

EIGHTIETH SESSION

In re LUSTIG DE SCHÖNSTEIN

Judgment 1464

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sonia Lustig de Schönstein against the United Nations Industrial Development Organization (UNIDO) on 5 February 1995 and corrected on 14 March, UNIDO's reply of 16 June, the complainant's rejoinder of 21 July, the supplement thereto of 18 September and the Organization's surrejoinder of 13 October 1995;

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

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. The complainant, a citizen of Chile and Germany, joined UNIDO's staff in October 1971 under the first of a series of short-term appointments that ran until June 1972. In September 1972 UNIDO granted her a fixed-term appointment as a typist at grade G.3. It promoted her to G.4 in 1973, to G.5 in 1976 and to G.6 in 1986 as a senior secretary. It granted her a permanent appointment on 1 August 1975. As from April 1991, when it brought in a new grading system, it put her back to grade G.5.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division informed her that because of a review of "priority programmes and staffing requirements" her appointment was "likely to be terminated in the near future" and there would "shortly" be talks with her about "the modalities of separation".

On 8 November 1993 she fell ill and the medical service advised her to go home. She went into hospital and in a letter of 19 November 1993 her doctor in Vienna told the head of the Organization's medical service that he attributed her ailment, intestinal ulcers, to "stress" at the workplace.

In a memorandum of 6 December 1993 to the secretary of the Advisory Board on Compensation Claims she sought compensation for total disability due to the performance of official duties.

There followed correspondence between the parties about her claim and about her entitlement to sick leave pending a determination by the Board about the cause of her illness.

In a letter dated 15 March 1994 the secretary of the Board told her that by 22 November 1993 she had exhausted her entitlement to sick leave on full pay but that by taking half days from her annual leave entitlement she could stay on full pay "until June". In a letter of 21 June 1994 the secretary informed her that she was on sick leave with half pay as from 17 June.

By a letter dated 14 July 1994 she asked the Director-General to review that decision. In his reply of 22 August he said that the Board would examine her case at its next meeting and pointed out that the reckoning of her entitlement to sick leave depended on its recommendation.

According to a personnel action form dated 26 September 1994 she was put on "special leave with half pay" as from 21 September in accordance with circular UNIDO/DA/PS/AC.77.

By a letter of 12 October 1994 the Director-General endorsed a unanimous recommendation from the Board that he should not treat her illness as service incurred; he also upheld the earlier reckoning of her entitlement to sick leave.

In a letter of 10 November 1994 she asked the Director-General to review his decision of 12 October. He informed her in a letter of 8 December that he was referring her case to the Advisory Board on Compensation Claims, which would set up a medical board. According to a personnel action form of 14 August 1995 she was put on special leave without pay as from 1 August 1995.

B. The complainant infers rejection of the claim she lodged on 10 November 1994 from the Organization's failure to take a decision within sixty days. She says that its treatment of her claim was dilatory and it overlooked the evidence that shows her illness to be due to the performance of official duties.

She wants the Tribunal to recognise her entitlement to compensation for service-incurred illness, including payment of 12 months' pensionable remuneration, the refund of related medical expenses, payment of salary and allowances for a full year as from the onset of her illness, the grant of special leave with full pay as from the time she exhausted her entitlement to sick leave, and compensation "related to benefits under the United Nations Joint Staff Pension Fund". She has subsidiary claims to the refund of medical expenses she incurred because of the "belated convening" of a medical board; to credit for accrued annual leave and sick leave; to payment of interest on all sums due; and to repayment of sums she made over to her bank by way of interest on her overdraft. She claims the production of several documents, "reinstatement" in some other United Nations agency in Vienna and awards of "physical, moral and material damages" and costs.

C. In its reply UNIDO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies open to her. The Director-General's letter of 8 December 1994, in which he gave her information about the applicable procedure, was plainly a decision. The Organization observes that, though still pending, her claims have suffered no untoward delay.

D. In her rejoinder the complainant insists that UNIDO has followed a "delaying policy" and acted in breach of "all" the material rules. She lodges a supplementary claim to the rescinding of the personnel action form issued on 14 August 1995 on the grounds that it failed to specify that special leave without pay was granted under the terms of circular UNIDO/DA/PS/AC.77. She also asks for the continuance of benefits under the temporary disability insurance plan pending award of a disability grant under the Pension Fund.

E. In its surrejoinder the Organization rejects her additional claims as irreceivable on the grounds that they amount to a fresh complaint impugning different decisions. It presses its other objections to receivability and observes that only a medical board, not her own doctors, may determine whether her illness was service incurred.

CONSIDERATIONS:

1. The complainant, who has worked for the Organization since 1971, holds a permanent appointment at grade G.5. She was granted sick leave in November 1993 and was put on special leave at half pay on 21 September 1994.

2. On 6 December 1993 she had lodged a claim under Appendix D of the Staff Rules to the grant of compensation for illness on the grounds that it was service incurred. There was some delay in getting additional medical information from her doctor, who did not provide it until 17 June 1994. The Advisory Board on Compensation Claims took up her claim on 14 September 1994. It unanimously concluded that her illness was not "attributable to the performance of official duties" and therefore recommended refusing her claim to compensation under Appendix D of the Staff Rules. By a letter of 12 October 1994 the Director-General informed her that he had approved the Board's recommendation.

3. Article 17 of Appendix D reads:

"(a) Reconsideration of the determination by the Director-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability, may be requested within thirty days of notice of the decision provided, however, that in exceptional circumstances the Director-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him or her on the medical board provided for under paragraph (b).

(b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Officer of the Organization or a medical practitioner selected by him or her; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the Organization.

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with a report of the

medical board to the Director-General who shall make the final determination."

Clauses (d) and (e) are not material.

4. By a letter of 10 November 1994 to the Director-General the complainant appealed against his decision of 12 October in accordance with Article 17 of Appendix D and named a doctor to represent her on the medical board provided for under paragraph (b) of that article. She asked what were the "criteria and substantial justification that led to the denial of compensation under Appendix D".

5. The Director-General replied in a letter of 8 December acknowledging hers of 10 November as well as another one she had written to him on 5 November. He refused to make the Board's minutes available to her on the grounds that they were "confidential"; said that he had reviewed the matter but was maintaining his decision; and acknowledged receipt of her appeal, which he said would be "brought to the attention of the Advisory Board on Compensation Claims for appropriate action concerning the convening of a medical board". She wrote again on 30 December 1994 and in a letter of 26 January 1995 in reply the Director-General confirmed his refusal to make the Board's "internal documentation" available but promised that the Board would deal with her case "as expeditiously as possible".

6. She lodged this complaint on 5 February 1995 claiming compensation for service-incurred illness and related supplementary relief and seeking disclosure of the "internal documentation" refused in the Director-General's letter of 26 January 1995. She seeks to justify resorting to the Tribunal on the grounds of implied rejection of the claim she made in her letter of 10 November 1994 in accordance with Article 17 of Appendix D. She contends that the Director-General's reply of 8 December 1994 merely acknowledged receipt and did not amount to a decision. Observing that Appendix D sets no time limits for the appeal procedure, she argues that the Organization has failed to take any decision within the time limit in Article VII(3) of the Tribunal's Statute, viz. within sixty days of the date of notification of her claim of 10 November 1994, and that her complaint is as receivable as if it were challenging an express final decision.

7. The Organization retorts that the complaint is irreceivable because there is no implied rejection of her claim: the Director-General's letter of 8 December 1994 did contain a decision, and that decision was to deal with the matter in accordance with Article 17. The Organization points out that her appeal was put to the Advisory Board and therefore went ahead. At a meeting on 11 April 1995 the Board postponed the convening of a medical board pending a decision by the Standing Committee of the United Nations Joint Staff Pension Board on her claim to a disability benefit.

8. While her claim to compensation for service-incurred illness was taking the course outlined above correspondence went on between her and the Organization about entitlements to sick leave, annual leave and payment of a disability benefit by the United Nations Joint Staff Pension Fund. None of those questions is material to the claims now at issue. In particular the Pension Board's decision was taken after the filing of the complaint and is therefore irrelevant to her case.

9. There is no substance to the complainant's argument that the Director-General's letter of 8 December 1994 did not constitute a decision but was a mere acknowledgment of receipt. It is plain from that letter that he was treating her letter of 10 November as a formal appeal under Article 17 and setting in train the procedure for convening a medical board. Since the letter amounted to a decision to follow the process of appeal under Article 17 there was no implied rejection.

10. The Tribunal has stated many times that in accordance with Article VII(1) of its Statute a complaint will not be receivable unless the internal means of redress are exhausted and the final decision notified. The complainant contends that her complaint is receivable because she may act under Article VII(3), the Organization having failed to take its decision on her appeal within the sixty days' time limit set in that provision. But her reading of VII(3) is mistaken. It does not require that the process of appeal be completed within sixty days. The process must follow its course, and that entails convening the medical board and having it report to the Advisory Board. That Board will then transmit its recommendations, together with the medical board's report, to the Director-General for a final determination.

11. The complainant alleges, and the Organization denies, delay in dealing with her initial claim. But that issue has no bearing on the receivability of her complaint, which depends on whether or not there has been implied rejection.

12. There is, however, one aspect of her claim which must be distinguished. The Director-General specifically refused in his letter of 8 December 1994 her application for disclosure, and did so again in his letter of 26 January 1995. Having made no internal appeal against that decision she has not exhausted her internal remedies insofar as they relate to that matter and her complaint is irreceivable to that extent. Her failure to realise that appeals would lie on different issues may result in a breach of due process. But the difficulty might be overcome if the doctor she named to sit on the medical board were to ask for disclosure of all the relevant records.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Julio Barberis
A.B. Gardner