

D. W. d. W. (No. 2)

v.

WHO

137th Session

Judgment No. 4760

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms C. R. M. D. W. d. W. against the World Health Organization (WHO) on 25 June 2020, WHO's reply of 21 October 2020, the complainant's rejoinder of 2 December 2020, WHO's surrejoinder of 3 March 2021, the complainant's additional submissions of 9 August 2021 and WHO's final comments thereon of 25 October 2021;

Considering Articles II, paragraph 5, 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 failure to establish a medical board to examine the percentage of her permanent loss of function.

The complainant joined WHO in 2007 in Abuja, Nigeria. Following the terrorist attack against the United Nations premises in Abuja on 26 August 2011, she developed a Post Traumatic Stress Disorder (PTSD), which in December 2013 was recognised as service-incurred. Effective 2 May 2017, her appointment was terminated for health reasons and she was awarded a disability benefit under the United Nations Joint Staff Pension Fund (UNJSPF) rules.

By a letter of 17 August 2017, she was informed that further to the recommendation of the Advisory Committee on Compensation Claims (ACCC), the Director-General had decided to pay her a lump-sum compensation for permanent loss of function, evaluated at 10 per cent of the whole body and calculated at 31,994.60 United States dollars. On 30 September 2017, she wrote an email to the ACCC in which she indicated that under the rules governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of WHO (Annex 7.E to the Staff Rules), “permanent loss of [...] function” ought to be “assessed on the basis of medical evidence and in relation to loss of enjoyment of life”, and asked to be provided with the “medical evidence” that was used to evaluate the percentage of loss of function she had suffered. On 9 October 2017, she was provided with a copy of the “loss of function report” and, on 10 November 2017, with copies of the other medical reports used in the evaluation of her loss of function.

On 6 October 2017, she lodged a request for administrative review of the 17 August 2017 decision and requested, inter alia, that the Administration reconsider the percentage of her loss of function upwards after further medical review, and that it reimburse her for incurred legal fees. Further to being informed that she could request her case be examined by a medical board, she requested the establishment of a medical board on 17 November 2017 and, on 22 November, she sought information on the ACCC procedure related to her request. Her request was forwarded to the ACCC Secretary on 27 November 2017. By a memorandum of 8 December 2017, the Administration informed her that, as she had required the establishment of a medical board, the existing “administrative channels” related to the 17 August 2017 decision had not been exhausted prior to the submission of her request for review, as prescribed in Staff Rule 1225.1, and no administrative review could be undertaken until the Director-General had made a final decision following the Medical Board’s report and the ACCC’s recommendation. In December 2017, the complainant’s legal representative enquired on the process to contest the Director-General’s future final decision.

Meanwhile, on 24 November 2017, the complainant had indicated to the Administration that Ms M. would be representing her on the Medical Board. However, as Ms M. was not a medical doctor and, therefore, not eligible to be a member of the Medical Board, there were several email exchanges between the parties on this issue culminating in the nomination, in November 2018, of Dr C. as the complainant's representative on the Medical Board. By a memorandum of 14 March 2019, the ACCC Secretariat sought, and obtained, the Director-General's approval for the proposed composition of the Medical Board, with Dr B. participating as the member chosen by the Director-General and Dr C. as the complainant's chosen member. The ACCC Secretary relevantly informed the complainant's legal representative by an email of 10 May 2019, which further advised that the next step would be for Dr B. and Dr C. to agree on the third member. Attached to the email were the Medical Board's Terms of Reference (ToRs) for the complainant's comments.

On 29 May 2019, the complainant's legal representative replied requesting that the Medical Board's ToRs be amended to include the term "PTSD" and that a French translation of all documents (ToRs of the Medical Board, Dr B.'s "loss of function" report and the American Medical Association Guides to the Evaluation of Permanent Impairment) be provided to the members of the Medical Board. After further email exchanges, on 18 July 2019, the ACCC Secretary provided the complainant's legal representative with a French translation of the Medical Board's ToRs and Dr B.'s "loss of function" report and, on 16 September 2019, she provided her with the amended ToRs for the Medical Board. On 26 September 2019, the complainant's legal representative thanked the ACCC Secretary and undertook to communicate the name of the third Medical Board member as soon as an agreement had been reached.

In the meantime, on 20 May 2019, Dr B. had written to Dr C. introducing himself and inviting Dr C. to schedule a time at which to speak. Dr C. wrote back on 20 August 2019, indicating that he needed a French translation of all the documents related to the complainant's case. By an email of 6 September 2019, the ACCC Secretary provided

Dr C. with a French translation of the Medical Board's ToRs and Dr B.'s "loss of function" report, and informed Dr C. that the next step was for him to agree with Dr B. on the nomination of the third member. Dr B. wrote again to Dr C. on 8 October 2019.

On 10 October 2019, the complainant's legal representative requested additional amendments to the Medical Board's ToRs, including the possibility for the Board to also deliberate in French and to ensure Ms M.'s presence during its deliberations. The ACCC Secretary replied on 23 October 2019, reiterating the earlier position that Ms M. could not participate in the Medical Board meetings but that she might be invited by the Board to provide her views. The ACCC Secretary undertook to review and discuss internally the remaining points.

Under cover of an email of 26 March 2020, sent to Ms L., Director of Human Resources and Talent Management, the complainant's legal representative addressed to the Director-General a letter, dated 25 March 2020, in which she complained about the lack of "any real urgency from the side of the ACCC to move this process forward" and requested that he take a decision regarding the establishment of a Medical Board that would decide "what grade (percentage) of the [complainant's] permanent loss of function for [...] PTSD [was] to be applied for the whole body".

On 25 June 2020, the complainant filed the present complaint with the Tribunal under Article VII, paragraph 3, of the Tribunal's Statute, impugning the Director-General's "tacit decision [...] to deny the establishment of a medical board within a reasonable time [...] following her formal demand sent in an email on 26 March 2020 with a letter attached dated 25 March 2020".

After the filing of the present complaint, the Medical Board convened to examine the complainant's case and recommended that the Director-General recognise that the complainant's percentage of permanent loss of function be increased from 10 to 15 per cent. On 25 October 2021, the ACCC Secretary informed the complainant of the Director-General's 22 October 2021 decision to accept the recommendation of the Medical Board and the ACCC to award the complainant additional compensation in the amount of 15,997.30 United States dollars. WHO informed the

Tribunal of these circumstances in its final comments on the complainant's further written submissions.

The complainant asks the Tribunal to "condemn" WHO for its failure to act upon her claim to set a date for the establishment of a medical board to examine "what grade (percentage) of [her] permanent loss of function for [...] PTSD is to be applied for the whole body", thereby undermining her interests in being evaluated in a timely manner. She also asks the Tribunal to "condemn" WHO for its failure to handle the whole process to establish a medical board in a timely manner, thereby obstructing her right to appeal. She claims compensation for those failures in the amount of 120,000 United States dollars, and she also claims compensation for the stress she endured while waiting for the Medical Board to be established and the impact this had on her well-being, estimated at 100,000 dollars. She requests that the Tribunal "condemn" WHO to reimburse her all legal fees, upon the presentation of invoices.

WHO submits that, in addition to being irreceivable and unfounded, the complaint has become moot, as the complainant's request for the establishment of a medical board to re-evaluate upward her permanent loss of function has been met. It therefore asks the Tribunal to dismiss the complaint and deny all of the complainant's claims for relief.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above. The Tribunal will firstly address the receivability issue raised by WHO.

2. Pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations". Pursuant to Article VII, paragraph 3, of the Tribunal's Statute, "[w]here 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 her or his complaint shall be receivable in the same manner as a complaint against a final decision”.

Under the Tribunal’s settled case law, the provisions of Article VII, paragraph 3, must be read in the light of paragraph 1 of that Article and are not applicable where the official concerned can use internal remedies, in which case these must be exhausted, as required under paragraph 1, before a complaint may be filed with the Tribunal (see Judgments 4517, consideration 4, and 2631, considerations 3 to 5).

According to the WHO Staff Regulations and Staff Rules applicable to the instant case:

“1225.2 If a staff member has submitted a written request relating to the terms of his appointment, the request shall be deemed to have been rejected if no definitive reply is received within:

1225.2.1 sixty (60) calendar days for staff assigned to headquarters and to regional offices;

1225.2.2 ninety (90) calendar days for staff assigned to other duty stations.

1225.3 A request for administrative review must be filed no later than sixty (60) calendar days from the date on which the staff member received written notification of the contested final administrative decision or within sixty (60) calendar days of a deemed rejection under Staff Rule 1225.2.

1225.4 The final decision on a request for administrative review (the Administrative Review Decision) shall be communicated in writing to the staff member within sixty (60) calendar days of receipt of the complete request for administrative review. The deadline may be extended, including to allow for informal resolution.

1225.5 If a staff member has filed a request for administrative review, the request shall be deemed to have been rejected if no final decision is received within the sixty (60) calendar day deadline or the extended deadline referred to in Staff Rule 1225.4.

[...]

1230.1 Subject to Staff Rule 1230.5, a staff member may appeal before the Global Board of Appeal (the Board) against an Administrative Review Decision or against a deemed rejection under Staff Rule 1225.5 or against a final administrative decision not subject to review under Staff Rule 1225.

[...]

1230.5 The following provisions shall govern the conditions of appeal against an Administrative Review Decision, a deemed rejection under Staff Rule 1225.5 or against a final administrative decision not subject to review under Staff Rule 1225.

1230.5.1 A staff member wishing to appeal must file with the Board, within ninety (90) calendar days after receipt of an Administrative Review Decision, within ninety (90) calendar days of the expiration of the deadline or extended deadline referred to in Staff Rule 1225.5, or within ninety (90) calendar days after receipt of a final administrative decision that is not subject to review under Staff Rule 1225, a complete statement of appeal specifying the decision against which the appeal is made and stating the facts of the case and the pleas. The Board shall open its proceedings upon receipt of the appellant's complete statement of appeal.

[...]

1230.6.1 The Director-General shall make the final decision on appeals. [...]

[...]

1240.2 A complaint may be made to the Tribunal when the decision contested is a final decision further to Staff Rule 1230.6.1 and the person concerned has exhausted such other means of challenging it as are open to him under these Rules."

3. The Tribunal will assess whether the impugned decision is a challengeable decision within the meaning of the Statute of the Tribunal, based on the Staff Rules applicable to the case.

Under cover of an email of 26 March 2020, sent to Ms L., Director of Human Resources and Talent Management, the complainant's legal representative addressed to the Director-General a letter, dated 25 March 2020, in which:

- (i) she complained about the lack of "any real urgency from the side of the ACCC to move this process forward"; and
- (ii) requested that the Director-General take a decision regarding the establishment of a medical board in order to decide "what grade (percentage) of the [complainant's] permanent loss of function for [...] PTSD [was] to be applied for the whole body".

On 25 June 2020, the complainant filed the present complaint with the Tribunal impugning the Director-General's "tacit decision [...] to deny the establishment of a medical board within a reasonable time [...] following her formal demand sent in an email on 26 March 2020 with a letter attached dated 25 March 2020".

It is not necessary, in any event, to establish whether the complainant's request was properly addressed to the officer competent to decide on it (which WHO denies). Nor is it necessary to assess whether the impugned decision was only an internal step in the process started by the complainant's 6 October 2017 request for administrative review, or whether WHO took any action to deal with the complainant's request by forwarding it to the body in charge of the appointment of the third member of the Medical Board, an action which, as WHO further contends, forestalled an implied rejection. There are, indeed, other conclusive reasons to support the conclusion that the complainant failed to exhaust all the available internal means of redress and therefore her complaint is not receivable in the same manner as a complaint against a final decision, within the meaning of Article VII, paragraphs 1 and 3, of the Statute of the Tribunal.

Irrespective of whether the 26 March 2020 request should be identified as having been made under Staff Rule 1225.2 (a written request) or under Staff Rule 1225.3 (a request for administrative review), the impugned implied decision is not a final decision.

If the complainant's 26 March 2020 request was to be construed as a new request (to establish a medical board), made under Staff Rule 1225.2, the complainant should have taken the following steps:

- (i) after the implied rejection of her claim to establish a medical board, she should have lodged an internal request for administrative review under Rule 1225.3; and
- (ii) she should have challenged the decision taken on her request for review before the internal appeal body.

If the complainant's 26 March 2020 request was meant to urge WHO to take a decision on her former request for administrative review, lodged on 6 October 2017 against the 17 August 2017 decision,

the complainant should have lodged an internal appeal, pursuant to Staff Rules 1230.1 and 1230.5, after the failure of WHO to adopt an express decision within 60 days (a failure that, by operation of Staff Rule 1225.5, is tantamount to a rejection of the request).

In light of the foregoing, the complainant has failed to follow the proper internal procedures to exhaust the internal means of redress. The complaint is therefore irreceivable.

4. Moreover, to the extent that it challenges WHO's failure to set up a medical board to recommend an upward re-evaluation of the complainant's permanent loss of function and to award her the respective financial benefit, the complaint is also moot as, in the meantime, WHO has adopted an express decision on the case, namely the 22 October 2021 decision, which recognised the complainant's permanent loss of function in the percentage of 15 per cent and awarded her an additional compensation in the amount of 15,997.30 United States dollars. Inasmuch as the complaint is irreceivable, the issue of delay in the process would have arisen for consideration only if the complainant raised it in a complaint impugning the 22 October 2021 decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2023, Mr Patrick Frydman, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER