SIXTY-THIRD SESSION

In re MUIGA

(Interlocutory order)

Judgment 875

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michael Ikua Muiga against the World Health Organization (WHO) on 22 August 1986 and corrected on 19 and 23 September, the WHO's reply of 27 November, the complainant's rejoinder of 30 January 1987 and the WHO's surrejoinder of 27 March 1987;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rules 1030 and 1040 and WHO Manual provision II.7, Annex C (Extract from the group personal accident and illness insurance policy for staff members appointed for one year or more) and Annex E (Rules governing Compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of the WHO);

Considering the medical records supplied by the Organization under cover of a letter dated 2 June 1987;

Having examined the written evidence;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Kenyan born in 1946 and ordinarily resident in Florida, joined the WHO on 22 June 1980 as a sanitary engineer at grade P.4. He had a two-year appointment and was assigned to the Regional Office for Africa in Brazzaville. He was transferred to Addis Ababa and took up duty there as a field engineer in July 1981.

On Saturday, 3 April 1982 he was in his office on an upper storey of a government department building. Finding himself locked in and having failed to get help, he clambered through a window and down a drainpipe. He fell some 40 feet to a concrete pavement, suffering multiple injuries. The WHO accepted in October 1982 that the accident was attributable to the performance of his official duties. He was put in hospital at once in Addis Ababa but his condition grew worse and there was difficulty in treating him. There was an exchange of telexes with the United Nations Chief Medical Officer in Addis Ababa. The Joint Medical Service, the medical unit of the WHO and other organisations in Geneva, authorised his removal to Nairobi. He flew there on 6 August 1982 and underwent further hospital treatment.

His initial appointment, which had ended on 21 June 1982, had been extended to 30 September. But the report on his work in 1981-82 was poor and a personnel officer in the Regional Office wrote to him on 23 July 1982 - the letter reached him in Nairobi in mid-August - to warn that he would get no extension beyond 31 October and his appointment would terminate under WHO Staff Rule 1040 ("Completion of temporary appointment"). He protested and, as it turned out, he was instead put on "special leave with insurance cover" from 4 October to 30 November 1982 and then to 30 April 1983. On 9 May 1983 the personnel officer wrote from Brazzaville to say that after examining reports by the doctors who had seen him the Director of the Joint Medical Service had declared him fit for full-time sedentary work from 1 April, but that there was no suitable post and he was given three months' notice under Rule 1040; from 1 April to 9 May 1983 he had been on special leave with pay, and his appointment would end on 9 August 1983. On 25 May the complainant wrote to the Regional Director and to headquarters in Geneva pointing out that he was gravely and permanently disabled because of the service-incurred accident and asking for an office job. In a letter of 8 August to Geneva he asked for termination, not under Rule 1040, but under 1030 ("Termaination for reasons of health") and applied for a disability benefit. His appointment ended on 9 August. The Chief of Personnel wrote to him in Nairobi on 20 September to say that he must appeal against the termination to the Regional Board of Appeal, and he did so on 10 October 1983. It appears that the Regional Board adjourned the case until the outcome of his application for a disability benefit, a matter dealt with at headquarters, was known. Since leaving the Organization he has been unemployed.

Having returned to live in Florida, he went to Geneva in January 1984 and was examined by Dr. Demé, the

Director of the Joint Medical Service, who confirmed that he was fit for office work. The Director sent him to an orthopaedic surgeon in Geneva, Dr. Kobel, who examined him on 9 January 1984 and found the loss of function of his left foot to be 20 per cent. He returned to Florida, and it was there that he got word by a telegram of 13 June 1984 and a letter of 26 June from Brazzaville that the Advisory Committee on Compensation Claims, to which his case had been referred, had put the loss of function of the whole body at 8 per cent on the strength of the orthopaedist's opinion and he was to get lump-sum compensation of 9,716 United States dollars. By a telegram of 27 June he told Geneva he wanted to appeal against that decision as well. In a letter of 24 July 1984 the Secretary to the Advisory Committee on Compensation Claims cited paragraph 28(a) of Annex E to WHO Manual provision II.7 (the compensation rules), which said that "in the event of a conflict of opinion on the medical aspects" of a case the Director-General might consult a medical board. The Secretary informed him that a board would be set up, and asked him to name one of the three members.

In May 1985 the WHO Staff Pension Committee recommended that he should receive a disability benefit under Article 33 of the Regulations of the United Nations Joint Staff Pension Fund. But the Secretary to the Pension Board in New York remitted the case for further medical inquiry and the WHO asked him to undergo examination while in Geneva for the meeting of the medical board. A change in his nominee having caused delay, it was not until 14 November 1985 that the board met. It found that the complainant's condition had grown much worse since January 1984 and it so reported to the Advisory Committee on Compensation Claims in February 1986. The Advisory Committee made a recommendation to the Director-General and by a letter of 26 May 1986, which is the decision impugned, its secretary informed the complainant that the Director-General had accepted that recommendation: the loss of function was assessed at 20 per cent and he was awarded $24,291.

Compensation for service-incurred accidents is governed by the compensation rules in Annex E to Manual provision II.7, and a schedule attached thereto prescribes lump-sum compensation corresponding to the assessed percentage of loss of function and determined as the same percentage of twice the yearly pensionable remuneration of a staff member at grade P.4, step 5. Annex C to II.7 is an excerpt from the WHO's staff insurance policy with a London insurance company and also prescribes lump-sum compensation for loss of function, but the percentages are different and apply to a different figure, namely thrice the staff member's yearly pay. Manual provision II.7.365 reads: "If the total amount of compensation payable under the compensation rules for a service-incurred condition, including the capital value of periodic benefits, is smaller than the total amount of benefits which would be payable to the staff member ... under the provisions of the Organization's commercial accident and insurance provisions ... had the condition not been admissible as a claim for compensation under the rules, the difference between the two totals is paid ...". In the complainant's case the figure of 20 per cent loss of function was applied to thrice his yearly pay, which had been $40,485, to yield the figure of $24,291 given above.

The matter of the disability benefit under the Pension Fund Regulations is pending.

B. The complainant submits that his complaint is receivable under Articles II(5) and VII of the Statute of the Tribunal.

He objects to the assessment of loss of function at 20 per cent.

(1) According to Annex C the total and permanent loss of a foot is reckoned as 50 per cent loss of function, and besides his other ailments and injuries he has lost the use of his left foot. The figure of 20 per cent does not come from Annex C, though the base figure of thrice yearly pay does, but from some scale that is not in the staff rules. Annex E gives 28 per cent. He is entitled to at least half (3 x $40,485), or $60,728, and even that overlooks the other prejudice he has suffered because of his service with the WHO.

(2) He sets out the details of that prejudice under eight heads. In particular, his injuries, some of which were not diagnosed promptly, were not properly treated in Addis Ababa. The matter of his termination was mishandled. There was delay in letting him go to Nairobi. He was caused a year of uncertainty and anxiety about his employment and future. For years he has been in almost constant pain. He is 100 per cent disabled for gainful employment - no employer would risk taking him on anyway - and he therefore believes he is entitled to the 100 per cent compensation payable under Annex C, result B, paragraph 6, for "total and permanent disablement from following or giving attention to normal occupation or business": 3 x $40,485, or $121,456.

(3) The award of 100 per cent under that paragraph would also be warranted by the sum of his several disabilities: 50 per cent for the loss of the use of his left foot: 25 per cent for back injury which makes it too painful for him to

sit or stand for long; and 25 per cent for the injury caused to his powers of concentration by years of pain and feelings of frustration and injustice.

(4) It is important that the loss of function be put higher that 20 per cent since, as the secretary informed the complainant's counsel by a letter of 18 July 1986, the Advisory Committee on Compensation Claims will apparently not consider awarding him an invalidity pension under Annex E - a matter that is not before the Tribunal - unless the loss of function is much greater than 20 per cent.

The complainant claims an award of $121,456 as compensation under Annex C, result B, paragraph 6, plus interest at 10 per cent a year as from 9 August 1983, and of $5,000 towards his costs.

C. In its reply the WHO gives its own version of the facts.

(1) It submits that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal insofar as it may be taken as a claim to compensation for the effects on his health of alleged ill-treatment or negligence unconnected with his accident. He has failed to exhaust the internal means of redress because the alleged mishandling of his case never formed the subject of an internal claim.

(2) As to the merits the essential issue is a medical one: whether the Director-General was right to decide that the accident caused the complainant 20 per cent loss of function. It is therefore immaterial whether he was the victim of mismanagement, whether he got inadequate treatment of his injuries, whether he acted unwisely in leaving his office by a window or whether his allegations about his assignments and termination are warranted.

(3) What he objects to is a finding of fact made by a method followed in such cases by United Nations agencies and probably elsewhere. He must therefore either challenge the application of the method or explain why the method is inappropriate. Instead of just making his own assessment of the loss of function he must show that the Director-General did not take account of the medical board's report or that the board was wrong. His arguments are unscientific: he simply contradicts the medical findings or quotes excerpts from doctors' opinions out of context and to suit his own case. Many of the grievances he lists have nothing to do with the accident and cannot be taken into account now. Besides, he has failed to adduce medical evidence to show that any of them had a lasting effect on his health.

(4) The reason why the board put the loss of function at only 20 per cent - whereas the compensation rules prescribe 28 per cent for the loss of the use of a foot - was that he had not suffered total loss of the use of his left foot: his ankle had set at an angle such that he could still use the foot for support.

(5) As to his claim to 25 per cent for back injury, the medical board's report says nothing of any such injury attributable to the accident. A medical report dated 8 March 1984 submitted to the Advisory Committee in 1984 by the Joint Medical Service found no loss of function in the spine. Nor is there any basis for the claim to 25 per cent loss of function for alleged loss of powers of concentration.

(6) The complainant misunderstands the connection between Annexes C and E. As II.7.365 makes plain, benefits under C - the insurance policy - are payable to the staff member only if he is not entitled to compensation under E - the compensation rules - and that is a right he buys with his own one-third of the insurance premiums. The other two-thirds are paid by the WHO and benefits are payable to the WHO, which if it finds it has more than it needs to meet its liability to the staff member will make over the balance to him: that is what 365 means. The complainant may not invoke the insurance policy, at least until his entitlements under E are settled, since any balance that might be payable under 365 is unknown. In any event, adds the Organization, the amount due to him on a strict construction of the terms of the insurance policy, which it discusses, would be less than the amount due under E.

D. In his rejoinder the complainant goes over in detail the WHO's version of the facts and points out what he sees as errors of fact or misrepresentations.

He contends that it is relevant that his service-incurred injuries were not properly treated while he was in the Organization's employ and that the administrative decisions made things worse: the WHO's acts and omissions must be taken into account if they aggravated the loss of function. The construction he puts on the facts is, in his submission, not tendentious but supported by many items of evidence. Neither he nor his counsel was given any inkling of a scientific method or of medical criteria which the medical board followed to assess loss of function and which he could challenge.

His left foot cannot serve as support: his orthopaedic surgeon in Florida certified in 1984 that he was "unable to put full weight on the left leg because of pain". Moreover, the board found that "the function of the joint concerned is nil". He refers to evidence of his other injuries.

The WHO's interpretation of II.7.365 is inconsistent because it suggests that 365 applies only if the claim will not succeed under E, whereas it has applied 365 to the complainant's case, which does come under E. The interpretation is also wrong since the hypothesis in 365 is that there is a total amount payable under E but it is less than what would have been due under C had E not applied. Since the WHO construes II.7.365 to mean that a staff member may get the compensation payable under Annex C if it is greater than what would be payable under E, the complainant has a right under 365 to compensation under C.

He presses his claims.

E. In its surrejoinder the WHO seeks to refute the arguments in the rejoinder. It submits that the complainant has not addressed its objections to the receivability of his allegations of mishandling of his case; that those allegations are irrelevant; and that they are in any event unfounded. It reaffirms that in the case of liability under its compensation rules the insurance policy is a matter between itself and the insurance company: it recognises no right of the staff member to rely on the policy, even if it hands over the difference to him where the money it actually gets from the company more than covers its liability to him.

As to the nature of his injuries, there is a great difference between amputation of a foot and ankylosis at a functional angle, and that was why the board put the loss of function at 20 per cent. The medical file does not bear out the existence of any permanent injury to the back, and the board members would certainly have mentioned it had there been any evidence of it.

F. By a letter of 18 May 1987 the Registrar asked the Organization, on the Tribunal's instructions, to disclose the full medical records on the complainant's case, and the Organization submitted further papers on 2 June 1987.

CONSIDERATIONS:1. Having made a claim in relation to the injuries suffered in the accident which took place on 3 April 1982 the complainant was examined in Geneva by Dr. Kobel, an orthopaedic surgeon, on 9 January 1984. Dr. Kobel discounted his complaint of back pain, concluded that the permanent injury related solely to the left leg and estimated it at 20 per cent disablement. This figure was applied by Dr. Demé, the Director of the Joint Medical Service, in his calculation for the Advisory Committee on Compensation Claims. In his medical report for the Advisory Committee dated 8 March 1984 he put the loss of function at 8 per cent of the whole body, a figure that was adopted by the Committee. The complainant was informed by a letter dated 26 June 1984 in the following terms: "The Advisory Committee on Compensation Claims considered your case and, according to the medical adviser's report, loss of function has been assessed at 8% of the whole body".

2. He replied by a letter dated 21 July 1984 giving particulars of his injuries:

"As a result of service incurred injuries of 3 April 1982 while on duty and in the services of the WHO I have developed severe chronic degenerative joints diseases, arthritis, disk degeneration of lumbar spine, chronic back, legs and neck which have been reported by doctors in their reports. I will have to suffer and receive medical treatment for the rest of my life. I am totally disabled for any kind of gainful employment and with loss of income since August 1983.

In view of the above, I have suffered severe permanent loss of functions, deteriorating medical conditions, continuing invalidity and loss of income, still medical treatment and operation is to be performed, I reject the decision contained on your letter dated 26 June 1984."

3. By a letter dated 24 July 1984 the Secretary to the Advisory Committee noted the complainant's intention to appeal against the decision to assess his loss of function at 8 per cent of the whole body; drew attention to paragraph 28(a) of WHO Manual II.7; and invited him to name a medical practitioner to represent him on the medical board.

4. The board was constituted and ultimately met in November 1985. It was given a summary by Dr. Demé and required to answer the following questions:

"Is the loss of function for the lower limb, estimated as 20% on 9 January 1984 following the [American Medical Association's] Guide, which corresponds to a global figure of 8% reported to the whole man, correctly estimated? The figure must be confirmed or quashed; in case of the latter, at what percentage should the figure be fixed?"

The board examined the complainant and reported in February 1986. It answered the question in the following terms:

"The figure of 8% does not correspond to the actual reality. The situation has become singularly worse since evaluation in January 1984 and the function of the joint concerned is nil, which corresponds under the AMA's guides to a loss of function of 20% reported to the whole man."

5. It can be seen from this that, even though what was at issue was the full disability which the complainant had suffered as a result of the accident, the board was limited to consideration only of the complainant's foot.

6. By the letter of 26 May 1986 the Secretary to the Advisory Committee informed the complainant that it had considered the board's report and that the Director-General had accepted the board's recommendation. The letter stated that the total loss of function of the whole body was now evaluated at 20 per cent, "the maximum amount for the loss of a foot". That is the decision which is impugned.

7. The Director-General's decision is an acceptance of the board's report. This report does not deal with all the issues he had to decide: he took into account only the foot injury, whereas the complainant was alleging several injuries.

8. The information available does not enable the Tribunal to assess whether the accident of 3 April 1982 resulted in all the permanent injuries now suffered by the complainant or only in the permanent injury to his left foot. In these circumstances an examination should be carried out by a medical expert whose terms of reference are set out below.

9. Before the medical examination the parties may each submit observations which will be forwarded to the expert.

10. The Tribunal postpones consideration of the other matters raised in the complaint.

DECISION:

For the above reasons,

1. A clinical and psychological examination shall be carried out by one expert, to be appointed by order of the President of the Tribunal. He shall:

(a) determine the nature and extent of the disorders, physical or psychological, from which the complainant is suffering;

(b) determine the degree of loss of function of the whole body;

(c) determine the extent (expressed as a percentage) to which each disorder is attributable, if at all, wholly or partly to the accident;

(d) if, in the opinion of the expert, a disorder is not wholly or partly attributable to the accident, state so far as possible the other causative factors.

2. The expert shall draw up his report after consulting the medical dossier of the case and the comments thereon by both parties and after examining the complainant in consultation with any specialist or specialists of his choice whose assistance he deems necessary. He may if he thinks fit engage the services of an interpreter.

3. The Organization shall pay the costs of the clinical examination and the fees of the expert and of any specialists he may deem necessary. The Organization shall also pay the complainant's expenses, to be approved by the President of the Tribunal failing agreement between the parties, for submitting himself for the examination.

4. The President of the Tribunal shall approve the amount of the fees.

5. The expert shall report not more than three months from the date on which he receives the medical records and the further briefs submitted by the parties.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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