

**SEVENTY-FIFTH SESSION**

***In re* FAHMY (No. 2)**

**Judgment 1284**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Yehia Fahmy against the United Nations Industrial Development Organization (UNIDO) on 13 March 1992 and corrected on 29 June, UNIDO's reply of 17 September, the complainant's rejoinder of 23 December 1992, UNIDO's surrejoinder of 22 March 1993, the complainant's further submissions of 20 April and the Organization's comments thereon of 17 May 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 12, 16 and 17 of Appendix D to UNIDO'S Staff Rules ("Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties");

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. Some of the relevant facts appear under A in Judgment 993 of 23 January 1990 on Mr. Fahmy's first complaint.

This case is prompted by UNIDO's refusal to acknowledge that the illness the complainant is suffering from is service-incurred and linked to mistreatment by his supervisor in his last year of service.

By a letter of 7 January 1991 the Secretary of the Advisory Board on Compensation Claims informed the complainant of the Director-General's decision of 17 December 1990 not to grant him compensation for illness attributable to the performance of official duties. He wrote to the Director-General on 5 February 1991 asking him to reconsider his decision of 17 December 1990 and have the Advisory Board take the case up again and put to a medical board the full records, including the latest certificates from the doctors.

In a letter of 25 March 1991 sent to his address in Cairo the Chief of the Personnel Administration Section told him that his request had been refused. The complainant says that he got that letter only at the end of 1991, when the Secretary of the Joint Appeals Board sent him a copy under cover of a letter of 20 December.

Believing that his letter of 5 February 1991 had gone unanswered, he lodged an appeal with the Joint Appeals Board on 15 June 1991. The Secretary of the Board wrote on 17 December 1991 acknowledging receipt of the appeal and apologising for the delay and wrote again on 20 December saying that the Organization considered the issues to be already disposed of by the appeal bodies, as the letter of 25 March 1991 had stated, and to call for no further review, the internal remedies being exhausted. It is the letter of 25 March 1991 from the Chief of the Personnel Administration Section that is now impugned.

B. The complainant contends that the Organization clearly drew wrong conclusions from the evidence. He describes in detail the conditions in which he had to work in his last year and the harassment by his supervisor. In early 1987 he complained about it to the Director of his Division, to the Deputy Director-General in charge of Administration and to the Personnel Division, but to no avail. Because of an angry scene with his supervisor on 16 March 1987 he had a heart attack and had to be rushed to hospital in Vienna. His doctors' reports show beyond doubt that his ailments were due to stress at work. So it is hard to see why the UNIDO bodies which examined his case found no causal link.

Though the procedures were properly observed neither the Advisory Board nor the Medical Board had all the relevant medical and administrative evidence. He told the Advisory Board in a letter of 29 October 1988 that he had all the hospital and doctors' reports but he was never asked to produce them. The Organization never made an inquiry into his supervisor's behaviour and, on the pretext that the Medical Board had already met, it would not let

him name another doctor, better acquainted with his case history, to represent him on the Board.

The Organization's prevarication caused him unnecessary and undue injury: nearly four years went by between his first request for an inquiry and the Director-General's final decision. He pleads material and moral injury: his illness disables him for any kind of work and he runs up heavy medical costs; the Organization's refusal to acknowledge that his illness is service-incurred denies him compensation under Article 17 of Appendix D to the Staff Rules; it is charging him in full the fees of the doctor who represented him and half of the fees of the third doctor on the Medical Board; and its refusal to extend his contract until he reached the age of 65, as it usually does for officials in his category, has reduced his retirement pension.

He asks the Tribunal:

- (1) to order the Organization to disclose the Medical Board's report;
- (2) to quash the Director-General's decision of 25 March 1991;
- (3) to rule that his illness is attributable to the performance of official duties and to order the Organization to pay him compensation under Article 11.1 of Appendix D to the Staff Rules;
- (4) to order the Organization to pay him salary up to the age of 65;
- (5) to have his pension rights recalculated accordingly;

and, subsidiarily,

(6) should the Tribunal hold that it is not competent to determine whether his illness is attributable to the performance of official duties, to order the Organization to investigate the conditions in which he was working from August 1986 onwards and to resume the procedure prescribed in Articles 16 and 17 of Appendix D;

and in any event,

- (7) to order the Organization to pay him damages for moral injury;
- (8) to order it to repay the costs of putting his case to the Medical Board, amounting to 8,580 Austrian schillings;
- (9) to award him 45,000 French francs in costs.

C. With its reply the Organization produces the report of the Medical Board, the only body that in its view is competent to rule on the medical aspects of the case. It denies drawing wrong conclusions: on the Medical Board's advice the Advisory Board recommended that the Director-General reject the complainant's request because his illness could not be attributed to the performance of official duties.

Besides his file in the Medical Service the Medical Board and Advisory Board had 17 reports from outside doctors and hospitals and so were quite well enough informed to give an opinion. The complainant sought leave on 19 November 1990 to name another doctor to represent him on the Medical Board on the grounds that after a year and a half his former representative was not familiar enough with the latest state of his health; but the Board had by then disposed of his case, at meetings of 12 and 31 January 1990.

UNIDO rejects the allegation that it never investigated the complainant's grievance that his supervisor's behaviour was putting him under stress. The Medical Board's report attributed 15 per cent of the deterioration in the state of his health to stress at work. Several letters, including the Deputy Director-General's one of 29 November 1988, assured him that his grievance had been looked into.

As for the delay in settling the case, the Organization points out that the procedure in Appendix D of the Staff Rules began on 29 October 1988. The Advisory Board submitted its recommendation on 19 April 1989, the Deputy Director-General approved it on 12 June and the complainant was informed of the decision on 19 June. There was nothing unusual about those lapses of time. On 12 July 1989 the complainant submitted his appeal under Article 17. The Medical Board met on 12 and 31 January 1990. The Organization admits to regrettable delay until the Advisory Board's last meeting, on 12 October 1990. But the difficulty was that the Board's members are the

Director-General's and the participants' representatives on the UNIDO Staff Pension Committee and are often on mission or stationed away from headquarters. The delay was not due to any reluctance on the Organization's part. After all, out of considerateness for the complainant it agreed to examine his first request of 29 October 1988 despite the time bar in Article 12 of Appendix D, which stipulates that "claims for compensation ... shall be submitted within four months of ... onset of the illness".

The Organization denies causing him material or moral injury, the Director-General's decision being lawful.

Lastly, in accordance with Article 17(d) of Appendix D the complainant must pay the medical fees and incidental expenses because the original decision was upheld.

D. In his rejoinder the complainant submits that the Medical Board's report of 2 February 1990 shows procedural flaws and he puts forward a new plea. The Board was made up of the UNIDO's medical officer, Dr. Reichmann, his own doctor, Dr. Fuchs, and a third doctor, Dr. Jahn, chosen by the other two in accordance with Article 17(b) of Appendix D. He points out that the specialist in occupational medicine, who drafted the report, never examined him and that Dr. Edward, who signed it as the Organization's medical officer, was not a member of the Board. Someone who did not take part in the Board's deliberations could not possibly sign in full knowledge of the facts.

Furthermore, the report is riddled with errors: contrary to the Board's assertion, no-one in the complainant's family has ever suffered from heart trouble or high blood pressure, and nor had he until 1986-87. All the doctors who examined him thereafter attributed his ailments to stress, as their reports show. It is not true that after he retired and left his former place of work his health improved and he did office work until the end of his sick leave; he remained unfit for work right up to the end of his sick leave, which coincided with the date of retirement. Since the incident in March 1987 his health has become so poor that he cannot work at all and has had to undergo a third operation.

He fails to see how the Medical Board can have concluded that 15 per cent of the deterioration in his health was due to stress at work when it had no information on his working environment.

In short it drew blatantly wrong conclusions from the evidence, and they afforded the basis for the Advisory Board's recommendation and the Director-General's decision.

Besides, the Medical Board overlooked essential facts: when it met it did not have his medical certificates for the period from January 1988 to January 1990; yet it made out that he was so much better that he could go back to office work.

UNIDO never investigated his working conditions or his supervisor's attitude. Not until 29 November 1988 did the Deputy Director-General answer his memorandum of March 1987 asking for such investigation. The Organization produces no written evidence of any investigation. And, oddly enough, the Medical Board's report does not even mention that it was his meeting of 16 March 1987 with his supervisor that provoked the heart attack.

On the issue of unnecessary or undue injury the Organization's explanations for delay are unconvincing. The member of the Advisory Board who was stationed in the field visited headquarters regularly in 1990. Besides, the Board's members all have deputies.

The treatment of him and his poor health since 1987 constitute serious injury that warrants compensation. He increases to 51,000 French francs the amount he claims in costs.

E. The Organization points out in its surrejoinder that it is for the Medical Board to examine the evidence and determine whether or not further medical examinations are necessary. The reason why Dr. Edward signed the report on behalf of Dr. Reichmann, UNIDO's former medical officer, is that Dr. Reichmann had already left the Organization and Dr. Edward had replaced him. Dr. Edward did join in the Board's deliberations at its last meeting on 31 January 1990; in a memorandum of 12 March 1993 to UNIDO's legal adviser he answered questions put to him about the complainant's health.

The Medical Board did know about the state of the complainant's health both before and after 1986; it was aware that he had suffered a myocardial infarction in 1975 when on mission in Ethiopia. He may not agree with its conclusions but they cannot be challenged. The Medical Board's statement that he was well enough to do office work was a general one and obviously referred to the period following his sick leave.

The Organization does not question his poor health, but what Article 17 of Appendix D to the Staff Rules provides for is an appeals procedure and its purpose in this case is review of a decision on whether the illness is attributable to the performance of official duties in 1987. There is no question of going into the case all over again on the strength of new evidence.

The Organization did make an investigation into the supervisor's behaviour and the Medical Board took due account in its report of the stress at work.

As for the delay in the procedure, it is difficult for deputy members too to attend the Advisory Board's meetings and the complainant may not plead unnecessary or undue injury on that account.

F. In a further brief the complainant points to inaccuracies in the memorandum of 12 March 1993 signed by Dr. Edward. His father did not, as the Medical Board and Dr. Edward say, die of a myocardial infarction but, as he stated in 1970, of war wounds. Dr. Edwards said that he relied on what the complainant had told Dr. Jahn, but Dr. Jahn never saw or examined him. He maintains that only once between 1970 and 1986 did he suffer from high blood pressure, in 1982, and he calls on the Organization to produce evidence in support of its assertion.

G. In its final submissions UNIDO stresses that the question of whether or not the complainant's father suffered a myocardial infarction could have been settled if the complainant had not failed, in breach of his duty under the Staff Rules, to pay his share of the fees due to the two outside doctors who served on the Medical Board. UNIDO maintains that the memorandum from Dr. Edward and the evidence he relied on plainly bear out the Medical Board's conclusions about the complainant's high blood pressure and counter his allegations.

#### CONSIDERATIONS:

1. The complainant, an Egyptian, joined UNIDO in 1969 and held a series of appointments until retirement in 1987. Judgment 993 of 23 January 1990 dismissed as irreceivable his first complaint, which challenged a decision not to extend his appointment beyond 31 October 1987.

He is now claiming under the provisions of UNIDO's Staff Rules on compensation for service-incurred illness. He contends that his heart trouble and other serious ailments were caused by stress due to pressure and harassment from August 1986 by his supervisor in the Investment Project Identification and Formulation Branch.

2. As early as 10 March 1987 the complainant told the Director of his Division of his supervisor's behaviour and on 12 October of that year said that the Medical Service blamed his supervisor for the stress that was making him ill. On 29 October 1988 he sought from the Advisory Board on Compensation Claims an amount equivalent to ten years' full pay on the grounds that his supervisor's behaviour was the cause of his ailments. To his mind ten years was the period for which he might reasonably have expected to go on working.

On 19 June 1989 he was told that the Advisory Board, after taking evidence from the medical officer, had come to the view that his condition was not attributable to the performance of official duties and that the Director-General had endorsed that view. In accordance with Article 17(a) of Appendix D to the Staff Rules he applied for review of the matter after referral to a medical board. The Advisory Board having agreed, his case went to the Medical Board, which met on 12 and 31 January 1990 and reported in February 1990. Not until 12 October 1990 was the Advisory Board able to meet and it then recommended upholding the refusal of his claim. The Director-General did so in a decision of 17 December 1990 that was notified to him by the Secretary of the Advisory Board in a letter of 7 January 1991. He then again made a request to the Director-General for review of the matter and filed an appeal with the Joint Appeals Board on 15 June 1991. But a letter dated 25 March 1991 from the Chief of the Personnel Administration Section, which he says he did not get until 20 December 1991, told him that his request was rejected: no further review by the Director-General was called for on any of the issues raised because all appeals procedures had been exhausted. He thereupon came to the Tribunal, on 13 March 1992. He is asking it, among other things, to declare that since his condition is attributable to the performance of official duties he is entitled to compensation.

3. The proceedings that culminated in the impugned decision of 25 March 1991, notified to the complainant on 20 December 1991, were unconscionably long, and the Organization was itself to blame for the dilatoriness and the delay in notification. Moreover, it expressly concedes that the internal means of redress are exhausted and says that it "has no legal comment regarding the receivability of the complaint". So the complaint must be deemed

receivable.

4. The impugned decision cites the Advisory Board's recommendation, which purportedly rests on the Medical Board's findings as appended to the defendant's reply. The main issue the complainant raises is whether UNIDO was right to refuse him compensation on the grounds that his condition was not attributable to his work. On that score the Organization argues that the Tribunal may not review the Medical Board's findings. Precedent has it indeed that the Tribunal may not replace the Board's assessment of medical questions with its own. But it goes further than that: the Tribunal does have full competence to say whether there was due process and whether the medical findings show any material mistake or inconsistency, or overlook some essential fact, or plainly misread the evidence.

5. In this case the Medical Board's report suffers from ambiguity or obscurity which the pleadings before the Tribunal have not removed, and the proceedings therefore failed to afford the complainant the full safeguards he was entitled to.

First, as the complainant points out, there was a defect in the signing by the members of the Medical Board of their report. The Board was made up of Dr. Fuchs, who was representing the complainant, Dr. Jahn and Dr. Reichmann, UNIDO's medical officer. But Dr. Reichmann did not put his signature to the report. Instead he was said to be "represented by" a Dr. Edward: he had left the Organization on 31 January 1990 and the report is dated 2 February. But the fact that he had left UNIDO by 2 February did not prevent him from signing the Board's report; and though Dr. Edward may have attended the Board's meeting of 31 January 1990 that did not give him authority to sign since he had not been appointed to the Board in any way that the complainant is bound to accept.

Contrary to what the complainant argues, it is not in itself a defect that Dr. Jahn wrote the report without having examined him. But the signing of the actual report does amount to a defect.

Worse still, some of the findings rest on allegations of fact that look highly dubious, even though evidence is lacking to declare them wrong. One is that the complainant's heart disease is endogenous. The doctors base it on his family history and in particular on his father's death by myocardial infarction and a sister's diabetes and high blood pressure. As the defendant does not deny, he revealed as early as 1970 that his father had been killed "in a battle" at the age of about 60 and that he had three brothers and two sisters in good health. The defendant so far doubted the relevance of his family history as to ask the doctors who had signed the report to give some explanation. It questioned first Dr. Edward, who signed the report, as was said above, instead of Dr. Reichmann, who ought to have done so. According to the Organization Dr. Edward's answer was that "it must be assumed that information on a myocardial infarction of the complainant's father was indeed available to the drafter of the report". So the Organization consulted the "drafter of the report", Dr. Jahn; he refused to go into the case on the grounds that the complainant had failed to pay his fees but he said that "in drafting the medical report he had obviously relied on data that had been made available to him". As for Dr. Fuchs, he too refused to "look up the records", again on the grounds that he "had not been paid for his services".

The defendant submits that it was because the complainant failed to discharge his obligations that it is now impossible to shed light on the contradiction between his own statements and the Medical Board's on that point. But that is an inadequate reply: though the complainant has made circumstantial allegations the defendant has failed to supply evidence to bear out the Medical Board's findings.

The Medical Board concluded that 15 per cent of the deterioration in the complainant's health from 1986 to April 1987 had been due to stress at work. Although the finding was binding neither on the Advisory Board nor on the Organization, there is no evidence, be it in the Advisory Board's recommendations, in the Director-General's decisions, or in the submissions to the Tribunal, to suggest what action if any has been taken on that finding.

6. The complainant's main claim - that his condition be declared attributable to the performance of official duties - fails because the Tribunal may not substitute its own assessment of the case for the Medical Board's. But because of the formal flaw and the serious omissions in handling the case it will set aside the impugned decision of 25 March 1991 and send the complainant back to the Organization for resumption of the proceedings for considering his claim in accordance with Articles 16 and 17 of Appendix D to the Staff Rules.

7. Since the decision is set aside and the Organization was to blame for the delay in the procedure, it shall pay the complainant 10,000 Austrian schillings in damages for moral injury and repay him 8,580 schillings against the

costs he incurred over the Medical Board's proceedings.

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

DECISION:

For the above reasons,

1. The Director-General's decision of 25 March 1991 is set aside.
2. The case is sent back to the Organization for resumption of the proceedings for considering the complainant's claim to compensation.
3. The Organization shall pay him 8,580 schillings to cover the costs he incurred over the Medical Board's proceedings.
4. It shall pay him 10,000 schillings in moral damages.
5. It shall pay him 20,000 French francs in costs.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas  
E. Razafindralambo  
Michel Gentot  
A.B. Gardner