

## EIGHTY-THIRD SESSION

### *In re Kogelmann* (Nos. 1, 2, 3 and 4)

#### Judgment 1640

#### THE ADMINISTRATIVE TRIBUNAL,

Considering the three complaints filed by Miss Edith Kogelmann on 18 March 1993 and the fourth filed by her on 14 July 1993 against the International Atomic Energy Agency (IAEA);

Considering the interlocutory order in Judgment 1373 of 13 July 1994.

Considering the complainant's application of 12 November 1993 for the production of further evidence, the IAEA's reply of 19 August 1994 and the complainant's further application of 21 September 1994 for the production of evidence;

Considering the complainant's submissions of 31 March 1995 and the Agency's of 5 April 1995 to Mr. Pierre Droz, the scientific expert appointed by the President of the Tribunal on 16 February 1995 in accordance with point 2 of the ruling in Judgment 1373; the Agency's observations of 12 May and the complainant's of 14 July 1995;

Considering the report submitted by Mr. Droz on 27 November 1995;

Considering the complainant's and the Agency's submissions of 29 March 1996 to Dr. Alois David, the medical expert appointed by the President of the Tribunal, also on 16 February 1995, in accordance with point 5 of the ruling in Judgment 1373; the complainant's observations of 1 May and the Agency's of 8 May 1996; the Agency's further brief of 11 July and the complainant's observations thereon of 26 July 1996;

Considering the report submitted by Dr. David in March 1997;

#### CONSIDERATIONS

1. These four cases first came before the Tribunal at its 77th Session in 1994. Its interlocutory order in Judgment 1373 of 13 July 1994 sums up the material facts and the parties' pleadings.

#### *The first complaint*

2. In her first, and principal, complaint the complainant is seeking an award of full financial compensation for the permanent total disability which she attributes to her working conditions at the International Atomic Energy Agency in Vienna. As is recounted in Judgment 1373, under 6 to 20, the Agency's Advisory Board on Compensation Claims recommended that she undergo tests and, in the light of the findings, came to the view that there was no conclusive evidence that her ailments were attributable to the performance of her official duties. The Director General of the Agency decided on 2 October 1991 to endorse the Board's conclusion and dismiss her claims. After reconsideration of her case by a medical board of arbitration and again by the Advisory Board, the Director General decided on the latter's recommendation to uphold his earlier decision, and the Board's chairman so informed her in a letter of 27 March 1992. She lodged an internal appeal on 15 July 1992. The Joint Appeals Board reported on 16 November 1992 on that appeal. The Director General took his final decision on 22 December 1992 rejecting the complainant's claims. That is the decision she is impugning in her first complaint and Judgment 1373 set it aside for the reasons explained therein and adjourned consideration of the other issues raised in the four complaints pending the completion of inquiries by a scientific expert and then by a medical expert.

3. Judgment 1373 provided, in point 2 of the ruling, for the appointment of the scientific expert to "carry out an investigation to determine the probable levels of exposure of the complainant to xylene and trimethylbenzene" at the material time. It provided, in point 5 of the ruling, for the appointment of the medical expert to:

"carry out a clinical and psychological examination of the complainant to determine:

- (a) the nature and extent of any physical and psychological disorders from which the complainant is suffering or was suffering at the material time;
- (b) on the balance of probability whether any of those disorders was attributable to her long-term exposure to xylene or her exposure for nearly three years to trimethylbenzene at the level or levels determined by the scientific expert;
- (c) to what extent, if any, her work capacity was impaired by disorders wholly or partly attributable to her exposure to toxic substances;
- (d) whether she was fit to return to work on the expiry of her sick leave on 17 April 1992 or indeed at any time in 1992 or 1993;
- (e) where in the medical expert's opinion some disorder is not wholly or partly attributable to her exposure to toxic substances, identify as far as possible other probable causative factors."

4. The scientific expert, Mr. Pierre Droz, of Lausanne, submitted a report dated 27 March 1995. A copy of it was sent to the medical expert, Dr. Alois David, of Prague, who, in conjunction with other specialists, examined the complainant. His report, which is dated March 1997, is clear, detailed and comprehensive. It reviews the complainant's disorders and ailments. In answer to question (b) -- see 3 above -- it concludes that "the complainant was exposed only to low levels of xylene and trimethylbenzene that could not cause any of the disorders or diseases from which the complainant was or is suffering". In answer to question (c) the medical expert says that "her work capacity was not impaired by her exposure to xylene or trimethylbenzene". In answer to question (d) he finds that "she was not fit to return to work on the expiry of her sick leave on the 17th April 1992 or thereafter". He discusses in his report the probable causes of the complainant's disorders.

5. In view of those findings the complainant's claim to an award of compensation for permanent total disability cannot succeed.

6. The complainant is, however, entitled to an award of her costs necessitated by the interlocutory order. Such costs are awarded on the same basis as the expenses that she incurred for the purposes of the two expert enquiries. With that sole exception her first complaint is dismissed in its entirety.

#### *The other three complaints*

7. The issue in her second case is whether she was fit to return to work on 21 April 1992: see Judgment 1373 under A and C. The Agency granted her sick leave from March 1991 on the strength of successive medical certificates to 11 December 1991, to 3 February 1992 and to 13 March 1992. After examining her on 13 April 1992 the acting chief medical officer of the Agency determined that her sick leave should end at 17 April 1992 and that she would be fit to resume duty on 21 April. She failed to go back to work at that date. The Director of the Division of Personnel confirmed the decision in a telegram to her on 23 April in which he said that the Agency "reserves the right to take appropriate action", her absence being "unauthorized". The Director confirmed in a letter of 6 May to her counsel that her absence was unauthorised from 21 April but that the case might be referred under Staff Rule 7.04.1(L) to an "independent practitioner" acceptable to both parties.

8. In a letter of 11 May 1992 to the Director the complainant asked for referral under Rule 7.04.1(L). The Director General agreed on 13 May but said that her "pay status" would not be reconsidered until the independent medical practitioner had reported.

9. The independent medical practitioner, Dr. Friedrich Kummer, examined the complainant on 1 July and reported on 2 July that there was no evidence to suggest that she was suffering from any continuing inability to work.

10. After receiving Dr. Kummer's report the Director General informed her in a letter of 16 July that he was upholding the decisions on her fitness to return to work and on her pay status communicated in the Director's telegram of 23 April to her and his letter of 6 May to her counsel. On 14 August she lodged an internal appeal against the decision of 16 July 1992 with the Joint Appeals Board.

### *The third complaint*

**11. The complainant's third complaint is about her "pay status". On receipt of Dr. Kummer's report the Director of Personnel wrote her a letter on 10 July 1992 to say that "in the light" of that report --**

**"the period from 21 April 1992 until you report for work will be charged to annual leave in accordance with Staff Rule 7.01.1(D) or if your accrued annual leave is insufficient to cover the whole period, to leave without pay. I request you to report for work upon receipt of this letter, failing to do so [sic] the Agency will take appropriate administrative action, which may include non-extension of your contract which expires on 31 August 1992."**

**12. By a letter dated 14 July the complainant asked the Director General to review that decision. Having got no reply, she lodged another internal appeal on 26 August 1992 against the Director's decision of 10 July.**

**13. By a letter of 7 August 1992 to the Director General she applied for medical review of her case. By a fax message dated 28 August the Director of Personnel told her that the Agency agreed to review of her "neuro-psychiatric condition" in accordance with Rule 7.04.1(L), an "independent neurologist/psychiatrist" was to be appointed for the purpose.**

**14. The Agency extended her contract to 30 September 1992 and, after further extensions, for the last time to 31 March 1993. Having reached the age of retirement, she left the Organisation on the expiry of her appointment.**

**15. By 24 September 1992 she had exhausted her entitlement under Rule 7.04.1 to totals of nine months' sick leave on full pay and nine on half-pay. By a letter of that date the Director General told her that he was "deferring the final decisions on the questions of your fitness for work and your pay status until I have received a report" from the independent neurologist, Dr. E. Scherzer. Dr. Scherzer having proved unable to act, a neuro-psychiatrist, Dr. Franz Gerstenbrand, was appointed in his stead, and he reported on 8 February 1993.**

**16. In its report of 16 November 1992 the Joint Appeals Board dealt with the internal appeal of 26 August 1992 as well as with the one of 14 August about her sick leave. Paragraphs 88 and 89 of that report read:**

**"88. As to the Kogelmann II appeal of 14 August 1992, the Board recommends reconsideration of Ms. Kogelmann's leave status as of 11 May 1992, the date she requested examination by an independent physician pursuant to Staff Rule 7.04.1(L), and that she be placed on special leave, without pay as of that date.**

**89. As there has been no final determination of Ms. Kogelmann's fitness to work, it is premature for the [Board] to make a recommendation as to the Kogelmann III appeal [of 26 August 1992]."**

**17. In his letter of 22 December 1992 the Director General -- having made in the first paragraph the decision impugned in the first complaint -- went on to say:**

**"As regards the recommendation in para. 88 which relates to your Appeal of 14 August 1992 concerning the decision regarding your fitness for work and pay status, I have decided not to follow the recommendation of the Joint Appeals Board and to maintain my earlier decision communicated to you on 16 July 1992. It is pertinent to point out that had you been placed on special leave without pay, your [United Nations Joint Staff Pension Fund] and health insurance schemes would have been adversely affected.**

**As soon as I receive the advice of Dr. Gerstenbrand, I will decide whether my previous decision should be upheld or whether your sick-leave status should be reinstated."**

**The former of those paragraphs of the letter contains the decision that the complainant is impugning in her second complaint, and the latter the one that she is challenging in her third.**

**18. Her fourth case is about her entitlement to benefits under the Agency's Temporary Disability Insurance Plan (TDIP): see Judgment 1373 under A and E. By a letter dated 9 November 1992 to her counsel the Director of Personnel explained that the Agency was withholding payment of those benefits pending determination of her sick leave status and her fitness to work and that payments of such benefits as "may be due to a staff member are calculated and paid by the Agency; they are then reclaimed from the insurers at the year end".**

19. By a letter of 27 November the complainant asked the Director General to review the Director's decision. A letter of 29 December from the acting Director General referred her to the Director General's letter of 22 December "on the various issues considered by the [Appeals] Board". The complainant filed yet another appeal with the Board on 28 January 1993.

20. The independent neuro-psychiatrist, Dr. Gerstenbrand, reported on 8 February 1993. He concluded that from a neuro-psychiatric point of view she was fit to work. The Director sent her a copy of that report on 8 March 1993. By a letter of 22 March 1993 the Director General told her that in view of that finding, over and above Dr. Kummer's "earlier attestation of your physical fitness", he maintained his previous decision that her sick leave had expired at 17 April 1992 and that she had been fit to report for work on 21 April 1992.

21. The Board reported on 11 May 1993 on her appeal of 28 January 1993. It recommended that she should "be reimbursed for TDIP payments which should properly have been paid to her during the period 11 May 1992 to 22 March 1993, including interest to the extent such was earned by the Agency on funds which otherwise would have been disbursed to her". By a letter of 15 June 1993, as clarified in a letter dated 18 June, the Director General decided not to accept the Board's recommendation, and that is the decision impugned in her fourth complaint.

22. The medical opinions of independent medical practitioners would ordinarily prevail and the Tribunal would not interfere. But this is no ordinary case. For the reasons set out in Judgment 1373 the Tribunal had to appoint a medical expert to give a final opinion on the complainant's medical condition, including her fitness to return to work on the expiry of her sick leave, on 17 April 1992, or thereafter. That expert found that she was not fit to return to work either then or thereafter. That finding must displace the medical opinions that the Agency has relied on to justify its decision that the complainant was fit to return to work. The medical expert's findings cut through all the legal arguments as to whether the decisions were justified at the time or the complainant was entitled to leave notwithstanding those opinions. Since she was not fit for work, the grounds for the Organisation's decisions on that score were mistaken in fact and must now be rectified.

23. The first and most obvious conclusion is that she is to be reinstated in sick leave status as from 18 April 1992 and any pay entitlements or TDIP benefits flowing from such status that were withheld from her must be paid, together with interest to be reckoned at the rate of 8 per cent a year up to the date of payment. No adjustment for inflation is necessary.

24. Secondly, references in her personal file to her being on unauthorised absence must be deleted.

25. Thirdly, as to her medical expenses, she is entitled to the repayment of any that she incurred for the purpose of showing that she was unfit to return to work, not to any that she incurred for the purpose of showing that her ailments were service-incurred. On that count the Tribunal awards her *ex aequo et bono* the sum of 2,500 Swiss francs.

26. The Tribunal makes her no award for moral damages.

27. It awards her a total of 15,000 Swiss francs towards her costs for her second, third and fourth complaints.

## DECISION

For the above reasons

1. The Agency shall pay the complainant the legal costs that she incurred and that were necessitated by the interlocutory order in Judgment 1373, the amount to be approved by the President of the Tribunal failing agreement between the parties.

2. With that sole exception, her first complaint is dismissed.

3. The decisions impugned in her second, third and fourth complaints are set aside.

- 4. She is reinstated in sick leave status as from 18 April 1992.**
- 5. The Agency shall grant her any pay entitlements and TDIP benefits arising out of her reinstatement in such status, plus interest to be reckoned at the rate of 8 per cent a year from the due dates and up to the date of payment.**
- 6. It shall remove from her personal file any references to unauthorised leave.**
- 7. It shall pay her the sum of 2,500 Swiss francs for the reasons set out in 25 above.**
- 8. It shall pay her a total of 15,000 francs in costs for her second, third and fourth complaints.**
- 9. All her other claims are dismissed.**

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

**Delivered in public in Geneva on 10 July 1997.**

**William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner**