

**NINETY-FOURTH SESSION**

**Judgment No. 2190**

The Administrative Tribunal,

Considering the complaint filed by Mr F. Z. against the World Health Organization (WHO) on 20 September 2001, the WHO's reply of 4 April 2002, the complainant's rejoinder of 7 June and the Organization's surrejoinder of 10 September;

Considering the application to intervene filed by Mrs Z. W. on 15 October, the WHO's observations thereon of 28 October, the intervener's reply of 29 October, and the Organization's final comments of 31 October 2002;

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

Having examined the written submissions;

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

A. The complainant was born in 1944 and has Ethiopian nationality. He joined the WHO in January 1981 as a Sanitary Engineer at grade P.4, and was stationed in Freetown, Sierra Leone, until 1989, when he was reassigned to Harare, Zimbabwe. In 1992 he was promoted to grade P.5 and assigned to the Regional Office for Africa (AFRO) in Brazzaville, Congo. As a result of the temporary relocation of AFRO in 1997 his duty station moved to Harare in March 1998, but he remained at headquarters in Geneva on a temporary assignment from February to November 1998; he did not take up his functions in Harare until 15 February 1999, following a period of home leave. Since 28 March 2001 he has held the post of Technical Officer, grade P.5, in Cape Town, South Africa.

In February 1997 the complainant was on mission in Namibia when he was severely injured in a road accident. The driver of the vehicle, who is also a WHO staff member, likewise sustained injuries but the two other passengers died. The complainant spent two weeks in hospital in Windhoek, Namibia, and was then flown to the United States where he underwent surgery and received treatment. Meanwhile, the Namibian authorities investigated the accident and in June 1997 informed the WHO that they had decided not to prosecute the driver.

On 17 March 1997 the complainant filed a claim for compensation in respect of his injuries under Staff Rule 730. In April 1997 the Advisory Committee on Compensation Claims recommended that his condition be recognised as being service-incurred. The Director-General endorsed this recommendation in June 1997, as a result of which the complainant's medical expenses and the cost of his medical evacuation were fully reimbursed.

In October 1998 the Director of the Joint Medical Service informed the complainant that if his surgeon expected no further improvement in his condition, an evaluation of his loss of function could be undertaken; for this purpose, his surgeon could send him a medical report. In his report of 7 December 1998 on the complainant's condition the surgeon recommended that the complainant be permanently assigned to a sedentary job in a duty station where "sophisticated medical support systems" were available. In March 1999 the Advisory Committee assessed the complainant's loss of function in relation to the whole individual at 6 per cent.

On 26 May the complainant requested a review of this assessment by a medical board, having already indicated in a memorandum of 10 May that he would not accept the Advisory Committee's assessment until a consensus of medical opinion had been reached on the assessment of his loss of function and a satisfactory and conclusive investigation of the accident had been carried out. He reiterated these requests in a letter of 29 September to the

Director-General.

In September 1999 the Namibian authorities summonsed the driver to appear in court on a charge of culpable homicide. The WHO advised them on 7 October 1999 that the driver was immune from legal process pursuant to Section 19 of the Convention on the Privileges and Immunities of the Specialized Agencies, but that a formal request to waive his immunity, duly supported by the information on which the charge was based, could be submitted to the Director-General. In November 2000 the Namibian Ministry of Foreign Affairs informed the WHO that the decision to prosecute the driver had been maintained.

On 6 October 2000 the complainant filed an internal appeal with the Headquarters Board of Appeal, asserting that the Organization had failed to investigate the accident; that it had failed to convene a medical board to review the assessment of his loss of function; and that it had failed to reassign him to a duty station where suitable medical care was available.

In January 2001 the medical board assessed his loss of function at 9 per cent. On the recommendation of the Advisory Committee, the Director-General accepted this new assessment and the complainant was therefore granted 34,417.94 United States dollars in compensation for his loss of function.

In its report of 12 April 2001 the Board considered that the Organization ought to have conducted an administrative enquiry immediately after the accident, particularly into the condition of the vehicle. It noted that the way in which the complainant had been assigned first to Geneva and subsequently to Harare complied with both the needs of the Organization and the physicians' instructions, but that it revealed an appalling style of communication and even a lack of humanity in the Organization's relations with the complainant. The Board made the following recommendations: the Organization should pursue the matter of the accident investigation with the Namibian authorities and take steps to obtain the information enabling the Director-General to decide on the driver's immunity; it should provide a full explanation and regular updates on this matter to the families of all victims of the accident; it should pay 30,000 dollars to the complainant as compensation for the Organization's failure to convene a medical board within a reasonable time, its refusal to conduct an internal investigation into the accident and its failure to treat the complainant with due consideration and respect; and it should pay the complainant's legal costs as well as the travel expenses he incurred in connection with the Board's hearings.

By a letter of 3 July 2001, the Director-General informed the complainant that she endorsed the Board's finding that the Organization had acted properly in assigning the complainant first to Geneva and then to Harare, adding that his transfer to Cape Town was equally satisfactory. She pointed out that the medical board had been convened in January 2001 and that his request on this issue was therefore to be considered as having already been satisfied. She rejected the Board's recommendations regarding the accident investigation and the information to be provided to the victims' families, and likewise its recommendation regarding compensation and the reasoning on which it was based. However, she acknowledged that the time taken to convene the medical board, though largely due to circumstances beyond the Organization's control, might have added to the complainant's distress and on that basis awarded him the sum of 35,000 dollars and up to 2,000 dollars for legal costs. Also, his travel expenses would be reimbursed. That is the impugned decision.

B. The complainant contends that the Organization's failure to investigate an accident, which involved its own staff and property and which occurred during a WHO mission, amounts to an abuse of discretion and authority. Given that there were conflicting accounts of the circumstances surrounding the accident, the Organization had at least a moral duty to clear up any uncertainty for the victims and their families and in failing to do so displayed an appalling lack of consideration. By refusing to waive the driver's immunity, the Organization is obstructing the administration of justice. On the one hand it claims that the investigation is a matter for the Namibian authorities, but on the other hand it is preventing them from resuming their investigation by upholding the driver's immunity. This likewise amounts to an abuse of discretion and suggests that the Organization is anxious to conceal certain facts.

The Organization's delay in convening a medical board was inexcusable and added to the complainant's distress. In December 1999 the complainant's surgeon had indicated that he was willing to be a member of the medical board, yet the board was not convened until 11 January 2001. The Organization's argument that it could not convene the board until it had received certain information from the surgeon is unfounded, since no such pre-condition is required by the WHO Staff Rules and Regulations. This delay was partly a matter of bad faith on the part of the Organization, which made little effort to contact his surgeon and did not inform the complainant that the board had

been constituted.

The Organization ignored the recommendations of the complainant's surgeon and failed to assign him to a duty station where suitable medical facilities were available. Harare did not offer the medical facilities his condition required and in assigning him there the Organization made no effort to accommodate his interests.

His subsequent transfer to Cape Town was procedurally irregular for want of prior consultation and adequate notice. Moreover, when he reported for duty in Cape Town the administrative formalities enabling him to take up his functions had yet to be accomplished and no funding was available for his project.

The complainant seeks the following redress: an investigation into the accident by the WHO, followed by disciplinary proceedings if appropriate; the application of his surgeon's evaluation of his loss of function, in lieu of the medical board's evaluation, and immediate payment of the resulting compensation; the immediate lifting of the driver's immunity; internal disciplinary investigations, backed by disciplinary measures where appropriate, into the actions of two WHO staff members in connection with the complainant's internal appeal; 250,000 dollars in moral damages; reimbursement of the legal costs and travel expenses incurred by the complainant in connection with the objection to receivability filed by the WHO in the internal appeal; 25,000 dollars in costs arising from the present proceedings; and interest on all amounts claimed.

C. The WHO replies that it has neither the means nor the authority to conduct the accident investigation requested by the complainant and that it was reasonable to rely on the Namibian authorities to carry out this task. The allegation that the Organization has refused to lift the driver's immunity is erroneous, since no decision has been taken on this issue. The Director-General has asked the Namibian authorities to observe the proper procedure for requesting a waiver of immunity by indicating the grounds for their recent decision to prosecute the driver. Whilst she has indicated her willingness to decide on the matter without delay once the required information has been provided, the Namibian authorities have failed to respond to her request. Decisions concerning a staff member's immunity are, in any case, discretionary matters which the Tribunal has declared to be outside its sphere of competence, and since the issue of immunity was not raised in the internal appeal, it is also irreceivable on the grounds that it represents a new claim.

The WHO acknowledges that the arrangements for convening the medical board took longer than expected, but it attributes the delay to the failure of the complainant's surgeon to respond to its correspondence and asserts that it acted with due diligence in seeking to ensure that the complainant would be represented by him on the board. In any case, there is no longer any basis for this claim, since the delay in convening the medical board was expressly taken into account by the Director-General in her decision to award the complainant 35,000 dollars.

The medical facilities in Harare were perfectly satisfactory for the complainant's condition, particularly since both his surgeon in the United States and his attending physician in Harare considered that there was no imminent need for further surgery. In any case, this claim is unfounded because the complainant had already been transferred to Cape Town by the time the impugned decision was made.

With regard to its alleged failure to treat the complainant with due respect when it ultimately transferred him to Cape Town, the Organization argues that his claim is irreceivable since it did not form part of the internal appeal. In any case, it disputes his account of the transfer and submits that he was aware as early as October 2000 of the possibility that he might be transferred to Cape Town as part of a wider set of restructuring measures. When the decision to transfer him was confirmed in January 2001, the complainant twice requested further information and his queries were duly answered.

D. In his rejoinder the complainant argues that the driver does not enjoy immunity from legal process, because Section 19 of the Convention does not apply to staff recruited locally and paid at an hourly rate. He draws attention to the Organization's failure to inform him that it was unable to contact his surgeon and submits that his claim regarding the delay in convening a medical board remains valid insofar as he has not accepted the Director-General's offer of 35,000 dollars in compensation. He produces press articles and a WHO study to support his view that the medical facilities in Harare were inadequate and maintains that his transfer to Cape Town was procedurally irregular.

E. In its surrejoinder the WHO asserts that the driver was and is immune from legal process as a fixed-term staff member paid on an annual basis and it presses all its arguments.

## CONSIDERATIONS

1. Before considering the complainant's pleas, the Tribunal shall examine the complainant's requests for the production of a very large number of documents and other items of information, and for the hearing of witnesses. The Tribunal considers that it is not necessary to grant these requests, since the file contains all the information it requires to render its judgment.

*Regarding the enquiry into the circumstances of the accident and the Organization's position on the lifting of the driver's immunity from legal process*

2. To justify the fact that it has not conducted an enquiry into the circumstances and causes of the accident, the Organization states that the Namibian authorities conducted a judicial enquiry and that the public prosecutor in charge of the matter decided initially not to prosecute the driver. The Organization was informed of this decision in a letter of 4 June 1997. It was not until two years later, in September 1999, that the driver was summonsed to appear before a Namibian court on a charge of culpable homicide, and that the Organization, duly informed of the charge, was prompted to inform the Namibian authorities that the driver was immune from legal process and could therefore be prosecuted only if the Director-General decided to lift that immunity. The Namibian Ministry of Foreign Affairs having informed the WHO in November 2000 that the driver was to be prosecuted, the Organization reiterated its position and asked, as it had done previously, to be provided with documents enabling it to assess whether the immunity of its employee should be lifted. Having not received the requested documents, the Director-General considers that she is still not in a position to take a decision on lifting the driver's immunity.

3. The Tribunal accepts the defendant's position on the issue of lifting the immunity from legal process of the staff member who was driving the vehicle at the time of the accident. Contrary to the complainant's assertion, that employee does belong to the category of staff members who have immunity, and the Organization has a discretion to assess, in the context of its relations with a Member State, which are beyond the jurisdiction of the Tribunal, whether it is appropriate to lift the immunity from legal process of its employees (see in this respect Judgments 933 and 1543). Similarly, the Tribunal can only reject the claims concerning the possibility of disciplinary proceedings against the driver, since such proceedings are likewise at the discretion of the Organization, as stated by the Tribunal in several of its judgments. Nevertheless, it is incomprehensible that no internal administrative investigation was conducted following an accident which involved a WHO vehicle driven by an employee of the Organization in the context of an official mission, and which caused the death of two passengers, one of whom was a WHO staff member, as well as the serious injuries suffered by the complainant. The fact that the Namibian authorities opened their own enquiry could not in any way exempt the Organization from ascertaining whether the condition of the vehicle, the preparation of the mission and, more generally, the circumstances of the accident revealed any administrative failure, the consequences of which it would have a duty to bear. As noted by the Board of Appeal, there is no evidence to suggest that any internal enquiry whatsoever was conducted in connection with this accident. This failure caused the complainant an injury which the Tribunal considers to be equitably compensated by an award of 5,000 United States dollars.

*The belated convening of the medical board*

4. On this issue, the Director-General acknowledged, in the impugned decision, that the time taken to convene the medical board may have added to the complainant's distress, and she took this into account in determining the sum of 35,000 dollars granted to him. Moreover, it has been established that the medical board was convened on 11 January 2001, that the Advisory Committee on Compensation Claims adopted the medical board's findings on 30 March 2001 and that on 11 April 2001 the Director-General accepted the Advisory Committee's recommendation of an award of 34,417.94 dollars in favour of the complainant. This decision was conveyed to the complainant by a memorandum of 4 May 2001 and confirmed in a registered letter of 1 November 2001. Thus, contrary to the complainant's assertions, all measures were taken to inform him of the convening of the medical board and of the follow-up to it. Whilst the delay in convening the medical board, though not entirely attributable to the Organization, remains difficult to explain, there is no evidence that the Organization showed bad faith or reluctance, and the award of compensation granted to the complainant in the impugned decision ought to have put an end to any criticism by him on this issue. The Organization cannot be considered to have failed to notify the complainant in due time of the decisions taken on the basis of the medical board's recommendations.

### *The complainant's successive assignments*

5. The complainant's temporary assignment to Geneva warrants no criticism: it was in the complainant's interest that this assignment was decided on and extended beyond the six-month period initially envisaged. Regarding Harare, where the complainant resumed his functions in February 1999, the evidence on file shows that the medical facilities of that city afforded the complainant suitable medical care; that he could have been evacuated in the event of an emergency; and that the surgeon treating him in the United States had simply recommended that his duty stations be confined to regions where satisfactory "sophisticated medical support systems" are available, which did not exclude Harare. No abuse of procedure has been established and there is no evidence to suggest that the complainant's return to Harare, which was decided on after consultation with the head of the Joint Medical Service, caused any deterioration of his condition or any injury warranting compensation beyond that which was awarded to him in the impugned decision. The same applies to his transfer to Cape Town.

6. The complainant's claim that the Tribunal should order the Organization to undertake disciplinary investigations into the actions of the Director of the Joint Medical Service, who allegedly refused to appear before the Headquarters Board of Appeal, and of the staff member who allegedly entered a "frivolous and dilatory" plea of irreceivability before the Board, clearly cannot be allowed by the Tribunal, which has no jurisdiction to issue injunctions against international organisations, let alone to cast judgment on the means of defence used on behalf of such organisations in the context of internal appeal proceedings or litigation.

7. Consequently, the Tribunal only partially allows the complainant's claims and awards him compensation of 5,000 dollars for the reasons stated under consideration 3 of the present judgment. The arguments put forward in support of his claim for interest are rejected, given that for the most part the sums which the Organization has agreed to pay the complainant have already been paid or have been offered under proposals which the complainant was unwilling to accept at the time. Similarly, there is no need to reconsider the evaluation of expenses incurred before the Board of Appeal, nor the reimbursement of any other expenses since the sums awarded in the impugned decision must be considered as compensating all losses claimed by the complainant.

8. The complainant's pleas succeed in part. He is entitled to an award of costs, which is set at 2,000 dollars.

### *On the application for intervention*

9. On 15 October 2002 an application to intervene was filed by the widow of the WHO staff member killed in the accident which occurred on 11 February 1997. She considers that her husband was in the same situation as the complainant both in fact and in law, and that she is entitled to claim, on her husband's behalf, the benefit of the Tribunal's ruling in the present case. She asks the Tribunal to order the Organization to conduct an in-depth enquiry into the causes of the accident and to lift the driver's immunity from legal process. She seeks an award of 250,000 dollars as compensation for the moral injury resulting, in particular, from the WHO's unjustified delay in launching an enquiry, from its refusal to lift the driver's immunity and from its failure to fulfil its duty as regards the maintenance of the vehicle and the safety of the passengers, for whom no safety belts were provided.

10. Article 13, paragraph 1, of the Rules of the Tribunal provides as follows:

"Anyone to whom the Tribunal is open under Article II of the Statute may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect him."

The Tribunal shares the Organization's view that the intervener's situation in fact and in law is different to that of the complainant and that the solution adopted in the dispute raised by the latter is not apt to affect the rights of the intervener, whose application to intervene is, therefore, irreceivable.

## DECISION

For the above reasons,

1. The WHO shall pay the complainant, in addition to the compensation it has agreed to pay him, the sum of 5,000 United States dollars.

2. It shall pay him 2,000 dollars in costs.
3. The complainant's remaining claims are dismissed.
4. The application to intervene is rejected.

In witness of this judgment, adopted on 5 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

*(Signed)*

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet