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

SEVENTY-SIXTH SESSION

In re FIGUERA DE PEREZ

Judgment 1320

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Helena Figuera de Pérez against the International Telecommunication Union (ITU) on 6 April 1993, the ITU's reply of 28 May, the complainant's rejoinder of 30 June and the Union's surrejoinder of 6 August 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 13 of the Rules of Court, Article 11.4 of the Constitution of the ITU, Regulation 6.2 and Rules 6.2.1 to 6.2.4, 11.1.1.2 a), 11.1.1.4 and 11.2.1 c) of the ITU's Staff Regulations and Staff Rules;

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

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

A. After several short-term appointments with the ITU in Geneva, the first of which began in January 1971, the complainant, a Spanish citizen who was born in 1936, got a two-year appointment on 1 May 1987. She had it regularly renewed. She was assigned as a copy typist at grade G.3 to the Spanish translation section of the Languages Division. She stayed there until 1991, when the section became part of the Document Composition Service. Her work included word- processing.

On 20 February 1992 she complained of pain and irritation in her left eye. The casualty department of the Institute of Ophthalmology at the Cantonal Hospital of Geneva gave her a check-up and found a corneal ulcer making her 100 per cent incapable of work. She then had several appointments at the hospital and from 28 February with Dr. Simon-Bernard, her own doctor. She was granted sick leave in accordance with medical certificates which variously declared her to be 100 or 50 per cent incapable.

A medical certificate of 4 May 1992 from her own doctor said that it would "help if, at least for a short while, she spent less time" on visual display units (VDUs).

On 19 May a new eye lesion appeared and the next day she went to the ITU's Medical Service, where she saw Dr. Cohen. On 25 May he had a talk on the telephone with Dr. Simon-Bernard which he supposedly recorded in a handwritten minute he put on her medical file.

She sent a memorandum on 29 June to the Chief of the Personnel and Social Protection Department applying for transfer to a job that took full account of her professional and physical capacity. She pointed out that nothing had been done to give her working conditions in which she could do her job with no risk of further eye lesions.

On 3 July she saw an eye specialist in Paris, who certified the same day that she was suffering from "severe dry-eye syndrome with recurrent ulceration"; she should be allowed to do "the sort of work that required focusing for only short periods with very frequent intervals" and should not do "work in air-conditioned rooms".

Having got no answer from the ITU to her memorandum of 29 June, she wrote to the Secretary-General on 13 July asking again for transfer to another job and claiming compensation for permanent impairment of eyesight and for moral injury.

In a report of 12 August to the Chief of Personnel the Director of the Medical Service recommended on the strength of her own doctor's findings transferring her to another division.

Having got no reply from the Secretary-General either, she filed a "complaint" with the Appeal Board on 27

August 1992 under Staff Rule 11.1.1.2 a) pressing the pleas and claims in her letter of 13 July.

By a memorandum of 1 September, of which the complainant got a copy, the Chief of the Conferences and Common Services Department told the Chief of Personnel that he was putting her provisionally on a post as receptionist on night watch.

The complainant wrote to the Chief of that Department on 2 September to ask what the job entailed and she learned from a job description given to her on 3 September that it included night shifts as receptionist.

In a memorandum of 2 September to the Chief of the Pensions and Insurance Service she asked for repayment by the Staff Health Insurance Fund of a fifth of her medical costs on the grounds that using VDUs was to blame for her recurrent eye lesions.

On 14 October 1992 the Chief of the Department offered to let her resign on terms to be negotiated, but she refused.

In a memorandum of 16 October he offered her two other jobs, but she did not answer.

In his reply of 19 October to her memorandum of 2 September the Chief of the Pensions and Insurance Service said that in the opinion of the Director of the Joint Medical Service her condition was not attributable to the performance of her duties.

On 26 October she took up the duties she had been seconded to.

On 30 November the Chief of Personnel notified to her a decision taken on the Secretary-General's behalf to second her to the post as receptionist on night watch at grade G.3.

By a letter of 7 December 1992 she told the chairman of the Appeal Board that the Secretary-General had not sent her a copy of the Board's report and that in accordance with Staff Rule 11.2.1 c), if the Secretary-General failed to take a decision within 60 days, she would take the view that she had exhausted the internal means of redress.

On 5 February 1993 she applied for two vacant posts as clerk. The Secretary-General appointed her to one of the posts by a decision of 5 April.

By a memorandum of 11 February she asked the Medical Service to let her have a copy of Dr. Cohen's handwritten minute of 25 May 1992 from her medical file, but the Medical Service refused in a memorandum of 17 February 1993.

Since the Secretary-General had failed to take a decision by 1 February 1993 on her "complaint", she concluded that her internal remedies were exhausted and she filed this complaint with the Tribunal on 6 April 1993.

B. The complainant puts forward several pleas.

She submits that the Union failed to observe the rules on staff health protection in Regulation 6.2 and Rules 6.2.1 to 6.2.4, which call for preventive action. Service Order No. 48, which the Secretary-General issued on 28 November 1985 under the heading "Conditions of work for operators of visual display units", overlooked several points which the Director of the Joint Medical Service had raised in a memorandum of 8 December 1983 to the Chief of Personnel about conditions of VDU work.

She submits that because it was remiss the Union is liable for her recurrent eye lesions. Paragraph 7 of Service Order 48 says:

"If an official is medically unable to take up or continue work on a VDU for reasons of health as certified by the Joint Medical Service, suitable action will be considered for transferring permanently or temporarily the official to another post or assigning him/her with different tasks."

But the administration took no "suitable action", despite the certificates from her own doctor and the report of 12 August 1992 by the Director of the Medical Service.

She alleges that Dr. Cohen told her own doctor on the telephone on 25 May 1992 that he would be sending the Chief of Personnel a report recommending no word-processing for six months and transfer to another unit. But he "retracted" under pressure from the Personnel Department, which dissuaded the Medical Service with arguments that were other than medical, wrong and disparaging in that they harmed her professional reputation and her dignity.

By refusing to let her have a copy of Dr. Cohen's handwritten minute of 25 May the Medical Service infringed the right that any staff member has to see his own case records, withheld evidence and obstructed the course of justice. She asks the Tribunal to order disclosure and she releases the Medical Service from its professional obligation of secrecy.

She submits that the appeal procedure was flawed on two counts. It was in breach of Rule 11.1.1.4 a) for the Secretary-General not to send the chairman of the Appeal Board within four weeks a reply to her memorandum of 27 August. It also offended against Article 7 of the Universal Declaration of Human Rights, which guarantees equality before the law. Furthermore, the Appeal Board failed to meet the time limits in Rule 11.1.1.4 for processing appeals.

The Chief of the Conferences and Common Services Department abused his authority by seconding her on 1 September 1992 to the post as receptionist on night watch. Only the Secretary-General may transfer someone to a post with duties different from those in the original letter of appointment. Since the decision to second her was not taken until 30 November 1992 transfer prior to that date was unlawful. It was a blatant trick to get her to disobey so that she could be dismissed. On 14 October 1992 when she tried to get exemption from night duty because of anxiety over the responsibility and risk, the Chief of the Department summoned her and told her "any private business would have sacked you long ago" and "the ITU is not a charity" and if she refused night duty she would be dismissed at once. Such remarks were an affront to her professional and personal dignity and amounted to intimidation.

She points out that what the Director of the Medical Service said about the link between her eye ailment and VDU work was inconsistent. His report of 12 August 1992 did not tally with his remark in a letter of 23 September 1992 to the Chief of the Pensions and Insurance Service that "the lesions are caused by a disorder that is not attributable to work". As her own doctor established what is decisive is that they occurred during and because of work.

She submits that all those factors, the dangers of night duty and mental stress caused her serious moral injury.

She asks the Tribunal to (a) order the Secretary-General to transfer her to another post corresponding to her grade, background and physical condition; (b) rule that the corneal lesions constitute four occupational accidents and to order the Secretary-General to pay her 200,000 Swiss francs in damages; (c) instruct the health insurance fund to compensate her for the permanent impairment of eyesight caused by the corneal lesions; (d) credit her with days docked for sick leave from 20 February to 12 October 1992; and (e) pay her 200,000 francs in damages for physical and moral injury and emotional stress and 10,000 francs in costs. In a letter of 23 April 1993 to the Tribunal she withdrew claim (a).

C. In its reply the Union first addresses the facts.

It asserts that for an experienced typist copy work requires little or no looking at the VDU screen, and it took that into account as far as possible in assigning her new tasks after reform of her section. So it was at pains to change her job as little as possible, despite the demands of reform, long before her ailment began.

It points out that she took sick leave unusually often both before and after the lesions occurred.

She applied for transfer before then but the technical nature of Union work and dwindling funds made it hard to meet her request.

Since her ailment kept her off work only for a while any decision about working conditions and possible transfer still lay with the Chief of the Department; so he committed no abuse of authority by seconding her.

As soon as the Medical Service had issued its report of 12 August 1992, steps were taken to relieve her of VDU work. Early in September she was transferred to a post at the same grade as receptionist. The working conditions of such staff in the ITU are much as in other intergovernmental organisations in Geneva. Besides, the transfer was

only temporary - as was borne out by her later appointment as clerk on a post that had become vacant - and enabled her to work without strain on her eyesight.

Turning to the complainant's pleas, the ITU submits first that although, as she says, the memorandum of 8 December 1983 from the Director of the Joint Medical Service differs from Service Order 48, that is because the Union constantly updates data-processing equipment.

Her charge that it was remiss is groundless. Doing copy work half the time or even all the time after 26 February 1992 cannot have made her condition any worse.

It is libellous of her to say that the Personnel Department sought to deter the Medical Service and that evidence was withheld. The Union could not be expected any more than she to know what Dr. Cohen's minute said or why the Medical Service had refused to disclose it.

She has no grounds whatever for pleading breach of the appeal procedure. When she went to the Board there was no challengeable administrative decision yet because the process of transfer was not complete. Besides, the matter was in the process of being settled, as events later showed.

The offer of agreed termination was not an attempt to intimidate; far from it: some employees want such an arrangement on reaching the complainant's age.

Turning to her charge of inconsistency against the Director of the Medical Service, the Union cites a memorandum of his of 5 May 1993 to the deputy chief of Personnel denying a link between her eye disorder and her work.

It asks the Tribunal to set aside the complaint as devoid of merit.

D. In her rejoinder the complainant alleges a formal flaw: the ITU's reply is signed by the Chief of Personnel and not by the Secretary-General who, according to Article 11.4 of the ITU Constitution, acts as the Union's legal representative.

Not until she had eye trouble did she ask for transfer and she was fully aware of what Dr. Cohen said in his minute of 25 May 1992.

Appointing her to a post as clerk had nothing to do with the recommendation of 12 August 1992 by the Director of the Medical Service or paragraph 7 of Service Order 48. It shows the Union's bad faith: it was not on its own initiative that it transferred her to a post that had "become vacant", but on a recommendation by the Appointment and Promotion Board: she went through the channels ordinarily open to anyone.

She maintains that there was a connection between her eye lesions and her work: she had never had eye trouble before.

She is dismayed to learn that her medical records include a copy of her complaint to the Tribunal.

E. In its surrejoinder the Union answers her charge of a formal flaw in the Secretary-General's not signing its reply. It explains that the Secretary-General has expressly delegated authority - to the Chief of Personnel among others - to sign submissions to the Tribunal.

It is not seeking to deny the complainant's eye ailment but maintains that she applied for transfer long before it occurred.

It stresses that her almost unbroken absence from 26 February 1992 onwards explains why her health had to improve before any proper solution could be found.

It contends that there is nothing unwarranted about forwarding the complaint and its own reply to the Medical Service, since the complainant has made several allegations against the Service.

CONSIDERATIONS:

1. The complainant held short-term appointments from January 1971 with the ITU. It appointed her on 1 May 1987

as a copy typist in the Spanish translation section of its Languages Division. She had her appointment renewed first to 30 June 1991, then to the end of September 1996, the month in which she was to reach the age of 60. In June 1991 her section was incorporated in the Documents Composition Service and she was then required to do a great deal of electronic data- processing. From 20 February 1992 she complained of serious eye-strain, particularly recurrent corneal ulcers. On the strength of medical certificates she applied on 13 July 1992 for transfer to a post suited to her physical and professional abilities. She asked for a credit of sick leave from 16 March 1992 which she said she would not have needed if the Union had observed proper standards of work on a visual display unit (VDU) and if the Medical Service had reacted more promptly. She claimed damages. Having got no answer, she appealed to the Appeal Board on 27 August 1992. The Board not yet having reported, she rightly took the view that she had exhausted the internal means of redress and she filed this complaint on 6 April 1993. Receivability is not at issue.

2. The complainant is challenging the validity of the ITU's reply on the grounds that its submissions ought to bear the signature of the Secretary-General or the Legal Adviser, not of the Chief of the Personnel Department. She is mistaken. According to Article 13(2) of the Rules of Court a defendant organisation may be represented by any serving or former official. It is so represented here: the Chief of Personnel may properly represent the Union.

3. Turning to the merits the Tribunal observes that on 1 September 1992 the complainant left her old job, which she said was causing her eye-strain, and was put on night-shift duties as a receptionist. She later applied for a post as a clerk in the Conference Documents Section and was put on it on 1 April 1993. She thereupon waived her original claim to transfer to a post in line with her grade and physical and professional abilities, and the Tribunal duly notes such waiver.

4. Her other claims hold good: that her ailment be treated as service-incurred and entitle her to damages; that the Secretary-General seek compensation for her from the health insurance scheme; that she be credited with the sick leave she had to take from 20 February to 12 October 1992; and that she be awarded damages for physical and moral injury and emotional stress.

5. Her pleas fail. What she is claiming is not an invalidity benefit but damages from the Union for the injury under various heads she says she has incurred in its service. But her arguments in support of such claims are unsound for the reasons set out below.

6. First, she contends that the Union ought to have enforced the standards of the Joint Medical Service that govern VDU work throughout the United Nations common system; since it failed to do so it was in breach of its duty to safeguard staff health. In fact the recommendations which the Director of the Joint Medical Service made in 1983 were not binding in all respects on the ITU. As it maintains, the Union was free to take account of changes in electronic data-processing equipment in updating the conditions of VDU work. There is not a shred of evidence to suggest that it required staff to work in dangerous conditions and thereby acted in breach of its duty to protect their health.

7. Secondly, the complainant submits that by taking too long to transfer her to a job with no VDU work the Union caused her ailment to recur and made it worse. But the Union shows that after it got the first medical certificate - the one dated 26 February 1992 - she did such work for only twenty days half time and four days full time, and after the Union got the medical certificate of 12 August 1992 she did none at all. Although the duties she was given on 1 September 1992 did not suit her they took account of her eye trouble.

8. Her third argument is that the Personnel Department put pressure on the Medical Service and gave a doctor there wrong information that was calculated to injure her reputation and dignity. Again she offers not a jot of evidence to bear out that contention or to cast doubt on the independence and impartiality of the doctors in charge of her case.

9. Fourthly, she maintains that by refusing to let her have the text of a minute of 25 May 1992 in her medical records the Medical Service has denied her the right to prove her case. Although an international civil servant may be granted access to his medical records on the responsibility of the doctor who has them, the complainant acknowledges that she had read out to her twice, on 24 July and 3 August 1992, the minute that the doctor of the Medical Service had written recording a conversation he had had with her own doctor on 25 May 1992. So she knew what the minute said - indeed she cites it in her pleadings - and may not properly plead breach of her right of access to her medical records. The Union refused to let her have the text of the minute. In the circumstances of the case the Tribunal sees no point in ordering its disclosure.

10. Fifthly, she pleads flaws in the procedure followed by the Secretary-General and by the Appeal Board: both of them, she says, failed to give express answers to her claims. The Union retorts that it was not bound to give an immediate answer to her application for transfer and that she was not really challenging any administrative decision when she instigated proceedings since the process of transfer had not been completed. In fact the issue is irrelevant since the absence of reply from the Union and the Appeal Board has not prevented her from bringing the dispute to the Tribunal. Since any flaws there may have been in the procedure have caused her no injury her pleas fail, in particular those she founds on breach of the Staff Regulations and Staff Rules and the Universal Declaration of Human Rights.

11. Sixthly, she accuses the Chief of the Conferences and Common Services Department of abuse of authority and of attempts by threat and intimidation to humiliate her and injure her dignity. But it is plain on the evidence that what prompted her transfer to new duties on 1 September 1992 was a desire to meet her wish to stop VDU work. And making her the offer of agreed termination cannot be seen in the circumstances as improper pressure tantamount to abuse of authority. In general there is no evidence to bear out the charges of bad faith and contempt that garnish her pleadings.

12. Lastly, she sees shifts in the Medical Service's findings. She is wrong. The memorandum that its Director wrote on 5 May 1993 makes the medical background plain by saying that she "shows an ailment that warrants her taking several precautions at work and in everyday life" and that "the Medical Service has therefore prescribed adaptation of her work" but that "that does not mean that the ailment is service-incurred". The conclusion to be drawn is not at odds with the medical certificates in her records: although the state of her health argued against giving her VDU work - and that was why the ITU transferred her to another unit - her eye ailment was not attributable to the performance of her duties.

13. Such being the medical findings, the Tribunal disallows her claim to have her eye lesions declared to be service-incurred. Her complaint therefore fails in its entirety.

DECISION:

For the above reasons,

1. The Tribunal notes the complainant's waiver of her claim to transfer to a post in line with her grade and physical and professional abilities.

2. Her other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.