Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B.

v.

ILO

136th Session **Judgment No. 4709**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. B. against the International Labour Organization (ILO) on 6 March 2020, the ILO's reply of 14 May 2020, the complainant's rejoinder of 17 August 2020 and the ILO's surrejoinder of 21 September 2020;

Considering Articles II, paragraphs 1 and 2, 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 may be summed up as follows:

The complainant challenges the refusal to recognise her illness as attributable to official duty.

The complainant joined the International Labour Office, the ILO's secretariat, in January 1984. On 1 August 2016 she submitted a claim for compensation for illnesses attributable to her official duties, in which she stated that she was suffering from burn-out and sudden deafness. At the material time, the complainant was working as an administrative assistant in the interpretation unit of the Official Relations Branch of the Official Meetings, Documentation and Relations Department, at grade G-6. She retained this position until she separated from service on 15 April 2017 in an agreed termination of appointment.

The complainant's compensation claim was divided into two claims, which were examined by the Medical Adviser and the Compensation Committee. On 4 December 2018 the complainant was informed of the Director-General's decision, taken on the Committee's recommendation, to reject her compensation claims. The complainant filed two grievances with the Joint Advisory Appeals Board, which recommended that the Director-General's decision of 4 December 2018 be set aside and that a complete and detailed re-examination of the claims for compensation be carried out. By letter of 19 July 2019, the Deputy Director-General for Management and Reform informed the complainant of the Director-General's decision to endorse the Board's recommendations. Accordingly, the Director-General had decided to refer the compensation claims back to the Compensation Committee, composed of new members, for a new recommendation to be submitted to him as soon as possible after a re-examination affording all the requisite safeguards of objectivity and impartiality. The Committee was to be charged with reviewing the professional aspects of the complainant's situation at the material time, as well as the medical aspects of her case relating to her medical history and the factors causing her deafness. The Director-General had also decided to award the complainant compensation of 2,500 Swiss francs for the moral injury resulting from the inordinate length of the proceedings before the Compensation Committee.

The newly-composed Compensation Committee met on 11 September, 16 October and 22 November 2019. On 13 November 2019 the Medical Adviser delivered his opinion to the other members of the Compensation Committee, in which he concluded that the complainant's psychiatric illness could be regarded as attributable to her official duties. With regard to the sudden sensorineural hearing loss, the Medical Adviser considered it plausible that work-related stress resulting from the performance of her duties could have played at least a triggering role in the onset of the illness, but that other aetiological factors may have contributed to it, such as a possible vascular cause linked to the complainant's smoking and use of aspirin.

The Compensation Committee unanimously recommended that the complainant's psychiatric illness (namely, anxiety-depression syndrome with associated somatic symptoms) be recognised as service-incurred. By contrast, a majority of the Committee recommended that her sudden sensorineural hearing loss should not be so recognised. Two members noted that there were other possible contributing factors, including smoking and substantial use of aspirin, and considered that the available evidence was not sufficient for the recognition of the causal role of work-related stress in the onset of the illness. A third member recommended that the sudden sensorineural hearing loss be recognised as service-incurred because of the chronology of events.

The complainant was informed of the Director-General's final decision on her two claims by a letter from the Deputy Director-General for Management and Reform of 10 December 2019. The Director-General had decided to endorse the Compensation Committee's unanimous recommendation that the complainant's psychiatric illness be recognised as attributable to work-related factors. He also expressed regret for the inadequacy of the measures taken to improve the complainant's professional situation at the material time and for the repercussions of that situation on her health. Furthermore, the Director-General agreed with the conclusion, adopted by the majority of the members of the Compensation Committee, that the evidence available was insufficient for the recognition of a causal link between the complainant's working environment and her sudden sensorineural hearing loss, and that there were other factors identified by the Medical Adviser, including smoking and substantial use of aspirin, which could also have contributed to the illness. That is the impugned decision.

The complainant asks the Tribunal to set aside that decision, to set aside the conclusions and recommendations of the Compensation Committee not to recognise her sudden sensorineural hearing loss as attributable to her official duties, and to recognise that causality and the fact that this health condition therefore constitutes an occupational disease conferring entitlement to compensation under Annex II to the Staff Regulations. Should the Tribunal refuse to recognise her occupational disease, the complainant asks it to remit her compensation claim for

consideration to a newly- composed Compensation Committee. The complainant further seeks fair compensation for the moral injury she considers she has suffered and an award of costs.

The ILO asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 10 December 2019 whereby the Director-General of the International Labour Office granted only partly the claim she had made on 1 August 2016 seeking recognition of two illnesses as service-incurred, namely a psychiatric disorder and a sudden deafness, resulting, in her view, from work-related stress and burn-out owing to the conflictual working environment to which she had been exposed, in the administrative unit to which she belonged, between March 2015 and June 2016.

That claim was made under the scheme for compensation in case of illness, accident or death attributable to official duty established pursuant to Article 8.3 of the Staff Regulations and governed by Annex II thereto, the details of which are set out in Circular No. 6/42 (Rev. 4) of 31 March 1994, which provides in particular that claims for compensation presented under this scheme are to be examined by a Compensation Committee.

It is important to note that the complainant's claim – which was subsequently split into two separate claims – had initially been rejected in its entirety by a decision of 4 December 2018 but, as the Joint Advisory Appeals Committee considered that this decision was unlawful on account of, inter alia, the numerous flaws that tainted the conditions in which the Compensation Committee had examined the case, that the Director-General had decided on 19 July 2019 to withdraw the decision and to refer the claim back to a Committee with a different composition. That re-examination led to the impugned decision of 10 December 2019, which, as its wording indicates, was intended to be a final decision that could only be challenged before the Tribunal.

2. In that decision of 10 December 2019, the Director-General recognised, in accordance with the unanimous recommendation of the Compensation Committee, that the complainant's psychiatric illness, namely an anxiety-depressive syndrome with associated somatic symptoms, was attributable to factors linked to her working conditions during the aforementioned 15-month period, but refused to recognise that causation in respect of the complainant's other illness, a sudden sensorineural hearing loss. The Director-General endorsed the conclusion reached by the majority of the Committee on that point and considered that there was insufficient evidence available to accept the existence of a causal link between that illness and the complainant's working environment in view of the other factors identified in the Medical Adviser's opinion submitted to the Committee that could have contributed to the onset of the illness in question, such as the complainant's smoking and her significant intake of aspirin as a prescribed treatment.

The complainant, who contests that decision insofar as it is unfavourable to her on the second point, submits that, as one member of the Committee considered, the causal link should have been recognised particularly in view of the fact that her sudden deafness had occurred concomitantly with the onset of her psychiatric problems in May 2016, which was the period when she faced difficulties in her working environment. Her case is based particularly on medical certificates drawn up by her treating ear, nose and throat (ENT) specialist in July 2016 and October 2019, which show that in the specialist's view, "[t]his type of deafness appears most commonly in patients suffering from overwork"[*] and even that it "is directly linked to [such] overwork"[*] when that overwork is "to blame for incapacitating stress"[*].

3. First of all, the Tribunal observes that the complainant's claims concerning the report of the Compensation Committee as such must be dismissed as irreceivable since the opinion issued by an advisory body of that kind is merely a preparatory step in the process of reaching the decision taken on the basis of that opinion and does not itself cause

[*] Registry's translation.

injury to the complainant (see, for example, Judgment 4464, consideration 10).

4. In respect of the challenge to the impugned decision, the Tribunal recalls that, according to consistent precedent, it may not replace the opinion of medical experts or a of committee dealing with medical cases, such as a compensation committee, with its own assessment. However, it does have full competence to say whether there was due process and to examine whether the opinion delivered by the committee in question shows any material mistake or inconsistency, overlooks some essential fact or plainly misreads the evidence (see, in particular, Judgments 4473, consideration 13, 3994, consideration 5, 2996, consideration 11, 2361, consideration 9, and 1284, consideration 4).

5. With regard to due process, which should be considered first, the complainant submits in her complaint that the procedure was tainted by three flaws.

(a) Firstly, the complainant submits that, since the Compensation Committee has five members, it has not been clearly shown that the recommendation not to recognise her sudden deafness as service-incurred – which, according to the Committee's report, was approved by only two members – was adopted by a majority. However, the rule is that only three of the five members of the Committee – the Chairman, a member chosen by the Director-General for her or his knowledge of occupational safety and health and a member appointed in consultation with the Staff Union Committee – are entitled to vote. The other two members, namely the Medical Adviser and a representative of the Legal Adviser, who sit on this committee in an *ex officio* capacity in order to inform the discussion on matters within their respective fields of expertise, act in a purely advisory capacity. The disputed recommendation, which was approved by two of the three voting members, was therefore adopted by a majority.

(b) Secondly, the complainant takes issue with the fact that she was not provided with the Medical Adviser's opinion on her compensation claim before that opinion was submitted to the Compensation Committee,

which did not allow her to obtain any comments that her treating physicians may have wished to make on it. She regards this as a breach of the adversarial principle. However, the Tribunal considers that the opinion, drawn up for the Committee by one of its members to serve as a basis for its deliberations, is by its nature an internal working document which, in the absence of provisions requiring it to be disclosed to the parties, need not be communicated to the staff member concerned. Thus, while the complainant was entitled to have access to the Medical Adviser's opinion afterwards – it being noted that this right was observed, as the submissions show that the document in question was sent to her on 21 January 2020 at her request – she has no grounds to submit that she should have received a copy of it before the Committee drew up its recommendations.

Furthermore, it is to no avail that the complainant attempts to assert, apparently in order to emphasise the value that having the opportunity to comment on the opinion would have had, that the Medical Adviser's views set out in that opinion concerning the point at issue represent a reversal of those expressed in an email that he sent to her on 18 October 2019, in which he stated that "[a]t least in respect of the hearing problem, it [was] clear to [him]"[*]. It is clear from the context in which the email was sent that – as the Medical Adviser himself confirmed in a note dated 5 May 2020 on the medical aspects of the case, appended by the Organization to its reply – the reference in question did not, in any event, refer to whether the sudden deafness was service-incurred but to the persistence of the symptoms of that illness.

(c) Thirdly, the complainant asserts that the Director-General should have submitted her compensation claim for examination by a medical board pursuant to paragraph 25 of the aforementioned Annex II to the Staff Regulations.

The relevant provisions of this paragraph read as follows:

> "25. (a) In the event of a conflict of opinion on the medical aspects of the relationship between an illness [...] and the performance of official duties, the Director-General may refer the case for advice to a medical board composed of three duly qualified medical practitioners, one of whom shall

[*] Registry's translation.

> be chosen by the Director-General, one by the official, and the third by the two practitioners so chosen. [...]
>
> (b) A medical board composed as provided in subparagraph (a) shall also be consulted if the official concerned [...] so request[s] [...]"

Contrary to what the complainant appears to contend, it is not evident from subparagraph (a) of that paragraph that the Director-General was required to submit her case to a medical board. In that respect, the Tribunal considers that, contrary to the view expressed by the ILO in its submissions, the report of the Compensation Committee did indeed present the Organization with a conflict of opinion on the medical aspects of the causal relationship between the illness and the performance of official duties. However, it is clear from the wording of the subparagraph in question, which states that "the Director-General may refer the case for advice to a medical board", that it is optional for the Director-General to convene such a board, not mandatory. Moreover, it cannot be considered that, by refraining from applying this procedure in the present case, the Director-General committed an obvious error of judgement.

Although, pursuant to subparagraph (b), a medical board is automatically appointed if the staff member concerned so requests, it is clear that the complainant did not do so in the present case. In that respect, the complainant wrongly submits that the Compensation Committee should have informed her in the course of its work that a conflict of opinion existed over the medical aspects of the causal relationship so as to allow her to submit such a request. At that stage, that information was only relevant to the Committee's internal discussions and therefore did not need to be disclosed to the complainant – it being noted that the right of the staff member concerned to request that a medical board be convened is not restricted to this particular scenario and the complainant could have exercised it even without the information in question.

6. Continuing her criticisms of the Compensation Committee in her rejoinder, the complainant argues more fundamentally that "the Committee's procedures are [...] opaque and do not offer the safeguards

of transparency, impartiality and due process"[*] required of a body of this type. However, this line of argument, which goes beyond the question of compliance with the applicable rules and shifts the dispute towards a challenge to the rules themselves, will not be accepted. The Tribunal observes that the provisions governing the procedure before the Compensation Committee would undoubtedly benefit from greater formalisation and wider promotion among the staff, and it considers it incumbent to draw the ILO's attention to this point in this judgment. However, it should be recalled that, as the Tribunal stated in Judgment 1752, consideration 6, the Compensation Committee "is just an advisory body, not a court of law" and that the safeguards offered by the rules governing its workings should be assessed in the light of the requirements applicable to such a body. On the basis of the documents in the file, the Tribunal does not detect any substantive defects in those rules that would justify censuring them in whole or in part by upholding the challenge to their lawfulness.

7. The complainant submits that the impugned decision and the report of the Compensation Committee are tainted by an error of fact – that is to say, a material error within the meaning of the case law referred to in consideration 4 above – in that they mention "substantial use of aspirin" as a possible aetiological factor in her sudden deafness, whereas the Medical Adviser stated in his opinion that the complainant had been treated with "low-dose aspirin". However, that opinion specified that this was a "long term treatment". The Compensation Committee and the Director-General found that taking a low dose of aspirin over a long period of time constituted a "significant intake" of that substance in view of the cumulative doses absorbed. The Tribunal considers that, even if the loose phrasing used could be criticised as approximative from a scientific point of view, the statement reflected the general sense of the findings of the Medical Adviser, who noted in his opinion that "[s]ensorineural hearing loss may follow long periods of therapy with aspirin in pharmacological doses". The plea of an error of fact must therefore be dismissed.

[*] Registry's translation.

In her rejoinder, the complainant goes beyond the plea that she initially raised and attaches a "solemn declaration" in support of her statements. She disputes the very existence of this long-term treatment with aspirin, as well as the history of vascular disorders that the Medical Adviser also mentioned as a possible aetiological factor in the illness at issue. She states that she had taken aspirin for only six months and had stopped taking it several years before the onset of the illness. She also denies that she had been diagnosed with a transient ischaemic attack in the past, as indicated by the Medical Advisor in his opinion. However, as the Organization rightly observes, those assertions are contradicted by the information contained in the report on the complainant's medical check-up by the Office's Medical Service in September 2015, in which the part completed by the complainant herself, signed on 31 August 2015, states that, on that date, she was still on daily treatment with aspirin and that she had suffered a vascular accident of the "CVA[**]/transient ischaemic attack" type.

Moreover, the Tribunal notes that it is highly doubtful that a reconsideration of the existence of the various facts in question would, in any event, have had a decisive effect on the recognition of the complainant's sudden sensorineural hearing loss as service-incurred in the present case, given that the opinion of the Medical Adviser and the report of the Compensation Committee pointed out that this illness could also be caused by other factors including smoking, a habit which the complainant does not deny.

8. The complainant also submits that the Compensation Committee failed to take account of essential facts, since the Medical Adviser did not mention in his opinion, as she considers he ought to have done, that none of the many periodic medical check-ups carried out by the Medical Service since her recruitment had identified a change in her hearing. In her view, this was "relevant and essential information in examining [her] claim"[*], which should have been taken into account in assessing the causal link between the medical condition in question and her

[**] Cerebrovascular accident.

[*] Registry's translation.

adverse working environment at the time of its onset. However, the Tribunal is fully convinced by the explanation given on this point by the Medical Adviser, in his note of 5 May 2020 referred to above, to the effect that "given the nature of the diagnosed disease and the medical reports from the Ear, Nose and Throat (ENT) specialist, there [was] no question about the sudden character of the severe hearing loss experienced by the [complainant], so whether there was or not a previous sub-clinical hearing deficit is not relevant from the causality point of view". It follows that the Medical Adviser's failure to mention this information in his opinion cannot be regarded as having led to the omission of essential facts.

9. The complainant submits that the impugned decision is tainted by an error of law as regards the burden of proof which the Compensation Committee required her to discharge.

As is apparent from the arguments set out in the complaint on this point, the complainant does not seek to challenge the rules applied in this case concerning the burden of proof, but rather the standard of proof set for the illness at issue to be recognised as service-incurred. In her view, to grant her claim the Committee, insofar as it was not satisfied with the evidence she had produced before it and in particular the aforementioned medical certificates from her treating ENT specialist, required her to prove the causal link between that condition and her working conditions beyond reasonable doubt, and not according to the less demanding standard of the balance of probabilities.

Under the Tribunal's case law, the standard of proof applicable in recognising that an illness is service-incurred is indeed that of the balance of probabilities (see, for example, Judgments 3111, consideration 6, 1971, consideration 15, 1373, consideration 16, and 528, considerations 4 and 5). As that case law sometimes frames it in another manner, it is enough for there to be "a causal link in the legal sense, that is to say, some fairly definite connection" between the diagnosed condition and the alleged occupational origin for a condition to be accepted as service-incurred (see Judgments 3111, consideration 6, and 641, consideration 8).

However, the Tribunal observes that, contrary to what the complainant submits, it was indeed within this legal framework that the Compensation Committee and subsequently the Director-General determined whether there was a causal link between the complainant's working conditions and the onset of her sudden deafness. They did not require this link to be established conclusively, but, as is clear from the Committee's report and the grounds for the impugned decision, merely considered that the evidence adduced did not make it possible to regard the link as sufficiently probable for the illness in question to be recognised as service-incurred, taking into account the other factors that may have contributed to its onset. The plea of an error of law in respect of the applicable standard of proof is therefore unfounded. In fact, what the complainant is disputing by this plea is the soundness of the assessment made of the evidence in question. As stated above, that assessment, which is based on medical considerations, falls outside the Tribunal's power of review, except in the extreme case where a clearly mistaken conclusion has been drawn from the facts, which is certainly not the case here and which the complainant does not expressly argue.

10. In the complainant's view, the Compensation Committee's report is contradictory in that the majority recommended that the illness in question not be recognised as service-incurred although the Medical Adviser, whose conclusions it endorsed, had accepted in his opinion that "work-related stress experienced during the performance of duties may have had at least a triggering role in the development of the case's SNHL [sensorineural hearing loss]". However, under the Tribunal's case law, where an illness has several possible causes – which is by definition the case of such a hearing loss, according to the scientific literature cited by the Medical Adviser – and only one or some of those causes are related to the complainant's employment, there is no reason to recognise it as service-incurred unless those causes are shown to be the determining factor (see, in particular, Judgments 3111, considerations 3, 6 and 7, and 1752, consideration 9). In the present case, it is clear from the aforementioned note from the Medical Adviser of 5 May 2020 that the concept of "triggering role" to which he referred in his opinion in respect of work-related stress was not to be understood as alluding to a

factor that was necessarily preponderant among the various aetiological factors considered. The plea is therefore unfounded.

11. The complainant also contends that the Organization was not lawfully entitled to call into question the probative value of the medical certificates issued by her treating ENT specialist without a second medical examination. However, the case law of the Tribunal to which she refers in that respect concerns a situation where an organisation rejects a medical certificate without a further examination by a doctor. It does not preclude such certificates from being rejected as inconclusive insofar as they have a bearing on a finding of causality in a procedure aiming to establish whether an illness is service-incurred that requires the submission of an opinion by a medical adviser, such as the procedure at the Office. The complainant's submissions that the Medical Adviser was not an ear, nose and throat specialist and that he had not personally examined her – which would have been pointless in this case given the issues to be determined in the light of his assessment – do not alter that conclusion.

12. Ending her complaint with claims for compensation, the complainant submits that the ILO "failed to grant [her] adequate compensation"[*] for the moral injury suffered owing to the difficult conditions in which she had to work at the Office between March 2015 and June 2016. Noting in her complaint that, in the decision of 10 December 2019, after informing her that her psychiatric illness had been recognised as attributable to official duty, the Director-General had stated that he "express[ed] his regret for the inadequacy of the measures taken to remedy [her] professional situation at the time and the repercussions on [her] health"[*] that had resulted, she submits that the Director-General thereby acknowledged that the Organization had behaved negligently towards her and criticises him for not matching that regret with compensation for the injury caused by that negligence.

[*] Registry's translation.

However, the Tribunal observes that, under the compensation scheme applicable in the event of illness attributable to official duty established by Article 8.3 of the Staff Regulations, which is the sole legal basis for the complainant's compensation claim, the ILO incurs strict liability when such an illness is recognised but is not held negligent. While the award of compensation under this scheme does not rule out the possibility that the Organization may also be accused of negligence, the question of whether it is liable on that other basis is in principle a separate dispute (see, for example, Judgments 4222, consideration 15, 3946, consideration 17, and 3111, consideration 8). Consequently, the complainant is not in any event entitled, in the present case, to submit for the first time before the Tribunal claims based on the existence of such negligence.

13. Lastly, the complainant claims damages for the length and complexity of the procedures conducted in respect of her compensation claim, owing in particular to the unreasonable length of the initial examination of that claim and then the Director-General's withdrawal of his decision of 4 December 2018 and the referral of the case for reconsideration to a Compensation Committee with a different composition.

However, the Tribunal notes that the complainant has already been awarded compensation of 2,500 Swiss francs for the length of the first procedure in the decision of 19 July 2019 and that the second procedure was conducted within a period of some four months, which cannot be regarded as inordinate in view of the time required for the Committee to undertake a rigorous and thorough examination of the case. In the circumstances, the Tribunal considers that the complainant has not established that she has suffered under this head an injury warranting additional compensation, bearing in mind that, although she refers in particular to an exacerbation of her psychiatric illness owing to the conditions in which those procedures were conducted, pursuant to the impugned decision itself she has been receiving from the ILO the benefits to which she is entitled owing to the recognition that the condition is attributable to official duty.

14. It follows from the foregoing that the complaint must be dismissed in its entirety, without there being any need to order the disclosure to the complainant of the minutes of the meetings of the Compensation Committee, produced by the ILO for *in camera* review owing to their confidential nature, which the Tribunal did not take into account to render this judgment.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ