

EIGHTIETH SESSION

In re WASSEF (No. 8)

Judgment 1486

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 16 March 1995, the FAO's reply of 3 May, the complainant's rejoinder of 12 June and the Organization's surrejoinder of 28 July 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. Facts relevant to this case appear under A in Judgment 1401, which dismissed the complainant's first and second complaints. He was employed by the FAO under short-term and fixed-term appointments from 1979. At the material time he was serving as an administrative officer at grade P.3 at N'Djamena, in Chad, on a project funded by the United Nations Development Programme. He left the Organization on 7 January 1994, when his fixed-term appointment expired.

Having caught hepatitis B in Chad, he needed medical treatment for which the Organization had him sent to Paris on 23 August 1993. In letters dated 13 September and 5 November 1993 he asked a medical officer of the FAO to acknowledge that his illness was service-incurred within the meaning of Manual paragraph 342.213, which reads:

"... the death, injury or illness of a staff member is attributable to the performance of official duties when it:

(i)...

(ii) was directly due to the presence of the staff member, in accordance with an assignment by the Organization, in an area involving special hazards to his health or security, and occurred as the result of such hazards. ..."

Replying on 10 November 1993, the medical officer set out the procedure for him to follow. In a letter of 22 November to the social security officer he submitted a claim.

By a letter of 7 December 1993 he asked the secretary of the Advisory Committee on Compensation Claims to review the rejection which he inferred from the Administration's failure to reply to his claim of 22 November.

In a letter of 4 March 1994 the secretary told him that his claim was rejected for want of proof that his duties had exposed him to the virus of hepatitis B and cited the provisions under which he might seek review.

In a letter to the secretary dated 16 March 1994 the complainant made a request for review of the decision of 4 March, and on 17 March the secretary, acknowledging receipt of his request, explained by what procedure a medical board would be convened.

The board met on 3 November 1994 and submitted a report to the Advisory Committee.

B. The complainant is impugning the implied rejection of his request of 16 March 1994. He submits that the FAO showed negligence in failing to have him vaccinated against hepatitis. It was wrong to require him to show how he had contracted the disease: in most cases doctors are utterly unable to tell how the patient has become infected. The medical board having concurred in that view, the FAO had only to declare his illness service-incurred.

He seeks acknowledgement that his illness was service- incurred and awards of at least 2 million United States dollars in moral damages, \$1 million in "punitive" damages, and costs. He also claims the quashing of his separation; extension of authorised sick leave; refund of the costs of publication of the Tribunal's judgment in four American, four European and four Arab daily newspapers; leave from the Tribunal for a public discussion of

"corruption" in the FAO; and a "penalty clause" which would apply if the FAO failed to execute the Tribunal's decision within 30 days of delivery.

C. In its reply the FAO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal remedies available to him. As the Tribunal held in Judgment 1401 on his first two complaints, he first has to get a final decision from the Director-General in the light of a report from the Advisory Committee. This complaint being about the refusal to treat his illness as service-incurred, several of his claims are irrelevant anyway.

D. In his rejoinder the complainant objects to what he calls the "immoral procedural tactics" the Organization resorts to in its reply. There has, he observes, been a "considerable reasonable lapse of time" since he put his claim to the Advisory Committee. He presses his claims.

E. In its surrejoinder the FAO observes that he has not put forward any new evidence or pleas in his rejoinder. It maintains that the complaint is premature.

CONSIDERATIONS:

1. The main facts that have given rise to this complaint were set out, under A and 1 to 3, in Judgment 1401. It is not in dispute that the complainant caught hepatitis B in August 1993 while serving the FAO at N'Djamena, in Chad. Contending that the illness was service-incurred, he submitted in November 1993 a claim to the grant of compensation and benefits on that account under the rules.

2. In the FAO such a claim is processed in three stages:

First, the Advisory Committee on Compensation Claims inquires into the claim.

Secondly, if the Committee does not accept that the illness was service-incurred, the claimant may ask for reconsideration. The question is thereupon referred to a medical board consisting of three members, including a nominee of the claimant. After considering the board's report the Committee makes recommendations to the Director-General, who then reaches his decision. No time limits are set for recommendations or decision.

Thirdly, if dissatisfied with the decision, the claimant may appeal to the Appeals Committee, which makes recommendations to the Director-General. The Director-General's decision is not subject to further internal review.

3. By a letter dated 4 March 1994 the Advisory Committee informed the complainant that his claim to a declaration that his illness was service-incurred failed for want of sufficient evidence to show that the performance of his duties had exposed him to the hepatitis B virus.

4. As is explained in Judgment 1485, also delivered this day, on his seventh complaint, the complainant had already written to the Director-General on 7 January 1994 seeking a declaration that his illness was service-incurred. By a letter dated 9 March 1994 the Assistant Director-General rejected that claim on the Director-General's behalf on the grounds that no administrative decision had been taken on it by 7 January 1994, but pointed out that such a decision had been communicated to him on 4 March and he might ask for reconsideration.

5. By a letter of 16 March 1994 to the secretary of the Advisory Committee the complainant made a request for reconsideration of his case by that Committee. In a letter of 22 March to the Director of the Personnel Division he named his own doctor, Dr. Barlattani, to sit on the medical board that was accordingly to be convened.

6. It took four months to set up the board. The Organization's nominee was its chief medical officer, who proposed as chairman a doctor from London. Dr. Barlattani suggested for the sake of convenience two Italian doctors who were living in Rome, but the chief medical officer pressed his nomination on the grounds that the usual practice in the United Nations system was for the chairman not to be of the same nationality as the other members. Pointing out that if his claim failed the complainant would have to bear half the cost of attendance by the chairman, Dr. Barlattani then proposed three non-Italian doctors who lived in Rome. One of the three was at last appointed, in July, to chair the board.

7. The board did not meet for over three months. According to a report dated 3 November 1994 it agreed that "the exposure to hepatitis B in a sub-Saharan country like Chad has to be considered a special hazard because of the

high prevalence of hepatitis B virus carriers in this area"; that "it was not possible in this specific case to establish the exact time and mode of transmission of the illness"; that "transmission by intimate or sexual contact and transmission by non-percutaneous or covert percutaneous contagion" were equally probable; that there were "no elements to doubt" the complainant's denial of sexual or other intimate contact; and that, "if one is to believe the patient", there was "a preponderance for the possibility of [his] having contracted the illness in unavoidable way for which he could not be held responsible". Thus the board's finding, as summed up in the FAO's reply to this complaint, was that "the evidence weighed in favour of the view that the illness was service-incurred".

8. By a letter of 17 November 1994 the Director of the Personnel Division informed the complainant that the board's report had been forwarded to the secretary of the Advisory Committee. The complainant wrote five letters - on 17 November, on 7, 19 and 28 December, and on 12 January 1995 - asking when the Committee would make its recommendations to the Director-General so that he could calculate "the expiry date of the time limit" for the decision. The two replies dated 21 December 1994 and 19 January 1995 that he got from the Personnel Division said that the Committee had not yet met and that there were time limits neither for the submission of his case to the Committee, nor for the Director-General's decision, which he would be told "in due course"; if dissatisfied, he could then go to the Appeals Committee.

9. Nearly two more months having gone by without further news, he lodged this complaint with the Tribunal on 16 March 1995.

10. The FAO pleads that the whole complaint is irreceivable because the complainant has not exhausted the internal means of redress available to him against the decision communicated to him on 4 March 1994.

11. It is true that Article VII(1) of the Tribunal's Statute requires a complainant, before he files suit with the Tribunal, not just to apply for internal review but also to await the outcome of the internal proceedings. Yet that is not a hard-and-fast rule, even though the Statute does not allow any express derogation. If a complainant does his utmost to procure a decision, and if nevertheless the internal appeals body evinces by its statements or conduct an intention not to report within a reasonable time, justice requires that an exception be made. A mere failure to proceed with all proper speed and diligence is not enough: it is only if the proceedings have been so protracted that the delay is inordinate, unexplained and inexcusable that such an intention will be inferred: see Judgments 408 (in re García and Márquez) and 451 (in re Dobosch).

12. The complainant brought this case one year after submitting his request for review of the decision of 4 March 1994. Not only was there needless delay in appointing someone to chair the medical board, but four months after the board's report had been sent to the Advisory Committee the complainant had not yet been given the slightest inkling of the date at which the Committee would meet. What is relevant is not only the delay that had already occurred but the further delay which he still reasonably anticipated. To conclude the process of internal review such further delay was indeed inevitable: the Advisory Committee had to meet; it had to submit its recommendations to the Director-General; and the Director-General had to take his decision. If that decision did not give the complainant satisfaction there would be yet further proceedings before the Appeals Committee and thereafter the Director-General would take his final decision. Considering the tardiness of the proceedings up to the date of filing this complaint, 16 March 1995, the complainant was right to fear much more delay, quite out of proportion to the simple and straightforward issue involved: was his illness service-incurred?

13. The conclusion is that the complainant had done everything in his power to exhaust his internal remedies and that by 16 March 1995 it was quite clear that the internal process of review would not be concluded within a time which the Tribunal may regard as reasonable in the circumstances. Subsequent events confirm that view. In its reply the FAO says that the Advisory Committee met on 21 April 1995. Yet in its surrejoinder of 28 July 1995 it does not even say whether the Committee's recommendation has been put to the Director-General or whether he has taken his decision. Not even now is the end in sight. The complaint is therefore receivable.

14. When the defendant organisation submits a reply it must enable the Tribunal to render a complete ruling on the dispute. If it chooses to argue only procedural issues, that may - even if it does not so intend - amount to dilatory tactics that hold up the ruling, and the risk is that the Tribunal may treat the complainant's allegations of fact as established.

15. The FAO has stated in its reply to the complaint that it will not deal with the facts, and it confines itself to the issue of receivability. But the facts are simple, and no adjournment of the proceedings is justified. Hepatitis B is

endemic in Chad. The complainant says that his functions included those of security warden, which put him in situations where there was bloodshed and exposure to contagion. For its part the FAO acknowledges in its reply, without demur, that the medical board's findings were that the evidence weighed in favour of the view that the complainant's illness had been service-incurred.

16. The Tribunal concludes that the complainant's illness must be assumed to have been directly due to his assignment by the FAO to an area posing a special hazard to his health, to have occurred as a result of that hazard, and therefore to be service-incurred within the meaning of Manual paragraph 342.213. The case must go back to the Organization so that it may determine his entitlements accordingly.

17. The complainant makes several other claims which did not form part of his request of 16 March 1994 for reconsideration. Since he has not exhausted the internal means of redress the claims are irreceivable under Article VII(1) of the Tribunal's Statute and therefore fail. But he is entitled to an award of costs.

DECISION:

For the above reasons,

1. The complainant's case is sent back to the Organization so that it may determine his entitlements under the Staff Regulations and Staff Rules on the assumption that the hepatitis B which he contracted in Chad in August 1993 was incurred in the Organization's service.
2. The FAO shall pay him 2,000 United States dollars in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Michel Gentot
Mark Fernando
A.B. Gardner