

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

C.-W. (No. 4)

v.

WIPO

129th Session

Judgment No. 4246

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms M. C.-W. against the World Intellectual Property Organization (WIPO) on 2 July 2018, WIPO's reply of 8 October, the complainant's rejoinder of 9 November 2018 and WIPO's surrejoinder of 13 February 2019;

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 non-recognition of her illnesses as occupational illnesses.

Facts relevant to this case are set out in Judgment 4243, also delivered in public this day, concerning the complainant's first complaint.

The complainant, who held a permanent appointment, suffered an injury at work (lumbago) on 18 March 2013. She was placed on 100 per cent sick leave until 19 May, and then on 50 per cent sick leave. On 11 November the medical officer of the Medical Services Section of the United Nations Office at Geneva (hereinafter the MSS), who was also the WIPO Medical Adviser, stated that she was not in a position to approve the complainant's sick leave relating to the above-mentioned injury beyond 15 November. As from 14 November 2013, the complainant's

treating physician issued her with certificates placing her on 100 per cent sick leave for a depressive/anxiety disorder.

By a letter of 9 January 2014, the complainant was informed that, in view of the information in its possession, the MSS had not validated the latest medical certificates she had submitted and that consequently her absence up to 7 January 2014 had been recorded as annual leave. On 18 January the complainant, who had been issued with a new certificate of sick leave by her treating physician until 9 February 2014, expressed her disagreement and requested that an independent “second medical opinion”^{*} be obtained from a rheumatologist and a psychiatrist. This request was accepted and her medical certificates covering the period from 14 November 2013 to 7 February 2014 – the date on which the multidisciplinary expert assessment was due to take place – were validated. The rheumatological assessment indicated that the extension of sick leave beyond 14 November 2013 for the above-mentioned injury at work was not justified. The psychiatric assessment indicated that the complainant’s capacity for work was 50 per cent and that a resumption of work on a full-time basis would be possible in two or three months at most. By a letter of 16 April 2014, the complainant was instructed to “resume work without delay”^{*} and no later than 23 April.

Since the complainant did not resume work on the requested date, the Human Resources Management Department (HRMD) sent her two reminder letters. On 8 May the complainant stated that she was unfit to resume work and requested that a medical board be convened pursuant to Staff Rule 6.2.2(g). This request was granted. On 11 July 2014 the complainant filed an internal complaint alleging discrimination and harassment.

The medical board, which met on 27 January and 17 March 2015, issued its conclusions on 4 June 2015. It considered that the conclusions of the expert assessment in February 2014 were well founded, even though the prognosis concerning the resumption of full-time work was “probably over-optimistic”. Asserting that the complainant’s state of health had worsened since 17 March 2014 and that she was “currently”

^{*} Registry’s translation.

unfit for work because of her psychological illness – and had been since 17 March –, the board recommended that she be retired on invalidity grounds. By a letter of 30 June 2015, the complainant was informed that, further to the recognition of her unfitness for work, her sick leave and annual leave entitlements had been exhausted as of 7 May 2015 and that, as “the [MSS] [...] ha[d] confirmed”^{*} that she was unable to perform her duties or other duties which might reasonably be assigned to her, the Director General had decided, pursuant to Staff Regulations 9.2(a) and 9.4, to terminate her appointment for reasons of health as from 30 September 2015.

On 3 August the complainant submitted a request for a review of this decision. At this juncture, she also requested “the set[ting] up [of] the procedure to have [her] illness recognized as an occupational illness”^{*}. At the end of the month, she was advised of the decision to grant her a disability benefit as from 8 May. By a letter of 20 October, she was informed that her request for review of the decision to dismiss her had been rejected. With regard to her request for recognition of an occupational illness, she was informed that it had not been possible to submit an official request to the MSS since she had not returned the relevant declaration form, which had been sent to her on 2 October.

In November 2015 the complainant returned the occupational illness declaration forms in relation to her lumbago and a “major depressive episode”^{*}. WIPO forwarded the requests for recognition of these illnesses as occupational illnesses to the MSS and to its insurer. By an e-mail of 16 June 2016, the insurer informed WIPO that, regarding the lumbago, the file had been closed and that, regarding the psychological illness of 14 November 2013, it was not in a position to examine the complainant’s request since she had submitted it outside the contractual time limit of 120 days.

In the meantime, on 11 February 2016, the complainant had lodged an appeal with the Appeal Board against the decision to terminate her appointment. In a letter of 16 December 2016, referring to WIPO’s submissions before the Appeal Board, the complainant inferred that the

^{*} Registry’s translation.

Director General was in possession of information that had not been disclosed to her concerning the occupational nature or otherwise of her illnesses, and she requested that this information be sent to her. By a letter of 1 March 2017, the complainant was informed that, up to the entry into force, on 1 January 2015, of Office Instruction No. 79/2014, WIPO's practice had been not to deduct absences for an occupational injury or illness from the staff member's sick leave entitlement. Thus, although the complainant's psychological illness had manifested itself before 1 January 2015, that circumstance alone would not have prevented the resulting absences from being deducted from her sick leave entitlement: the illness in question also had to be recognized as occupational, which was not the case. On this point, it was made clear to the complainant that it was not for WIPO to give an opinion on the occupational nature or otherwise of an illness and that, apart from the insurer's "decision" of 16 June 2016, the Organization was not in possession of any document enabling it to confirm or deny the occupational nature of her illness. On 30 April 2017 the complainant requested a "review of the non-recognition"* of her illnesses as occupational. On this occasion, she made other requests, in particular for the disclosure of various documents, the "review of all coercive and erroneous decisions taken against her"*, the "rectification"* of "current and pending procedures"* and redress for the injuries suffered. These requests were rejected on 3 July. On 7 August 2017 the complainant lodged an appeal with the Appeal Board, which, in its conclusions of 2 February 2018, recommended that the appeal be dismissed. By a letter of 4 April 2018, the Director General informed the complainant that he had decided to accept this recommendation. That is the impugned decision.

To begin with, the complainant requests the disclosure of a number of documents. She also requests the setting aside of the decision not to recognize her illnesses as occupational and also of the Appeal Board's conclusions and recommendations. She further requests recognition of the occupational nature of her illnesses. Lastly, she requests the Tribunal to make a number of declarations of law, to order her reinstatement with all the legal consequences that this entails, to order WIPO to "rectify all

* Registry's translation.

current and pending procedures”*, to award her damages under various heads – and in particular 500,000 Swiss francs for moral injury – or to grant her “overall compensation for her four cases”*, and to award her costs.

WIPO asks the Tribunal to dismiss the complaint as unfounded. It points out that the claim for the payment of 500,000 Swiss francs in compensation for moral injury was not submitted to the Appeal Board and is unsubstantiated.

CONSIDERATIONS

1. By her fourth complaint, the complainant impugns the decision of 4 April 2018 by which the Director General accepted the Appeal Board’s recommendation to dismiss the appeal against his decision of 3 July 2017. This latter decision rejected the complainant’s request of 30 April 2017, which was essentially a request for her illnesses to be recognized as being of an occupational nature.

2. WIPO Staff Regulation 6.2 provides that the Director General shall establish a scheme of social security for staff members, which shall provide reasonable compensation in the event of illness or accident attributable to the performance of official duties on behalf of the Organization. To that end, WIPO has concluded an insurance contract, which constitutes Part D of the Administrative Manual and forms an integral part of it. Article 12 of this contract establishes the following rules for the recognition of an occupational (“service incurred”) illness:

“12.1 Generalities

Notice of an accident or service incurred illness which causes or may cause death, disability or the incurrence of medical expenses, must be given to the Insurers within 90 days after the date of accident or 120 days [after] the date of the confirmed diagnosis of service incurred illness. This notification obligation is a pre-requisite for the subsequent claim to be receivable [...].

[...]

* Registry’s translation.

12.2 Service incurred incidents

When the Policyholder [WIPO] requests the UNOG [United Nations Office at Geneva] Medical Services Section [MSS] to review a claim related to a service incurred incident, the UNOG Medical Services Section is in charge of performing an independent medical assessment of the claim. Whenever necessary, the UNOG Medical Services Section may request an external contractor to perform the medical assessment of the claim. The outcome of the medical assessment by the UNOG Medical Services or the external contractor will be binding for the determination of the service incurred aspect of an incident for the application of this contract.”

In the instant case, the insurer considered that the file concerning the occupational injury of 18 March 2013 was closed and that the request relating to the illness of 14 November 2013 was irreceivable because it had been submitted after the contractual time limit of 120 days.

3. With regard to the injury at work of 18 March 2013, this caused lumbago and was recognized as an occupational injury. On 11 November 2013 the Medical Adviser considered that an extension of the complainant’s sick leave could not be justified beyond 15 November.

The complainant considers that the Medical Adviser, in so doing, did not take account of another condition, namely coxarthrosis. According to the complainant, the independent expert medical assessment of 7 February 2014 confirmed the existence of her back pain and the medical board upheld her claim by approving all her sick leave. In her view, it was therefore wrong to consider that the condition resulting from her injury at work had ended on 15 November 2013.

Until 11 November 2013, the Medical Adviser took account of the medical certificates issued by the complainant’s treating physician, which only mentioned lumbago. On 11 November 2013, she decided to no longer approve sick leave relating to this condition, which, moreover, is no longer referred to in the certificates issued by the treating physician from 14 November 2013 to 18 June 2014, which refer only to a depressive/ anxiety disorder.

The Medical Adviser’s diagnosis was confirmed by an independent multidisciplinary expert medical assessment of 7 February 2014. The experts explicitly replied in the negative to the question: “Was the

extension of sick leave after 14 November 2013, relating to the injury at work, justifiable on medical grounds, based on the condition cited (lumbago)?”^{*} Even though the medical board validated all the complainant’s sick leave after 17 March 2014 and declared that she was unfit to work, this was only on account of her psychological illness. The medical board did not confirm the existence of a somatic condition, even though its terms of reference also covered this aspect of the complainant’s state of health. The Tribunal also observes that Dr E., nominated by the complainant, was one of the members of the medical board, and it was this doctor’s certificate, referring to both the somatic and the psychological conditions, that the complainant used to indicate to WIPO what she considered should be the subject of the examination by the medical board.

Lastly and above all, the evidence in the file shows that the complainant was suffering from coxarthrosis before the injury at work. In a medical certificate of 21 February 2013, in other words prior to the injury at work, a rheumatologist had noted this condition and recommended hip replacement surgery. In addition, the report of the independent expert medical assessment of 7 February 2014 states that the complainant had suffered from occasional lumbago since 2011. The complainant cannot therefore attribute the coxarthrosis to her injury at work.

The MSS, and subsequently WIPO and the insurer, therefore rightly concluded that the occupational injury of 18 March 2013 should no longer be taken into account beyond 15 November 2013 and considered the related file to be closed as of that date.

4. With regard to the irreceivability of the request for recognition of the occupational nature of her psychological illness, the complainant contends that the Organization cannot simply rely on the decision of the insurer, which is not an organ of WIPO capable of issuing decisions within the meaning of the WIPO Staff Regulations.

^{*} Registry’s translation.

Under Article 12.1 of the insurance contract, the insurer is required to decide whether a request for recognition of an occupational illness is receivable in terms of the applicable time limits. In the instant case, it considered that the request had been submitted after the prescribed time limit of 120 days. Throughout the procedure, WIPO considered that the decision concerning the receivability of the request came within the insurer's sole competence. In so doing, WIPO overlooked the fact that although the insurer is not an organ of the Organization, WIPO is liable for the insurer's acts (see Judgment 3506, consideration 19). In view of its duty of care towards its staff members, WIPO was obliged to check whether the insurer's calculation of the time limit was correct. If this had appeared not to be the case, it would have been obliged to contest it, using the dispute resolution procedure established in Article 8.1 of the contract. In the instant case, WIPO did not comment on whether the calculation was accurate but relied exclusively and emphatically on the insurer's decision.

In these circumstances, the Tribunal should in principle set aside the decision and remit the case to WIPO so that it can take a decision on the matter. But the Tribunal will not proceed in this way because the error of law thus committed was without consequence, as the case file shows clearly that the calculation was correct. Indeed, the request for recognition of an occupational illness was made for the first time on 3 August 2015, but the illness was diagnosed on 14 November 2013. In the declaration to the insurer, dated 10 November 2015, the complainant indicates that the depressive/anxiety disorder was diagnosed on 24 April 2014. Whichever date is taken as being that of the initial diagnosis, and even if it is considered that WIPO should have provided the occupational illness declaration form on 3 August 2015, so that the complainant could have submitted it on this date, the time limit of 120 days imposed by the insurance contract had already elapsed.

5. The complainant contends that the Director General should have convened a compensation committee or a committee of independent medical experts.

No regulatory text imposes such an obligation on the Director General. As emphasized by WIPO, the only provisions relating to recognition of an occupational illness are those established by the above-mentioned insurance contract, which stipulates that only the MSS or, if necessary, an external contractor designated by it, is competent to perform a medical assessment to decide whether or not the injury or illness is “service[-]incurred”. But since the request was time-barred, there was no need to perform such an assessment.

6. The complainant submits that the conclusions of the medical board of 4 June 2015, in which the board recognized her psychological illness, are a new element which would be decisive for determining the start date of the 120-day period. But the medical board’s conclusions were not a new element for the complainant, since they merely confirmed the illness from which she claimed to be suffering.

The complainant argues that since WIPO did not take account of the medical certificates which she submitted, she was obliged to have recourse to the medical board in order to prove the existence of her illness, before being able to demonstrate that it was occupational. She therefore considers that it was the date of the medical board’s conclusions that marked the start date of the 120-day period and that WIPO, because of its attitude, bears sole responsibility for the fact that the deadline was missed. However, with regard to the declaration of an illness that is alleged to be occupational, the relevant provisions of the insurance contract do not require recognition of the illness by the Organization as a precondition. These provisions merely stipulate that the illness must be confirmed by a “legally qualified doctor” (Article 3 – definition of the term “illness” – and the above-mentioned Article 12.1 of the contract).

On 11 July 2014 the complainant filed a complaint of harassment. Nothing prevented her from filling in the declaration relating to an occupational illness at the same time since, according to her, the illness had been caused by that harassment.

7. The complainant submits that the fact that she filed the request for recognition of her illness as occupational when she did is attributable to the evolution of her illness. But since, in the declaration form, the complainant herself indicated 24 April 2014 as the date when her illness was diagnosed, she cannot tax either the insurer or WIPO with failing to take account of a later date.

8. The complainant further contends that the psychological illness from which she suffered rendered her unable to meet her day-to-day commitments, let alone fill in administrative documents for obtaining compensation. This argument cannot be accepted, since the complainant and her then counsel here initiated a very large number of administrative and litigation procedures since 2014, as borne out by the plethora of documents attached to the four complaints submitted to the Tribunal.

9. The complainant submits that the Director General should have given a “scientific”^{*} reply to the request for recognition of the illness as occupational without relying exclusively on the Medical Adviser’s diagnosis. She also taxes WIPO with being negligent and sets out a long list of facts which, according to her, constitute the harassment that was the cause of her illness. Furthermore, she suspects the Director General and the insurer of a conflict of interest and considers that they were not in a position to take any decision regarding the recognition of her illness as occupational. Lastly, she considers that the Director General’s attitude was “dubious”^{*} and puts forward two hypotheses to the Tribunal: either the request for recognition of the occupational illness was not sent to the MSS, or the request was sent but subsequently “blocked”^{*}, each hypothesis being indicative of an illicit act.

But all these arguments are of no avail because the request for recognition of an occupational illness was in any case time-barred.

^{*} Registry’s translation.

10. The complainant considers that the length of the procedure was excessive, both for the convening of the medical board and the drawing up of its conclusions and for the refusal to recognize the illness as occupational.

With regard to the plea concerning the length of the procedure relating to the medical board, the Tribunal held, in consideration 17 of Judgment 4243, also delivered in public this day, concerning the complainant's first complaint, that the plea failed.

As for the procedure that led to the refusal to recognize her illness as occupational, the complainant asserts that it lasted more than two years and eight months. The complainant submitted her request on 3 August 2015. She states that it was only on 23 November 2016 that she "receive[d] any news"* through the communication of the Appeal Board's conclusions concerning her appeal against the termination of her appointment (WAB/2016/02 of 7 November 2016). It is true that WIPO took two months to send the occupational illness declaration forms to the complainant and over six weeks to send the forms completed by her to the insurer. It never notified the complainant of the insurer's decision. All of that is open to criticism. But the evidence shows that the insurer notified the complainant of its decision on 21 June 2016. The complainant could therefore have filed her request for review at this time. However, she did not do so until 30 April 2017, so a significant part of the delay in the procedure can be ascribed to her. The plea therefore fails.

11. The complainant requests the Tribunal to make a number of declarations of law. According to the Tribunal's established case law, such claims are irreceivable (see Judgments 3876, consideration 2, 3764, consideration 3, 3640, consideration 3, and 3618, consideration 9).

12. It follows from the above that the complaint must be dismissed in its entirety, without there being any need to order the production of the documents requested by the complainant.

* Registry's translation.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ