

119th Session

Judgment No. 3451

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr S. S. against the International Labour Organization (ILO) on 9 July 2012, the ILO's reply of 23 October, the complainant's rejoinder of 7 December 2012 and the ILO's surrejoinder of 12 March 2013;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. Relevant facts concerning the background to this complaint can be found in Judgments 3050 and 3219, which dealt with the complainant's third and first complaints respectively. Suffice it to recall that he joined the International Labour Office – the ILO's secretariat – in 1999 and was transferred to the position of Finance Officer in the Regional Office for the Arab States in Beirut, Lebanon, on 1 February 2004. On 13 June 2007 he was injured in a terrorist attack near his home in Beirut, where Security phase II was in place. On 30 November 2009 he submitted a compensation claim under Annex II to the Staff Regulations with respect to an eye injury which, according to his physician,

resulted from the bomb blast. In March 2010, following an initial review of the claim, the ILO Medical Adviser submitted a report to the secretariat of the Compensation Committee recommending that the claim be presented to the Committee for discussion, because it was plausible that the complainant's medical condition was linked to the bomb blast.

In August 2010 the Committee started examining the complainant's claim. By a minute of 19 May 2011 he was informed that following careful and thorough analysis of his claim by the Committee, the Director-General considered that there were valid reasons for the late submission of his claim and he had decided to endorse the Committee's recommendation to commission medical expertise to examine the causal link between the bomb blast and his eye injury. On 13 March 2012 the Secretary of the Compensation Committee forwarded to the complainant a minute of 12 March informing him that the Committee had reviewed the medical expertise commissioned by the Director-General. The expert had concluded that a "direct, formal and exclusive link c[ould] not be established". On that basis the Committee had recommended rejecting the compensation claim and the Director-General had decided to endorse that recommendation. The Director-General's decision indicated that if the complainant disagreed with the medical aspects of the decision, he could request that the matter be reviewed by a Medical Board in accordance with paragraph 25(b) of Annex II to the Staff Regulations. If he disagreed with the decision on any other ground, he could refer the case for review to the Joint Advisory Appeals Board (JAAB) within one month. On 8 May 2012 the complainant wrote to the Secretary of the Compensation Committee, copying the Legal Adviser, and asked for clarification as to why the Committee had not recommended that the Director-General refer his claim to a Medical Board before he made his final decision. He also asked that the Director-General review his decision to reject his compensation claim, and he attached a copy of a report from a medical expert who considered that his compensation claim should be allowed as there was a causal link between the bomb blast and his eye condition.

On 22 May 2012 the Chief of the Policy and Social Benefits Branch (HR/POL) informed the complainant that the Compensation Committee had not deemed it necessary to recommend to the Director-General to convene a Medical Board because there was no conflict of opinion between his treating physician and the ILO Medical Adviser, who both considered that the link between his eye condition and the bomb blast was plausible. However, the Committee had found a need to clarify whether the theoretical link between the blast and his eye condition was plausible by obtaining expert advice from an ophthalmologist. He added that, if the complainant wished to have the matter referred to a Medical Board under paragraph 25(b) of Annex II to the Staff Regulations, he should make the request in June, indicating the name of the medical practitioner he would like to appoint. That is the impugned decision.

B. The complainant submits that the Staff Regulations do not set out internal appeal procedures for grievances related to compensation claims. Indeed, Article 13.2 of the Staff Regulations provides that special procedures apply to such claims. Annex II to the Staff Regulations merely provides, under paragraph 25(a), that in the event of a conflict of opinion on the medical aspects of the relationship between an illness or injury and the performance of duties, the Director-General may refer the case to a Medical Board for advice. The Annex does not foresee any internal appeal procedures for compensation claims. Consequently, only the Tribunal is competent to examine his complaint against the decision to reject his compensation claim without convening a Medical Board. Moreover, Article II, paragraph 2, of the Tribunal's Statute provides that it "shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of his employment and to fix finally the amount of compensation, if any, which is to be paid". He adds that the ILO made a blatant attempt to mislead him regarding his rights under the Staff Regulations, in particular when rejecting his request for review of 8 May.

On the merits, he contends that the Director-General's decision to reject his compensation claim without convening a Medical Board, despite the fact that there was a conflict of opinion on the medical aspects of the possible causal link between his injury and the performance of his duties, involved a violation of paragraph 25(a) of Annex II. In addition, he contests the findings of the expert appointed by the Director-General, according to whom it was impossible to assert that there was a direct, certain and exclusive link between the explosion and the retinal tear he was suffering from. The complainant indicates that both his treating ophthalmologist and the ILO Medical Adviser concluded that there was a compelling reason to link his injury to the bomb blast as the symptoms arose immediately after that event. He criticises the ILO for having used the standard of proof "beyond a reasonable doubt" as opposed to "preponderance of evidence" in assessing his claim.

The complainant also submits that the decision of 12 March 2012 to reject his compensation claim provides no reason for the Director-General's decision not to convene a Medical Board. He alleges undue delay in examining his compensation claim. He also alleges bad faith on the part of the ILO, in particular because he was informed of the decision of 12 March 2012 just one day before leaving on duty travel. Consequently, he could not abide by the one-month time limit given to him to file a grievance with the JAAB.

The complainant asks the Tribunal to join his fourth and fifth complaints. By way of relief, he asks the Tribunal to order the ILO to convene a Medical Board, in accordance with paragraph 25(a) of Annex II to the Staff Regulations, and to award him damages and costs.

C. In its reply the ILO submits that the impugned decision of 22 May 2012 is not a final decision, as it merely provided clarification as to the procedural steps to be followed by the complainant with respect to his compensation claim. The final decision on the complainant's compensation claim was taken on 12 March 2012. As he did not challenge that decision in due time, his complaint is irreceivable for

failure to exhaust internal remedies under Article VII, paragraph 1, of the Tribunal's Statute.

It adds that, should the Tribunal find that the JAAB was not competent to review the matter and that the complainant was entitled to challenge the decision of 12 March 2012, the complaint would be irreceivable as time-barred because it was filed on 9 July 2012, i.e. more than 90 days after he was notified of the decision of 12 March.

On the merits, the ILO contends that, according to paragraph 25 of Annex II to the Staff Regulations, the Director-General was not compelled to convene a Medical Board because the complainant did not request it. It asserts that the Committee reviewed all medical reports that were available and found no conflict of medical opinions. The Director-General even appointed an external independent medical expert to examine whether the complainant's medical condition was linked to the bomb blast. The expert concluded that this was unlikely. It asserts that the Director-General took into consideration the expert's opinion and other medical reports before making his decision.

It submits that the decision of 12 March 2012 was substantiated and that it was explained therein that the complainant could appeal the decision either on medical grounds to a Medical Board or on other grounds to the JAAB.

With respect to the alleged undue delay in dealing with his compensation claim, the ILO explains that the Human Resources Department (HRD) underwent restructuring at that time, that one of the Committee's members died and that it was a complex case. It stresses that the late submission of the claim (almost two and a half years after the incident) made the examination more difficult.

D. In his rejoinder the complainant points out that, on 8 May 2012, he submitted a request for clarification concerning the decision not to convene a Medical Board and for review of the decision of 12 March 2012 to the Legal Service. That constituted an internal appeal, which was rejected on 22 May. He stresses that, before the Tribunal, he contests the decision of 12 March 2012 not to convene a Medical Board. As he did not receive the medical report on the basis of which

that decision was taken until 2 May 2012, that is the date on which he was notified of the contested decision.

With respect to his claim for undue delay in examining his compensation claim, he specifies that it took about 27 months to take a decision on his claim.

He further submits that the ILO has not shown that the Chief of HR/POL received a delegation of authority to reply to his request for review in lieu of the Director-General, and that the Legal Service failed to reply to the request for clarification he made in that respect.

He indicates that in November 2012, after the filing of his complaint with the Tribunal, he asked the Secretary of the Compensation Committee to disclose the minutes of the Compensation Committee's meetings and information concerning the composition of the Committee, but she refused. He adds that the ILO's reply before the Tribunal leads him to believe that a note of 12 February 2010 from his physician (which he had submitted to the Medical Adviser and to HRD) may have been concealed from the members of the Compensation Committee. He also alleges that the ILO had contacted the physician who had examined him with respect to his injury without asking him or even informing him. Consequently, he asks the Tribunal to disclose the composition of all sessions of the Compensation Committee during which his compensation claim was reviewed and copies of all relevant minutes and reports and to order measures of investigation concerning suppression of evidence by the ILO and violation of medical secrecy in the review of his compensation claim.

E. In its surrejoinder the ILO contends that the complainant's consent was not required for gathering and processing his medical information. It asserts that it was gathered and processed on a confidential basis and was not communicated to third parties, the ILO Medical Adviser only provided it to the other members of the Compensation Committee.

It denies any delay in dealing with his compensation claim, asserting that it made numerous efforts to resolve the claim expeditiously.

It explains that no formal reply was made to his request concerning delegation of authority because the Legal Adviser suddenly resigned, and that, in event, it was not within his competence to reply.

It indicates that the final report of the Compensation Committee was disclosed on 20 November 2012. In order to demonstrate the ILO's good faith, it provides information on the composition of the Committee together with records of the Committee's discussions on the complainant's case. It also appends one document showing that the Committee's members were aware of the note of 12 February 2010. For the other requested documents, it considers that the request amounts to a "fishing expedition", which the Tribunal does will not accept, and has therefore decided not to produce them.

CONSIDERATIONS

1. In the present case, the complainant impugns the Director-General's decision not to convene a Medical Board to review his request for compensation (Compensation Claim 31/09) prior to taking a final decision on the claim. He asks the Tribunal to order the Organization to convene a Medical Board in accordance with paragraph 25(a) of Annex II of the Staff Regulations; to provide him with "full disclosure of documents"; and to order "measures of investigation" for the "suppression of evidence and violation of medical secrecy in the review of [his] Compensation Claim". He also requests an award of damages and costs. The complainant asks that the present complaint be joined with his fourth complaint as they are closely linked.

2. In an e-mail dated 12 March 2012, with an attached Minute of the same date from the Secretary of the Compensation Committee, the complainant was informed of the Committee's recommendation and the Director-General's decision to reject his claim for compensation "since no causal link could be established between the hazard to which he was exposed in 2007 due to his employment with the ILO, and the medical condition in respect of which [he] claimed

compensation”. The Minute went on to read: “Should you disagree with the medical aspects of the relationship between your condition and the performance of official duties on which the Director-General decision relies, please note that you may request the matter to be reviewed by a medical board in accordance with paragraph 25(b) [of Annex II] of the Staff Regulations. Should you disagree on any other ground, please note that you may refer the case for review to the Joint Advisory Appeals Board within one month from the receipt of the present decision.”

3. The complainant sent a Minute, dated 8 May 2012, to the Secretary of the Compensation Committee, with the subject “Request for Clarification and Review of Decision on Compensation Claim 31/09”. In it, he stated inter alia: “I request clarification from the Compensation Committee as to why the Director-General was not advised to refer my Compensation Claim to a Medical Board [in accordance with paragraph 25(a) of Annex II of the Staff Regulations] before making its final decision to reject it.” He went on to state that he noted the advice that he could request the matter to be reviewed by a medical board in accordance with paragraph 25(b) of Annex II of the Staff Regulations, but asserted that “such interpretation of the Staff Regulations violates [his] right to due process, since paragraph 25(a) clearly defines how a conflict of opinion on the medical aspects should be handled”. He further states that the JAAB is not competent to review any matters related to compensation claims as they contain confidential medical information, and that “[he] should be given the right to refer any such matters directly before the ILO Administrative Tribunal”. The complainant claims that this Minute should be considered as an internal appeal and that the response from HR/POL, in the Minute dated 22 May 2012, constitutes the final decision which he impugns in the present complaint.

4. The Minute of 22 May 2012 states, inter alia, that the complainant’s Minute of 8 May 2012 was forwarded to HR/POL “as it touche[d] on procedural issues beyond the Compensation Committee’s purview”. It explains that “[r]eferral to a Medical Board is foreseen in

two instances under paragraph 25 of Annex II of the Staff Regulations. Under paragraph 25(a), the Director-General may exercise his discretion to refer a case to a medical board where there is conflict of opinion on the medical aspects of the relationship between an illness or injury and the performance of official duties; in contrast under paragraph 25(b) the Office is bound to convene a Board at the request of the claimant, on the conditions specified in that provision.” It went on to note that as “at no point in time [was there] a conflict of opinion between [the complainant’s] treating physician and the ILO Medical Advisor”, the Compensation Committee “did not deem it necessary to recommend to the Director-General referral to a medical board”. The complainant was also notified that the one-month time limit for the submission of a grievance to the JAAB had already passed but that if wished to pursue a referral to a medical board under paragraph 25(b) he may wish to do so “in the course of June [2012]”.

5. With respect to the request for joinder, the Tribunal has already dealt with the complainant’s fourth complaint in Judgment 3221, thus rendering the question of joinder moot.

6. The Tribunal finds that the complaint is irreceivable under Article VII, paragraph 1, of the Tribunal’s Statute for failure to exhaust all internal means of redress. The complainant was informed that he could contest the decision to reject his compensation claim in one of two ways; either by requesting that a Medical Board be convened in accordance with paragraph 25(b) of Annex II of the Staff Regulations if he contested the decision on medical grounds, or by bringing an appeal to the JAAB if he contested the decision on any other grounds (such as procedural grounds). He chose not to appeal to either, instead bringing the case directly before the Tribunal. The complainant is mistaken in his understanding of the competence of the JAAB and that the decision not to convene a Medical Board is an issue of procedure, and could have been analyzed by the JAAB. Staff Regulation 13.2.1 provides that special procedures apply for compensation claims. Article 13.3.3 provides that “[s]hould an official disagree with a decision or proposed decision in respect of which special procedures apply,

s/he shall be entitled to refer the matter to the Joint Advisory Appeals Board to the extent and within the time limits provided for in the relevant procedure”. The relevant procedure in this case falls under Annex II of the Staff Regulations. The relevant exception provided by Annex II regards contesting a decision based on medical grounds. It is understood that contesting a decision on any other grounds would fall automatically under the general rule which states that staff members have recourse to the JAAB prior to coming before the Tribunal. As the Organization did not waive the requirement of an internal appeal, the complainant was required to file an internal appeal with the JAAB or to contest the decision on medical grounds by requesting that a Medical Board be convened in accordance with paragraph 25(b) of Annex II of the Staff Regulations. He would then have to receive a final decision or an implied rejection of his appeal in accordance with the requirements of Article VII, paragraph 1, of the Tribunal’s Statute prior to bringing a complaint before the Tribunal. As he did not, the present complaint is not receivable.

7. As the complaint is irreceivable under Article VII, paragraph 1, of its Statute, the Tribunal shall not rule on the issue of time bar, nor on the merits. However, the Tribunal notes that the Minute of 12 March 2012 contains the decision impugnable in an internal appeal, and the Minute of 22 May 2012 was a mere confirmation and clarification of the 12 March decision and could not be considered as a new and final decision. Even if the Tribunal were to accept that Minute of 22 May as the final decision, the complainant still would have had to file an internal appeal prior to filing a complaint with the Tribunal. The Tribunal finds that the requests for documents and investigation are irrelevant to the present case as they have no bearing on the outcome of the complaint as they could only be relevant on the merits. In light of the above considerations, the complaint must be dismissed as irreceivable.

8. The Tribunal notes that the possibility of a referral under paragraph 25(b) of Annex II was raised in the impugned decision but not pursued by the complainant. A suggestion was made that it be

done in the month following the Minute of 22 May 2012. It presently appears to the Tribunal that there is no time limit on seeking such a referral, and that option may possibly remain open to the complainant.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ