Registry's translation, the French text alone being authoritative.

EIGHTY-THIRD SESSION

In re Fahmy (No. 3)

Judgment 1637

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Yehia Fahmy against the United Nations Industrial Development Organization (UNIDO) on 13 June 1996, UNIDO's reply of 6 September, the complainant's rejoinder of 19 November 1996 and the Organization's surrejoinder of 25 February 1997;

Considering Article II, paragraphs 2 and 5, 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. Facts relevant to this dispute, which began ten years ago, appear under A in Judgments 993 and 1284 on Mr. Fahmy's first and second complaints. In Judgment 1284 of 14 July 1993 the Tribunal held that the report of the Medical Board convened during the internal procedure showed several flaws, but that it was unable to declare the complainant's ailments attributable to the performance of his official duties on the grounds that it might not substitute its own assessment for the Board's. It therefore sent the complainant back to the Organization for resumption of the proceedings for considering his claim to compensation in accordance with Articles 16 and 17 of Appendix D to UNIDO's Staff Rules. This complaint impugns the Director-General's final refusal to treat the complainant's illness as service-incurred.

By a letter of 1 October 1993 the secretary of the Advisory Board on Compensation Claims told the complainant that in accordance with Judgment 1284 the Board had again taken up his case; that since a medical board would again be convened under Article 17 of Appendix D to the Staff Rules he should name a doctor to sit on it; and that the medical board's terms of reference were to assess his health at the date of separation, 31 October 1987, and thereafter, taking into account his medical and family history and the development of his condition, especially from October 1986 until October 1997, and to determine whether the harassment he was alleging could have caused any deterioration in his health and whether there was medical evidence that such deterioration was the direct or indirect result of the harassment.

In its report of 9 September 1994 the medical board found that the complainant's family history was irrelevant to assessment of his state of health, that he had been unfit for employment since 31 October 1987, that the harassment might have caused deterioration in his health and that there was medical evidence to establish that indeed it had. In a report dated 17 March 1995 the chairman of the Advisory Board observed that, since the vote was evenly split between the Director-General's and the participants' representatives, the Board could make recommendations neither as to whether the complainant's illness was service-incurred nor as to compensation.

The Managing Director of the Division of Administration wrote to the complainant, also on 17 March, to say that the Director-General saw no reason to depart from the earlier decisions declaring his illness not attributable to the performance of his duties. The complainant objected in a letter of 18 May to the Director-General in which he stated that he took it that the decision was final and he could therefore go straight to the Tribunal; if not, his letter should be treated as a request for review. In his reply of 6 July the Director-General rejected the request and informed the complainant that he might appeal to the Joint Appeals Board. The complainant did so on 1 September 1995.

In its report of 11 March 1996 the Appeals Board held that in the absence of formal investigation by the Administration there were no grounds for supposing that the Director-General should have taken the

complainant's allegations as fact. The Director-General having neither drawn plainly mistaken conclusions from the evidence nor misused his authority, the Board recommended rejection.

By a memorandum of 2 April 1996 - the impugned decision - the secretary of the Appeals Board told the complainant that the Director-General had rejected his appeal.

B. The complainant contends that the Director-General drew clearly wrong conclusions from the reports of the medical board and the Advisory Board's chairman and from information brought to his attention in the appeal proceedings. He alleges that the Organization originally admitted to the writing of a report on an investigation into his supervisor's treatment of him, only to deny it later. He gathers that it has destroyed the report and other material evidence. The then Director of Personnel confirmed before the Advisory Board and the Appeals Board that the complainant had suffered harassment. He also certified that he had told the Appeals Board of the disappearance of the report on the investigation and of the reasons why it had been destroyed. The medical board itself recognised that the harassment had so harmed the complainant's health that he had had to stop working.

In his submission the impugned decision shows bias: the report on the investigation was disposed of at the instigation of a friend of his supervisor's, who had been Deputy Director-General at the time. By concluding that it could make no recommendations the Advisory Board too showed bias. So did the Appeals Board in its wording of the questions it thought the Director-General should bear in mind in reaching a decision. Besides, the Director-General acted in breach of good faith: he held up the case by resorting to dilatory tactics. The Organization thus caused him serious moral injury. And he plainly suffered material injury since he had to stop working before he was due to retire whereas UNIDO would undoubtedly have extended his appointment beyond the prescribed age of retirement.

He asks the Tribunal to quash the decision of 2 April 1996 and accordingly to order the Organization:

"-to apply to the complainant in full and as from 16 March 1987 the rules relating to compensation for total disability in Appendix D to the Staff Rules (including Article 11.4 thereof);

-to pay the complainant the various sums due in Austrian schillings, to be reckoned at the various rates of exchange against the United States dollar prevailing at the due dates;

-to pay compound interest at the rate of 10 per cent a year on the various sums due to the complainant;

-to pay the complainant a sum in moral damages equivalent to three times the annual amount of his pensionable remuneration (applicable as at the day of payment) corresponding to his last grade and in-grade step;"

He seeks costs.

C. In its reply UNIDO submits that the Director-General properly appraised the information at his disposal and drew no mistaken conclusions from the evidence in making his final decision, which he took in the lawful exercise of his discretion. The decline in the complainant's health could not conceivably have been the direct outcome of the incidents he sees as harassment. The behaviour that he attributed to his supervisor in a memorandum of 10 March 1987 was just the sort of everyday occurrence that anyone may have to put up with when he has a new supervisor. Though he may have undergone some stress in his four-and-a-half months' contact with that supervisor, he offers not a jot of evidence of any harassment that might have been the direct cause of his illness. The medical board's findings were speculative and gratuitous.

Even though an investigation was made and the conclusion was that the complainant had suffered no harassment, there was no written report. The evidence that the former Director of Personnel gave before the Joint Appeals Board was mistaken. The complainant's charges of bias are groundless. There is none to be inferred from the Advisory Board's conclusion that it could make no recommendations: "that correctly reflected the situation of the Board in the light of its rules of procedure". The proceedings took a long time because the Organization wanted to let the complainant take part and to meet his wishes as far as possible. It committed no breach of good faith.

Judgment 993 dismissed his claim to material damages for frustration of his expectation of renewal of contract beyond the age of retirement. So the matter is *res judicata*.

D. In his rejoinder the complainant accuses the Director-General of substituting his own assessment for the medical board's. He maintains that papers were indeed destroyed. Citing the evidence given by two members of the medical board whom he questioned, he submits that the board's report leaves no doubt about the causal link between the treatment of him and his illness. He presses all his other pleas.

E. In its surrejoinder UNIDO submits that the medical board did not conclude in its report that there had been actual harassment. What the complainant alleges to be harassment amounts to "everyday occurrences in any office" that cannot be regarded as the direct cause, in the legal sense, of his illness and later total disability.

CONSIDERATIONS

1. The complainant, an Egyptian who was born in 1927, joined UNIDO in 1969 and held a series of appointments until he retired in 1987. In his first complaint to the Tribunal he challenged a decision not to extend his appointment beyond 31 October 1987, but Judgment 993 of 23 January 1990 dismissed his claims as irreceivable. The Organization rejected a request that he had made, in accordance with Article 17(a) of Appendix D to UNIDO's Staff Rules, for review of a decision not to treat as service-incurred several cardiac and other disorders which he attributed to stress caused by the behaviour of his first-level supervisor. In a second complaint he sought the quashing of that decision. Although the Tribunal declined to rule on whether his ailments were service-incurred, it held in Judgment 1284 of 14 July 1993 that the proceedings before the medical board showed flaws, inconsistencies and omissions. It sent the case back to the Organization for resumption of the proceedings for considering his claims. In this complaint, his third, he is impugning a decision of 2 April 1996 by the Director-General of UNIDO confirming, on the recommendation of the Joint Appeals Board, decisions of 17 March and 6 July 1995 not to attribute the deterioration in his health to the performance of his duties.

2. The complainant seeks the quashing of that decision on the grounds that the Director-General drew clearly wrong conclusions from the evidence, showed bias and was in breach of good faith. His other claims are to the application to him as from 16 March 1987 of the rules in Appendix D to the Staff Rules on compensation for total disability; payment, with interest, of the amounts due to him under those rules; moral damages; and costs.

3. The pleadings must be read in the context of the conclusions of the bodies to which the case has been referred: the medical board, the Advisory Board on Compensation Claims and the Joint Appeals Board.

4. In line with Judgment 1284 the Advisory Board took up the case again on 14 September 1993. It decided to convene another medical board. Its terms of reference were set out in a text of which paragraph 2 read:

"(a) Assessment of the claimant's state of health at the time of separation on 31 October 1987 and thereafter, taking into account the medical and family history of the patient and the development of his condition in general and during the period from October 1986 to October 1987 in particular.

(b) The claimant alleges that harassment and inhuman treatment took place at work. Could harassment as alleged cause a deterioration of health as claimed taking into account the level of stress as always present in a work situation at the level of responsibility of the claimant?

(c) Is there medical evidence that the deterioration of health was the direct or indirect result of the alleged harassment taking into account the medical history under (a) above and the level of stress under (b) above?"

5. After some difficulty the medical board was at last set up. It concluded as follows in its report of 9 September 1994:

"(a) In this particular case the family history is irrelevant. Even viewed retrospectively, we state he was unfit for employment on 31 October 1987 and has remained so since.

(b) Yes, this harassment could cause the deterioration of health as it took place.

(c) Yes there is medical evidence that the deterioration of health was definitely influenced for the worse by the harassment taking into account to 2(a) and 2(b).

We can give no precise percentage but it was clearly a substantial influence."

6. The board's report was put to the Advisory Board, which met several times. The minutes of its 23rd meeting held on 27 September 1994, show that at the outset it acknowledged the decline in the complainant's health as partly due to his working conditions. He came by the text of those minutes and has produced them even though they were set out in an internal memorandum that should have remained privileged. The Organization objects and in its reply asks the Tribunal to disregard them. Yet the memorandum forms part of the case records, the complainant did not obtain it by deceit, its authenticity is not in dispute, and in citing it the Organization seeks to belittle its importance. There are no grounds for striking out a text that is material to the case and that in any event the Tribunal might have ordered the defendant to disclose. Besides, it affords no conclusive evidence of the Board's opinion, which the Board did not reach until a later meeting and which appear in its chairman's report of 17 March 1995.

7. Also at its meeting of 27 September 1994 the Board agreed on the following finding:

"after having taken into full consideration the conclusions of the second Medical Board and taking also into account the fact that the complainant is fully incapacitated, [it] recognized that the work situation had an influence on the claimant's deterioration of health, but could not readily come to a quantification of the term 'substantial influence' for the purpose of determining an amount of compensation. [It] endorses that endeavours should be made to negotiate an amicable settlement at the latest by 30 November 1994, failing which a meeting will be called ... in early December 1994 to consider the compensation to be awarded under App. D."

But there was no negotiation and so no "amicable settlement". And, though the Board met again in December 1994, it could not agree on any recommendation to the Director-General.

8. The report of 17 March 1995 by its chairman distinguishes the views of the Director-General's representatives and those of the representatives of the participants in the United Nations Joint Staff Pension Fund. The former found no evidence of the alleged harassment, the medical board report shedding no new light on the question, which was not covered by its terms of reference anyway; so there was no telling whether the worsening of the complainant's health was due to the performance of his duties. The participants' representatives held, on the contrary, that the Organization was liable for the complainant's feeling harassed because of the attitude of his supervisor -- one of the representatives, who had been Director of Personnel at the time, described the supervisor's behaviour as "worse than harassment" -- because there was medical evidence to establish that the complainant's working conditions had been largely to blame for his poor health. Had his health gone into decline earlier and not just before his sixtieth birthday, he would have been declared an invalid and got a full pension. So the participants' representatives would grant him compensation under Appendix D to the Staff Rules. Their proposal having been put to the vote but not carried, the Board concluded that it could make recommendations neither as to whether his illness was service-incurred nor as to whether he should get compensation under Appendix D.

9. The Director-General thereupon wrote the complainant a letter on 17 March 1995 rejecting his claims on the grounds that there was no reason to review the earlier decisions endorsing recommendations made by the Advisory Board at its 7th and 12th meetings.

10. The complainant appealed against that decision and then against a decision of 6 July 1995 rejecting his appeal. The Joint Appeals Board met no fewer than seven times from 13 December 1995 until 26 February 1996. On 11 March 1996 it recommended rejecting his second appeal on the grounds that the Director-General had neither drawn clearly wrong conclusions from the evidence nor acted in bad faith nor offended against the complainant's dignity.

11. The Director-General decided on 2 April 1996 to endorse the Board's recommendation and reject the appeal, thereby confirming the position he had held to from the outset. The material issue is whether that decision is lawful. He was bound neither by the medical board's conclusions nor by the position of the Advisory Board -- which had made no recommendation at all -- and had broad discretion in the matter. Not but what he was of course bound to bear all the material evidence in mind and not to draw clearly wrong conclusions from it.

12. The Tribunal holds that some of the material evidence was misconstrued or even ignored.

13. First, the medical board's conclusions are much more to the point than the Organization allows. True,

the board did not say in so many words that there had been harassment, an issue outside its terms of reference anyway. But, after hearing the complainant and going through all the records, it did find medical evidence to show that his health had been "influenced for the worse by the harassment". Had its members believed the treatment he was alleging to be irrelevant to the decline in his health they would have said so and not have spoken of the "substantial influence" of "the harassment".

14. Secondly, as the Organization says, the Advisory Board's only formal conclusion is the one in its chairman's report explaining why it had failed to agree. Yet it is odd, to say the least, that in a report intended for the Director-General the Board said nothing of its unanimous conclusion at an earlier meeting that working conditions had damaged the complainant's health.

15. Lastly, the evidence before the Tribunal. particularly the comments by the former Director of Personnel, make it hard to dismiss -- as UNIDO does in its surrejoinder -- the keen tension between the complainant and his supervisor as "everyday occurrences in any office" or the effect of "action taken in the ordinary run of management and likely to make for the degree of stress that any international civil servant is expected to cope with".

16. The complainant and the Organization disagree as to whether or not there was investigation into his allegations and whether some items of evidence have vanished; and that dispute has prompted the Organization to produce material evidence, however belatedly. Be that as it may, the Tribunal comes to the following four conclusions:

(a) The decline in the complainant's already poor health was unquestionably attributable to the stress of relations with his supervisor. But there is no determining just how far such stress at work affected him.

(b) The decision of 1 September 1987 not to renew his appointment was a final one and on account of Judgment 993 is beyond challenge. So he may not object to the termination of his appointment on retirement on the grounds that his ailments were partly service-incurred. Besides, the evidence does not suggest that he had any reasonable expectation that the Organization would keep him on after his sixtieth birthday.

(c) Appendix D of the Staff Rules affords him no entitlement to an invalidity pension. The "additional compensation" he claims under Article 11.4 is payable only to a staff member who has to depend on and pay for the assistance of another person or who, if partly disabled, has to undergo vocational rehabilitation. Articles 11.1 and 11.2, which deal with total or partial disability attributable to the performance of official duties, do not apply to cases like this one where, after several months' sick leave on full pay, the member does not go back to work and the reason is not that he is unfit but that he has reached the age of retirement and has had to stop work because of a decision no longer subject to challenge.

(d) As was said above, the conditions the complainant suffered in his last few months of work harmed his health. They caused him injury for which he is entitled to redress. Acting by virtue of Article II, paragraph 2, of its Statute and taking account of all the delay in sorting out what was a fairly straightforward case, the Tribunal awards him damages on that count. It sets the amount *ex aequo et bono* at 35,000 Swiss francs, including any interest accrued by the date of delivery of this judgment.

17. The complainant is entitled to an award of 20,000 French francs in costs.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 35,000 Swiss francs in damages for the injury referred to in 16 above.

2. It shall pay him 20,000 French francs in costs.

3. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Michel Gentot
Julio Barberis
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.