

SEVENTY-EIGHTH SESSION

In re WASSEF (Nos. 1 and 2)

Judgment 1401

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 16 May 1994, the FAO's reply of 8 July, the complainant's rejoinder of 6 August and the Organization's letter of 12 September 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering the second complaint filed by Mr. Wassef-Gerges against the FAO on 23 May 1994, the Organization's reply of 8 July, the complainant's rejoinder of 6 August and the FAO's letter of 12 September 1994 informing the Registrar that it did not wish to file a surrejoinder;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, 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. The complainant, an Egyptian citizen born in 1948, was employed by the FAO under several short-term and fixed-term appointments between 1979 and 1990. In June 1991 he was assigned to a project funded by the United Nations Development Programme (UNDP) at N'Djamena, in Chad, as an administrative officer at grade P.3. He had his initial appointment, which was for two years, extended to 30 September 1993. In a letter of 28 June 1993 a personnel officer set out the formalities he was to complete in preparation for separation from service on 30 September 1993.

The complainant having contracted hepatitis B, the FAO had him transported to Paris on 23 August. From 24 August to 7 September 1993 he was in the International Hospital of the University of Paris. On 24 August his wife went to Paris to be with him. His doctor certified on 6 September that he needed to spend several weeks resting in bed and then not less than two months in convalescence.

In a letter of 5 November 1993 to the medical service the complainant requested the refund of his wife's expenses for travel to Paris, acknowledgment that his illness was service-incurred, approval of sick leave and the extension of his appointment until 6 January 1994, the refund of medical costs relating to his illness and the right to be reappointed for at least 12 months after his sick leave ran out.

In a letter of 10 November 1993 the medical service rejected his claims to reappointment and to reimbursement of his wife's travel costs. It said that to get his illness treated as service-incurred he would have to show a direct link between it and his assignment. He would be granted more sick leave if medical tests so warranted.

On 18 November the complainant sent a claim form to the secretary of the Advisory Committee on Compensation Claims asking that his illness should be considered service-incurred. He repeated his request in a letter of 7 December.

In a medical certificate of 4 January 1994 and on the strength of the latest tests his doctor declared him to be "clinically cured" and fit to go back to work provided he did not overdo things in the next 60 days.

After correspondence with FAO officials he appealed to the Director-General on 7 January against the refusal to treat his illness as service incurred.

In a letter of 10 January 1994 to a personnel officer he asked for an extension of sick leave to cover his convalescence. He also said he was available for work "to the best of my physical conditions".

On 15 February he again appealed to the Director-General about the origin of his illness.

In a memorandum of 23 February a personnel officer told him that the date of separation was 7 January 1994, three days after the date on which his doctor declared him fit for work.

On 3 March he appealed to the Director-General against that decision.

By a letter of 4 March the secretary of the Advisory Committee on Compensation Claims informed him that his illness could not be regarded as service-incurred; that he would himself have to meet the cost of treatment; and that in keeping with Manual paragraph 342.72 he would have to submit any subsequent request for review to a medical board.

By a letter of 9 March 1994 the Assistant Director-General in charge of Administration and Finance rejected his appeals of 7 January and 3 March.

On 15 March he lodged an appeal with the Appeals Committee against the "decision" of 23 February 1994.

In a fax dated 16 March he informed the secretary of the Advisory Committee on Compensation Claims that he was pressing his claims. On 17 March the secretary replied that his claims would be referred to the medical board.

On 22 March he lodged an appeal with the Appeals Committee against the medical service's decision of 10 November 1993 and the Assistant Director-General's letter of 9 March 1994.

By a letter of 18 April the Assistant Director-General rejected his appeal of 15 February. On 21 April the complainant appealed against that decision to the Appeals Committee.

B. In his first complaint the complainant submits that the decision of 23 February is unlawful because it distorts the facts and divulges confidential medical data about him.

He denies having exhausted his entitlement to sick leave upon separation from service and argues that it was not open to the FAO to dismiss him while he was convalescing.

He suffered misuse of authority and harassment on the part of the medical service and Director-General, who should have granted him special leave on partial pay under Manual paragraph 302.625 after his sick leave had ended.

Lastly, he accuses the Administration of "swindling" insofar as it declared him cured on the basis of medical tests and disregarded the convalescence he needed to make a full recovery.

In his second complaint he alleges racial discrimination and charges the medical service with "unhealthy manipulation" and misleading him about the proper procedure.

By failing to have him vaccinated against hepatitis B before he went off to Chad the medical service was guilty of negligence and liable for his illness.

Referring to his doctor's certificate of 18 November 1993 he says it is impossible to give the medical service the proof it required in the letter of 10 November: in two out of three cases of hepatitis B there is no way to establish exactly when and how the infection was contracted.

He submits that, following sick leave, he was entitled to another appointment. Manual paragraph 342.524 provides for just such treatment of staff members who, upon separation, have had their earning capacity undermined by illness.

He produces several medical certificates to show that his wife's presence in Paris was indispensable.

In his first complaint he seeks the quashing of "the separation decision"; the recall of all copies of the personnel officer's memorandum of 23 February 1994; 1 million United States dollars in moral damages; and \$1,500 in costs.

In his second complaint he asks the Tribunal to recognise his illness as service-incurred; to acknowledge his right to a new appointment for at least 12 to 18 months; to order the refund of the costs of his wife's travel to Paris and "related" expenses; and to grant him \$3 million in moral and physical damages. He claims \$2,000 in costs.

C. In its replies the FAO submits that the complaints are irreceivable for want of any final decisions. The complainant has failed to meet the requirement in Article VII(1) of the Tribunal's Statute and Manual paragraph 332.222 on exhausting the available internal remedies. Only in the absence of an administrative decision may he rely on Article VII(3) of the Statute. But the Administration has taken express decisions on all his claims. Having appealed to the Appeals Committee he went to the Tribunal without waiting for the Committee to report. So his complaints are premature.

The FAO invites the Tribunal to dismiss the complaints as irreceivable or, failing that and by way of subsidiary claim, to grant it leave to argue the merits.

D. In his rejoinders the complainant enlarges on his earlier pleas. He charges the FAO with jumbling the facts. The internal appeals proceedings are a ruse which works in favour of the Administration, not the appellant: inasmuch as the Administration dominates the Appeals Committee recourse to it is pointless. He denies that his complaints are irreceivable and accuses the Administration of failing, in flagrant breach of the rules, to answer his claims.

CONSIDERATIONS:

1. The FAO employed the complainant between 1979 and 1990 under several short-term and fixed-term appointments. On 26 June 1991 it appointed him as a P.3 administrative officer at N'Djamena in Chad, to work on a project funded by the United Nations Development Programme (UNDP). The post he held was established at first for a duration of two years up to 25 June 1993. The UNDP agreed to a three-month extension to 30 September and the complainant was informed on 28 June 1993 that his fixed-term appointment would expire at the end of September.

2. Having contracted hepatitis B, the complainant was "medically evacuated" on 23 August from Chad to Paris. While he was in hospital there his wife joined him from Rome. He was discharged from hospital on 7 September and travelled to Rome. There his own doctor certified that he was clinically cured on 4 January 1994 and advised that he might "resume ... his proper working activities taking care for the next 60 days of convalescence to avoid heavy jobs requiring intensive psychological or physical stress".

3. The Organization considered the complainant fit for work as from 4 January 1994. The date of his separation was postponed by three days to 7 January and he was so informed by a memorandum dated 23 February 1994.

The first complaint

4. On 3 March 1994 the complainant appealed to the Director-General against that decision. That appeal having been rejected on 9 March he posted a notice of appeal on 15 March to the Appeals Committee. That is the notification on which he relies to infer rejection. The case was pending when he filed his first complaint on 16 May 1994.

The second complaint

5. Starting on 13 September 1993, the complainant had submitted various claims to the Medical Service. On 18 November he had put a claim to the Advisory Committee on Compensation Claims, which he asked to declare his illness "service-incurred". The details of those claims are set out in A above.

6. By a letter of 4 March 1994 the secretary of the Advisory Committee informed him that the Committee recommended rejecting his claim of 18 November 1993 for lack of evidence to show that his duties exposed him to hepatitis B. By a letter of 9 March 1994 the Assistant Director-General rejected that claim on the Director-General's behalf as irreceivable on the grounds that no administrative decision had been taken at the time he had made it. The Assistant Director-General pointed out that such a decision had been communicated to him on 4 March 1994 and in accordance with FAO Manual paragraph 342.72 he might now request reconsideration of that decision. His claim to have his illness treated as service-incurred was irreceivable because he had not yet followed the proper procedure. In the same letter the Assistant Director-General rejected all the other claims he had put to the Director-General.

7. On 22 March 1994 the complainant posted to the secretary of the Appeals Committee a further appeal which he directed against the medical service's decision of 10 November 1993 and against the Assistant Director-General's

letter of 9 March 1994. He claimed:

- (1) the recognition, without recourse to any medical board, of his illness as service-incurred;
- (2) the refund of the costs of his wife's travel to Paris and of her stay there during his illness;
- (3) the recognition of his right to re-employment after twelve months' convalescence;
- (4) the payment of \$2 to 3 million in damages.

Relying on the Appeals Committee's failure to report by 22 May 1994, the complainant lodged his second complaint with the Tribunal on 23 May against what he again sees as the implied rejection of his claims.

8. The Organization submits that both complaints are premature and therefore irreceivable, the complainant having failed to exhaust the internal means of redress as required by Article VII of the Tribunal's Statute. Article VII(1) reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

and VII(3):

"Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision ..."

9. Article VII(3) cannot apply to the Appeals Committee, which does not make administrative decisions but is an advisory body, with representatives of both management and staff, which submits mere recommendations. It is the Director-General who takes the final decision on the Committee's recommendation.

10. As regards the recognition of the complainant's illness as service-incurred, the prescribed procedure is to set up a medical board to report to the Director-General so that he can take a decision. If the complainant is dissatisfied with the decision he may lodge an appeal with the Appeals Committee in accordance with Manual paragraph 303.1313.

11. As for his other claims, he must await the completion of the internal appeals procedure and the final decision by the Director-General on the Appeals Committee's recommendations. In all cases he is required by Article VII to exhaust the internal means of redress before coming to the Tribunal.

12. The conclusion is that the Organization's objections are upheld: both complaints fail because they are premature.

DECISION:

For the above reasons,

The complaints 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 1 February 1995.

(Signed)

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

