

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

H. (No. 4)

v.

WTO

133rd Session

Judgment No. 4464

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr K. H. against the World Trade Organization (WTO) on 7 April 2020, the WTO's reply of 16 July, the complainant's rejoinder of 14 August, the WTO's surrejoinder of 15 October 2020, the complainant's further submissions of 19 February 2021 and the WTO's final observations thereon of 25 March 2021;

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 may be summed up as follows:

The complainant challenges the WTO's refusal to recognise the illness from which he states he suffers as service-incurred.

For the facts which preceded the facts directly connected to the subject-matter of this complaint and which allow all the facts to be placed in their context, reference is made to the statements of facts in Judgment 4462 and Judgment 4463, also delivered in public today.

The complainant, who considered that he had been overloaded and the victim of mobbing at work, took sick leave between 31 July 2017 and 21 March 2018. On returning to work, he was permitted to work part-time on medical grounds, which he did between 9 April and 3 July

2018, before being placed on full-time sick leave again by his doctor from 4 July 2018.

In an email from the Director of the Languages, Documentation and Information Management Division on 19 January 2018, the complainant was also informed that he had been given new duties in order to facilitate his gradual return to work.

By email of 8 May 2018, the complainant requested that the illness for which he had requested sick leave from 31 July 2017 be recognised as service-incurred and, consequently, that he receive the compensation provided for in Annex 3 to the WTO Staff Rules. By memorandum of 26 July 2018, the complainant was notified of the Director-General's decision not to consider his illness as service-incurred. On 15 August 2018 the complainant requested that the decision be reconsidered.

On 28 March 2019 a medical board met to examine the complainant's case with a view to submitting an opinion to the Director-General.

By letter of 15 May 2019, the complainant was notified of the Director-General's decision to maintain his refusal to recognise that the complainant had suffered from a service-incurred illness.

By email of 27 May 2019, the complainant informed the Human Resources Division (HRD) that his doctor, Dr V., had not received the final report of the medical board on which he had sat. By email of 21 June 2019, the Director of HRD confirmed that the report had not been forwarded to Dr V. and informed the complainant that the decision of 15 May 2019 would be suspended pending comments from his doctor. Dr V. submitted his comments by letter of 19 June 2019 and email of 9 July 2019. The final report was then completed and finalised by the WTO medical adviser, who forwarded it to the Director-General on 9 January 2020.

By letter of 16 January 2020, the complainant was informed of the Director-General's decision to maintain his refusal to recognise the complainant's medical situation as service-incurred. In particular, the letter expressly stated: "The aforementioned medical board concluded by a majority that the examination of the medical aspects does not demonstrate that, medically speaking, there is any causal link between

your work at the WTO and your medical situation.” That is the impugned decision.

The complainant asks the Tribunal to set aside and declare null and void the medical board’s composition, the minutes of its meeting on 28 March 2019 and its final report. He also seeks the setting aside of the impugned decision of 16 January 2020 refusing to recognise his medical situation as service-incurred. The complainant requests the Tribunal to order the WTO to pay him the sum of 170,367 Swiss francs in material damages and 10,000 Swiss francs in moral damages. He claims the sum of 2,000 Swiss francs in costs and interest at the rate of 5 per cent per annum from 28 May 2018 until all amounts due are paid. He also asks the Tribunal to declare all sums paid by the WTO exempt from taxation in Switzerland and to order the WTO to treat them as such. Lastly, the complainant seeks any other redress or relief that the Tribunal deems necessary.

The WTO requests that all the complainant’s claims be dismissed.

CONSIDERATIONS

1. The complainant asks the Tribunal in particular:

- to set aside the final decision of the WTO Director-General of 16 January 2020 refusing to recognise his state of health as service-incurred; and
- to set aside and declare null and void the composition of the medical board which met on 28 March 2019, the minutes of that meeting and the board’s final report.

He also seeks moral and material damages for the injury that he submits he has suffered, together with costs.

2. The complainant requests that oral proceedings be held. However, the Tribunal notes that the parties have presented sufficiently extensive and detailed submissions and documents to allow the Tribunal to be properly informed of their arguments and the evidence. That application is therefore dismissed.

3. In his rejoinder, the complainant expressly requests the Tribunal to disregard paragraphs 2.2 to 2.6 and paragraph 2.8 of the reply, as well as annexes 1 to 6 thereto. He submits that these passages of the reply and these annexes, which concern the circumstances surrounding his separation from service, are irrelevant to the question which the Tribunal is required to decide in these proceedings.

Considering that it is primarily for the parties to determine whether or not the production of a document in support of its pleadings is relevant, the Tribunal finds that there is no reason to grant the complainant's request in this case. The evidence shows that the illness which he alleges is service-incurred originated, inter alia, in the overall final ratings he was awarded in his performance evaluations for 2016 and 2017. The Tribunal observes that it has, in any case, already seen the information referred to in the WTO's reply and the contested annexes in connection with the complainant's previous complaints to the Tribunal. Reference is made in this respect to Judgment 4144 of 3 July 2019 and Judgment 4462 delivered in public today.

4. In support of his complaint, the complainant submits that the Director-General's decision of 16 January 2020 is unlawful since it is based on the medical board's final report although the procedure followed by the board was tainted by various flaws.

The complainant's pleas can be summarised as follows:

- (1) The medical board was not properly constituted.
- (2) The medical board's report was unlawful in that it bears only one signature, that of the WTO's medical adviser.
- (3) The minutes of the medical board's meeting of 28 March 2019 do not reflect what the complainant's doctor said, which renders unlawful the procedure followed by the medical board and the report which it drew up.
- (4) The medical board's report is tainted by an error of law in that it drew from the complainant's medical file a clearly mistaken conclusion that is contrary to the Tribunal's case law.

5. In support of his first plea, the complainant, relying on Article 38 of Annex 3 to the Staff Rules, which provides that a medical board is composed of three medical practitioners, submits that the medical board which decided his case was, in fact, composed of four medical practitioners, and this alone is sufficient to establish that the procedure followed was flawed. With regard to the fourth doctor who sat on the medical board, namely Dr Reb., to whose participation neither the complainant nor his doctor had consented, the complainant argues that his mere presence may have influenced at least one of the other three doctors on the board, namely the doctor who belonged to the medical centre of which Dr Reb. was a director. He argues that this is especially the case as Dr Reb. had taken an active part in the medical board's work, in particular by speaking at a meeting on 28 March 2019.

The WTO submits that the first plea is unfounded. It explains that the medical board comprised the following three medical practitioners: (1) the complainant's doctor; (2) the WTO's medical adviser; and (3) Dr R., a doctor from a medical centre appointed by mutual agreement of the WTO and the complainant, and by his doctor. As for the fourth medical practitioner present at the medical board's meeting on 28 March 2019, the WTO states that this was Dr Reb., who is a member of the medical management board at the same medical centre where Dr R. works, and that he in fact only played the role of "resource person" for the purposes of coordination and communication with Dr R. He attended the medical board's meeting on 28 March 2019 solely as an observer, as is apparent from the report drawn up at the end of that meeting. Lastly, the WTO notes that the complainant does not present any evidence of the influence that Dr Reb. may have actually had on the doctors who made up the medical board.

6. The Tribunal observes first of all that, pursuant to Article 38 of Annex 3 to the Staff Rules, a medical board, such as the one concerned in this case, consists of three medical practitioners, namely: (1) a duly qualified medical practitioner selected by the complainant; (2) the WTO's medical adviser or a medical practitioner selected by the medical adviser; (3) a third duly qualified medical practitioner who is selected by the first two, and who is not a WTO medical adviser.

The evidence shows that the medical board convened in this case was to be composed of the following three medical practitioners: (1) the complainant's doctor; (2) the WTO's medical adviser, namely the Head of the Medical Service; and (3) Dr R., a doctor from a medical centre appointed by mutual agreement of the WTO and the complainant. It is not disputed that a fourth medical practitioner was present at the medical board's meeting on 28 March 2019, namely Dr Reb., who the WTO explains is a member of the "medical management board" of the medical centre in question.

7. The Tribunal considers that the presence of this fourth medical practitioner at the meeting is sufficient to establish a breach of Article 38 of Annex 3 to the Staff Rules. Article 38 makes clear that the medical board convened to decide on the state of health of a member of staff is to consist of three medical practitioners appointed in the manner specified therein. This article does not in itself prevent other medical practitioners from being interviewed by the medical board, for example as experts, as long as it is clear from the procedure followed before the board that they were never considered, and could never have been objectively considered by the staff member concerned, to be members of the board.

On this point, the Tribunal reiterates that according to consistent precedent, it may not replace the medical findings of medical experts with its own assessment, but it is required to say whether there was due process (see, for example, Judgment 3994, consideration 5). It must therefore satisfy itself that a medical board was properly constituted and followed due process.

8. In this case, the Tribunal notes the following with regard to the composition and functioning of the medical board that considered the complainant's case.

In an email of 26 February 2019, the Head Doctor of the Medical Service stated that the medical board considering the complainant's medical situation would comprise three medical practitioners, namely, the complainant's doctor, herself and a medical practitioner selected by

mutual agreement of the first two medical practitioners. However, the report of the medical board's meeting on 28 March 2019, finalised on 22 July 2019, records Dr Reb.'s presence at the meeting in the same way as the presence of the board's officially appointed members and describes him as an expert on an equal footing with Dr R., although Dr R. was actually an appointed member of the board. Nowhere in the report is it mentioned that Dr Reb. was attending the meeting solely in his capacity as "expert" or "observer". On the contrary, it appears that Dr Reb. expressly intervened in the board's discussions at one point, even though according to the report this was just to "summarise" the situation. Lastly, the report shows that Dr Reb. was still present during the board's final discussions and when it formulated its findings.

Although the Organization subsequently stated, in the Director-General's final decision of 16 January 2020, that Dr Reb. had attended the medical board's meeting as an "observer alone", the fact remains that the letter of 15 May 2019 from the Director of HRD which notified the complainant of the Director-General's initial decision not to recognise his illness as service-incurred expressly stated that the board "comprised Dr [V.], selected by yourself, Dr [J.], the WTO's medical adviser, and [Drs R. and Reb.], selected by the previous two medical practitioners".

Similarly, the evidence also shows that the Head Doctor of the Medical Service expressly requested both Dr R. and Dr Reb. to indicate whether they agreed with the report drawn up following the meeting of 28 March 2019, and that Dr Reb. felt it was appropriate that he should give his approval to this report, which he did by email of 20 July 2019.

9. In the light of all these circumstances, the Tribunal finds the board's composition and functioning were tainted by a substantial flaw owing to the role played by a medical practitioner who was not a member.

10. This flaw is a sufficient basis to find not only that the medical board's conclusions in the report of 22 July 2019 are invalid, but also that the Director-General's final decision of 16 January 2020 must be

set aside. Contrary to what the complainant claims, there is no reason to set aside the board's report, which is merely a preparatory step that does not in itself cause injury (see, for example, Judgment 4118, consideration 2).

However, the case must be remitted to the Organization so that a properly constituted medical board of three medical practitioners can determine the cause of the illness from which the complainant submits he suffers with a view to allowing the Director-General to take a new final decision as to whether that illness is service-incurred.

11. Since the first plea is recognised as well founded and thus sufficient to set aside the impugned decision, there is no need for the Tribunal to rule on the complainant's other pleas.

12. In his submissions, the complainant seeks an award of 170,367 Swiss francs by way of compensation for the material injury he states he has suffered as a result of the loss of opportunity to have the illness from which he is suffering recognised as service-incurred.

In this regard, referring to the timeframe within which the Tribunal's judgment could be handed down, he submits that it will no longer be possible, at that point, to convene a new medical board which "could perform its task meaningfully by taking a fully informed decision on the [c]omplainant's state of health between August 2017 and December 2021".

However, the Tribunal takes the view that it is for the medical board, which will be properly constituted, to decide on the possible link between the complainant's illness and his working conditions. This question of causality has not yet been settled and the Tribunal's role is not to substitute its own assessment for that of the board, even for the sole purpose of assessing and evaluating the loss of an opportunity or a right. Furthermore, the complainant's assertion that a medical board could no longer meaningfully meet to make a determination on his case following a judgment of the Tribunal setting aside the impugned decision does not rest on any specific argument and cannot therefore be accepted.

It follows from the foregoing that the complainant's claim for material damages cannot be upheld in this judgment.

13. The complainant also seeks moral damages in the amount of 10,000 Swiss francs. In this connection, he refers to the length of the procedure followed in this case, which lasted almost twenty months, as well as the fraught exchanges between the complainant and the Organization and the Organization's unfounded accusations against him, which allegedly caused him stress and mental suffering.

The Tribunal considers that, as the WTO submits, the Organization has remained within the bounds of politeness in all its dealings with the complainant and there is no need to award him compensation under this head.

By contrast, the length of the procedure followed to decide whether the illness from which the complainant states he suffers is service-incurred is regrettable, particularly because this procedure will be further prolonged by the remittal of the case to the Organization made necessary by the flaw in the initial procedure. The Tribunal considers that the injury will be fairly redressed by awarding the complainant damages in the amount of 3,000 Swiss francs.

In view of the nature of this award, interest will not be payable on this sum, despite what the complainant requests. Lastly, the Tribunal has no jurisdiction to order national authorities to exempt from national taxation sums paid by an organisation pursuant to an award by the Tribunal.

The complainant is entitled to costs, set at 750 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 16 January 2020 is set aside.
2. The case is remitted to the WTO so that a properly constituted medical board of three medical practitioners can make a new determination as to whether the illness from which the complainant submits that he suffers is service-incurred.

3. The WTO shall pay the complainant moral damages in the amount of 3,000 Swiss francs.
4. It shall also pay him costs in the amount of 750 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 22 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ