accordance with Manual paragraph 314.2.39 (a)). That internal appeal is still pending. Manual paragraph 314.2.39 provides as follows:

“314.2.3 Termination for Health Reasons

.2.39 A staff member who is dissatisfied with a decision to terminate his/her appointment for health reasons has the following appeals machinery available:

- (a) for the legal, procedural, and, if he/she has not requested that a medical board be convened, medical aspects of the case: FAO Appeals Committee (see Manual Section 331, Appeals);
- (b) for the medical aspects of the case, if he/she has requested that a medical board be convened: the Administrative Tribunal of the International Labour Organisation (see Manual Section 332, Administrative Tribunals).”

14. The grounds of the complaint are that the impugned decision was not issued with proper authority, that the FAO disregarded the recommendations of the Medical Board without adequate justification and that the FAO violated its duty of good faith.

15. The FAO challenges the receivability of the complainant's plea that the 12 January 2018 decision was not taken by the proper authority for non-exhaustion of internal remedies, but recognizes that decision as final with respect to the medical aspects. Therefore, the Tribunal is satisfied that the complaint, insofar as it challenges the medical aspects of that decision, is receivable, and shall treat the second and third grounds as listed under consideration 14 above.

16. The complaint is well founded. The final decision of 12 January 2018 lacks adequate justification and is therefore flawed. It was based on a flawed recommendation of the CMO. The complainant was entitled to a thorough and complete analysis of her medical condition at the relevant time, prior to the termination of her appointment for health reasons under with Staff Rule 302.9.23. As cited above, the CMO stated in her 20 December 2017 recommendation that not all three Board members had individually assessed the complainant at the relevant time, nor did they discuss their assessments with each other in order to present a reasoned opinion. The CMO noted these flaws as a reason why she was unconvinced by the majority opinion, but she essentially ignored them because she did not endorse the Board's recommendations. The flaws noted by the CMO, in particular the fact that two of the three Board members did not individually assess the complainant at the relevant time, could have had a major impact on the final recommendations of the Board and, as such, should have triggered the attention of the Assistant Director-General on the flaws which resulted in essentially denying the complainant her right to a proper Medical Board procedure and reasoned report. The Tribunal notes that the CMO did not consider that the complainant's lack of compliance with her previous treatment potentially depended on the fact (as noted by Dr P.) that she had been partially misdiagnosed in the past and was suffering from a toxicity from one of her medications. It is also

noteworthy that the CMO consulted only two members of the Board but she did not consult with Dr K., the complainant's treating doctor in Rome and the only doctor of the Medical Board who had actually evaluated the complainant at the relevant time (i.e. after she had started a new treatment). These flaws and the lack of adequate justification undermine the motivations for every recommendation and decision which came after and are enough to require the setting aside of the 12 January 2018 decision.

17. The complainant claims that the FAO violated its duty of good faith by classifying her as "fit to work, 1b" at the time of her appointment, but then terminating her appointment for health reasons not based on her actual health condition at the relevant time but by noting, in the CMO's recommendation of 20 December 2017, the complainant's medical history of non-compliance with her treatments. As noted above, the CMO had cited the complainant's medical history of lack of compliance with treatments as one of her reasons for recommending the termination of the complainant's appointment for health reasons. The complainant's classification of "fit to work, 1b" was not mentioned in the 20 December 2017 recommendation of the CMO, nor in the 12 January 2018 decision. The Tribunal finds that this omission is not a violation of the duty of good faith but contributes to the finding that the CMO's recommendation and all subsequent recommendations and decisions were not adequately justified.

18. The complainant seeks reinstatement, compensation for material and moral injury, and legal costs. The Tribunal finds that reinstatement would be impracticable considering the administrative difficulties that would arise from convening a new Medical Board and completing the assessment procedure for the complainant's fitness to work; the fact that the complainant was on a one-year fixed-term appointment from 2 January 2017; the time that has elapsed since the termination of her appointment and the wellbeing of the complainant who would have to endure the ongoing insecurity of the re-evaluation process for assessing her health situation. Therefore, the Tribunal finds it appropriate not to order reinstatement but it will award the complainant

material damages for the loss of a valuable opportunity to continue her work with the Organization. The Tribunal sets the amount of material damages at the equivalent of five months' salary and emoluments.

19. The complainant requests an award of 20,000 euros in moral damages. Requests for moral damages must be properly motivated. The complainant specifically alleges that the Organization completely ignored the efforts she successfully made to overcome her illness, as well as the opinion of the Medical Board. According to her, the Organization considered her as a person suffering from an illness even though her full recovery had been certified by the Medical Board. The Tribunal considers that by concluding in the impugned decision, on the basis of a flawed recommendation, that the complainant was suffering from a serious medical condition justifying the termination of her appointment, the Organization caused her significant injury. In light of the above considerations, the Tribunal shall award the complainant moral damages in the amount of 20,000 euros. As her complaint succeeds, she is also entitled to an award of costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The 12 January 2018 decision is set aside.
2. The FAO shall pay the complainant material damages equal to five months' salary and emoluments.
3. It shall pay her 20,000 euros in moral damages.
4. It shall also pay her 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ