

SEVENTY-SECOND SESSION

In re ABOUKRAT

Judgment 1139

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Michèle Aboukrat against the World Health Organization (WHO) on 29 November 1990 and corrected on 4 January 1991, the WHO's reply of 1 March, the complainant's rejoinder of 10 April and the Organization's surrejoinder of 30 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Manual provision VII.2.72 and .78 and Annex E to Manual section II.7 (Rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of the WHO);

Having examined the written evidence and decided not to order oral proceedings, 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 French citizen on the staff of the WHO in Geneva, is employed at grade G.7 as a supply assistant in the supplies unit of the Personnel and General Services Division. On 4 November 1983 she opened a drawer of a filing cabinet, the cabinet toppled over, and she sustained painful injury to her right arm and hand and to her neck. On 10 July 1985 the Organization recognised the accident as attributable to the performance of official duties.

In August 1985 she applied for leave to undergo a course of sea-water therapy and the Secretary to the Advisory Committee on Compensation Claims agreed to meet the costs of two weeks' treatment and lodging at Quiberon, in France. She received the treatment at a thermal clinic in September 1985 and was repaid her costs at the rate of 1,006 French francs a day.

A certificate and a prescription signed by her doctor and dated 15 December 1988 called for 18 days' sea-water therapy each year at Biarritz or Quiberon. On 23 January 1989 she applied to the Secretary of the Committee for full payment of the costs of 21 days' stay at the Hotel Miramar in Biarritz at the rate of 1,810 French francs a day and 18 days' sea-water therapy at 315 francs a day, making a total of 43,680 francs. An insurance officer answered in a memorandum of 30 January headed "Course of sea-water therapy" that she would be paid at the rate of 25 United States dollars a day the costs of a stay in a thermal establishment from 11 June to 2 July 1989 and, against invoices, the full costs of any medical and special treatment she underwent there.

In a memorandum of 2 February 1989 she objected that the material rules were not the ones on health insurance but the ones on compensation for a service-incurred accident: Annex E to Manual section II.7. In a memorandum of 3 February the insurance officer, answering as Secretary of the Advisory Committee, pointed out that whereas under the rules on health insurance she would get only four-fifths of the costs of treatment she was to get her costs in full and that the matter would be put to the Committee.

By a memorandum of 31 May 1989 the Secretary informed her that on the Committee's recommendation the Director-General would refund, on presentation of a detailed bill, the costs of up to 21 days' stay in a hotel at the rate for duty travel in France outside Paris - 106 dollars (670 francs) a day - and would also meet the full costs of sea-water therapy.

After further correspondence she filed notice of appeal with the Board of Appeal on 24 July.

On 22 August she applied for the costs of travel to Biarritz and her application was referred to the Advisory Committee.

She underwent sea-water therapy at Biarritz from 4 to 21 September 1989.

On 14 September the Secretary to the Advisory Committee wrote to tell her that, in accordance with section III, paragraph 9(a), of the compensation rules, which entitled her to "any travel expenses necessarily incurred in obtaining proper treatment", she would be repaid the costs of travel, not to Biarritz, but to Aix-les-Bains, in Savoy, the place nearest to Geneva where the Committee believed that "proper spa treatment could be obtained".

On 4 October she wrote to the medical service pointing out that she had been prescribed sea-water therapy at Biarritz or Quiberon and that the Committee's view was at odds with that prescription. In a memorandum of 6 October to the Director of Personnel she proposed that she be paid 1,000 francs a day instead of the actual cost of 1,810, but the Director answered on 24 October that they must await the Board of Appeal's report.

In its report of 7 August 1990 the Board held that the complainant ought to have looked for a cheaper hotel in Biarritz, that the Director-General's decision had been reasonable and that he should reject her appeal. By a letter of 3 September 1990, the impugned decision, he informed her that he did so.

B. The complainant states that she is almost constantly in severe pain and that her physical handicap prevents her from living and working as she did before the accident. She has been told to undergo sea-water therapy every year and the purpose of her complaint is to establish just how much the WHO is bound to pay towards the heavy costs of treatment. She does not have a permanent appointment: if she left the WHO she would find it hard not only to meet those costs but also to earn her livelihood.

Paragraph 9(a) of the compensation rules says that a staff member who suffers injury in the performance of duties - as the WHO acknowledges the complainant did - "shall be entitled to the reimbursement of all reasonable medical, surgical, pharmaceutical, hospitalisation and convalescence expenses" and of "any travel expenses necessarily incurred in obtaining proper treatment". So the issue is what expenses it is reasonable for the Organization to refund for the sea-water therapy the complainant received from 4 to 21 September 1989.

Such treatment was prescribed - in Biarritz or Quiberon - by the very doctor whom the WHO's medical officer had recommended, and the medical officer endorsed the doctor's prescription. When she made a booking at the Miramar in August 1989 she believed in good faith that the Organization would meet her expenses. First, when she applied on 23 August for sick leave and the expenses of travel to Biarritz she was paid an advance of 4,000 Swiss francs in two days and without question. Secondly, since the WHO had met her expenses in 1985, why should it not do so again, at the higher daily rate accounted for by inflation in the four years that had since gone by? Thirdly, she could not reasonably be expected to await treatment any longer: she did not get the Director-General's decision until September 1990, 21 months after she had submitted the prescription to the medical officer and to the Secretary to the Advisory Committee. Any objection to the prescription ought to have come from them: instead the medical officer approved it and the Secretary consented to full reimbursement of the costs of treatment.

As for her lodging, Manual provision VII.2.78 allows refund of the costs of a better hotel in certain circumstances.

The complainant invites the Tribunal to go beyond the context of the dispute and rule on her entitlement to systematic refund of the costs of sea-water therapy and of lodging for 18 days each year for as long as her doctors prescribe treatment; to similar refund should she leave the WHO and to arrangements to solve the problem that would arise if she took up employment elsewhere; and to damages for her partial occupational disability and loss of enjoyment of life (she has to take pain-killing drugs and get treatment in her free time; she has had to give up sport; she cannot drive a car over long distances; she often loses her balance; and she needs domestic help).

She claims (1) the quashing of the impugned decision; (2) payment of all the costs she incurred in undergoing the treatment in Biarritz in September 1989; (3) annual payment of all costs she incurs in undergoing sea-water therapy in future; and (4) an award of 10,000 Swiss francs in costs.

C. In its reply the WHO observes that claim (2) covers the costs of treatment, lodging and travel. Since her internal appeal was against the Director-General's decision of 31 May 1989 and that decision was about costs of treatment and lodging only, her claim to travel costs is irreceivable because she is not challenging a decision by the Director-General on that subject. Since the decision was notified to her on 14 September 1989 and she never lodged an appeal against it, the claim is also irreceivable for failure to exhaust the internal means of redress. In any event the claim is unsound since the decision on travel costs is in line with section III, paragraph 9(a), of the compensation rules, which precludes the repayment of unnecessary expenses.

Claim (3), to an order about future payments, is also irreceivable because it is not the subject of the impugned decision. If the complainant needs treatment in future, she has only to submit her claims in the ordinary way.

Her additional claim in her brief to damages for disability and loss of enjoyment of life is irreceivable for the same reason.

As for the quashing of the impugned decision, her claim to the costs of treatment is devoid of substance since the Director-General has decided to pay those costs in full.

So the only remaining issue is the costs of lodging. The material rule is paragraph 9(a), which entitles the staff member to repayment of "all reasonable" expenses. In fact it was unreasonable of the complainant to choose the Miramar at Biarritz, a fashionable and sumptuous hotel in the four-

star category. Nor does Manual provision VII.2.78 afford any justification for her choice. The centre providing the sea-water treatment also suggested seven three-star hotels, three two-star ones and two with one star. It was even less reasonable of her to pick the Miramar in that she knew from the Organization's memorandum of 30 January 1989 and from other texts that she might not get repayment. The fact that she was promptly granted an advance in August 1989 gave her no expectancy of repayment: after all, she had asked for 7,000 Swiss francs but got only 4,000.

The success of her claim in 1985 affords no precedent. At the time it was the Secretary to the Advisory Committee who granted her the costs of a stay at the Hotel Sofitel at Quiberon on the grounds of "special circumstances". The circumstances were not explained, the decision was contrary to practice, and there was no decision by the Director-General on a recommendation by the Advisory Committee.

The daily subsistence allowance is, according to Manual provision VII.2.72, intended to "allow a staff member to stay in an hotel of good commercial standing". The amount which the Director-General decided to allow the complainant corresponded to that of the allowance and was therefore reasonable.

D. In her rejoinder the complainant enlarges on some of her earlier pleas. In particular she deplores the WHO's unwillingness to find a comprehensive solution to the problems her service-incurred accident has caused her.

As to receivability she observes that she cannot have been expected to realise that the decision of 14 September 1989 to limit her travel costs would be withheld from review by the Board of Appeal. She did raise the matter of travel costs in her memorandum of 6 October 1989 but the Director of Personnel dodged it in his reply of 24 October. It is unfair of the Organization to resort to procedural tactics.

The WHO is not in good faith in seeking to show that it warned her beforehand that the costs of her accommodation would not be repaid. It pleads its original offer dated 30 January 1989 of \$25 a day; but a similar original offer in 1985 had been abandoned and it was just an administrative error. There were no "special circumstances" warranting different treatment in 1985.

As for the choice of hotel, the Miramar was the nearest to the clinic, the second nearest was half-an-hour's walk away, going back and forth every day would have removed much of the benefit of treatment, and the WHO would presumably not have paid for taxis.

The daily subsistence allowance of which the complainant was offered the equivalent is irrelevant. It is intended for staff on official mission, not for someone who needs to travel to get treatment for a physical handicap. Why should she get only the ordinary rate applicable outside Paris when hotels in spas cost as much as in the capital? And why does she have to supply bills as proof of expenditure when the official on mission is absolutely entitled to the allowance?

She presses her claims.

E. In its surrejoinder the Organization submits that there is no new material plea in the rejoinder. It points out what it sees as distortion of the facts by the complainant, observing in particular that the decision of 14 September 1989 on travel costs was not "withheld from review" by the Board of Appeal: she never appealed against it. The WHO never told her that it would not meet the costs of lodging; what it said was that it would repay them up to the amount of the daily allowance; and it warned her in writing at least four times. Besides, her appeal of 24 July 1989

- two months before the treatment - objected to the refusal of full hotel costs, and her accusation is at odds with what she said in her original brief.

CONSIDERATIONS:

1. The complainant suffered injury at work on WHO premises on 4 November 1983. As part of the treatment she was prescribed a course of therapy. In August 1985, the Secretary of the Advisory Committee on Compensation Claims informed her that he had decided to meet her full expenses, including the cost of staying at a hotel and she underwent therapy in September 1985 at Quiberon, in France. The Organization paid back in full her medical and hotel expenses, and the cost of 14 days' board and lodging came to 14,084 French francs. The decision was a personal one by the Secretary without prior consultation of the Advisory Committee.

2. In November 1988 the complainant was prescribed sea-water therapy each year, preferably at Biarritz or Quiberon. She submitted in advance, on 23 January 1989, a claim to the cost of 21 days' full board at the Hotel Miramar at Biarritz at the rate of 1,810 French francs per day. On 30 January 1989 the Administration told her that she would be granted a daily allowance of 25 dollars to cover hotel costs as well as full reimbursement of the costs of therapy and medical expenses. She took the matter further and it was referred to the Advisory Committee. On 31 May 1989 she was informed that the Director-General had decided on the Committee's recommendation to grant her expenses at the rate of \$106 - 670 French francs a day for up to 21 days. That was the same amount as the subsistence allowance payable to staff on duty travel in France outside Paris. The costs of spa treatment would also be reimbursed in full.

3. The complainant appealed to the Committee on 5 June 1989, this time claiming refund at the rate of 1,245 francs a day of her anticipated hotel expenses at Biarritz. The Secretary answered that the decision was final but that she might appeal to the headquarters Board of Appeal. On 22 June 1989 she appealed to the chairman of the Advisory Committee but she was told that there would be no review of the matter by the Committee. On 24 July 1989 she appealed to the Board of Appeal. In its report of 7 August 1990 the Board recommended rejecting her appeal. The Director-General accepted the recommendation and rejected her appeal by a letter of 3 September 1990, the decision she impugns. She underwent treatment at Biarritz from 4 to 21 September 1989.

4. According to section III, paragraph 9(a), of Annex E to WHO Manual section II.7 - the rules on compensation for service-incurred injury or illness - a staff member who suffers injury in the performance of duties "shall be entitled to the reimbursement of all reasonable ... expenses" of the kind stated in the paragraph. The Organization does not dispute that the complainant is entitled to recover hotel expenses she incurred while undergoing treatment but submits that the amount she claims is not reasonable.

5. In its report of 7 August 1990 the Board of Appeal held that, knowing the amount allowed to be at issue, the complainant ought to have chosen a less costly hotel, though still one at a reasonable distance from the clinic.

The complainant argues that she was entitled in good faith to believe that her expenses would be reimbursed. In August 1989 she was granted within 48 hours of her request an unconditional advance of 4,000 Swiss francs towards her expenses. Moreover, it was also reasonable of her, she contends, to expect that the Organization would not refuse her in 1989 an amount in expenses which, inflation being taken into account, was equivalent to that which she had been paid under that head in 1985. She could not, she says, be expected to wait over a year to have the prescribed treatment.

6. The Tribunal holds that there was no breach of good faith. In the course of 1989 the complainant became aware that the amount of her hotel expenses to be reimbursed was at issue. By the end of May she knew that the Director-General's decision was that she would be paid the same daily allowance as was payable to staff on duty travel in France outside Paris. She did not lodge her internal appeal until 24 July 1989. It was not reasonable of her to assume that the expenses of a stay in a luxury hotel would be repaid when all indications at the time were to the contrary. Nor was she asked or expected to wait more than a year for treatment, the sole matter at issue being what was a reasonable amount in hotel expenses. The payment of a sum towards those expenses did not prejudice the Organization's position: it was merely an advance, not an acknowledgement that the higher amount of hotel expenses she claimed would eventually be paid.

7. The complainant chose to stay at the Hotel Miramar at Biarritz. It is a four-star hotel in the luxury category. The clinic for sea-water therapy at Biarritz recommended, besides the Miramar, four four-star hotels, seven three-star

ones, three two-star ones and two with one star. It was not essential to the success of the treatment that the complainant should stay at the most luxurious, and the basis for the Administration's decision was to put her at the same level of compensation as any staff member on duty travel in France outside Paris.

Since none of the grounds advanced by the complainant warrants setting aside the decision she impugns, her first claim to relief fails.

8. Claim (2) is to payment of all the costs she incurred in undergoing the treatment at Biarritz: medical expenses, the costs of the therapy and hotel and travel expenses. The decision she impugns concerned only medical and hotel expenses. There has never been any dispute between the parties as to medical expenses and the costs of the therapy, and the Director-General's decision on the repayment of hotel expenses is upheld. The claim to travel expenses did not form part of the internal appeal, was not mentioned in the decision and therefore does not arise.

9. In claim (3) the complainant seeks an order from the Tribunal determining the method of granting sums to her each year to cover the cost of future sea-water therapy. That goes beyond the Tribunal's competence: what the Tribunal is competent to do is to review each decision that is impugned and determine whether it should or should not be upheld.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner