SEVENTY-SEVENTH SESSION

In re KOGELMANN (Nos. 1, 2, 3 and 4)

(Interlocutory order)

Judgment 1373

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Edith Kogelmann against the International Atomic Energy Agency (IAEA) on 18 March 1993 and corrected on 22 April, the Agency's reply of 10 August, the complainant's application of 1 September for the production of documents, the IAEA's submissions of 13 October 1993, the complainant's rejoinder of 17 January 1994 and the Agency's surrejoinder of 8 April 1994;

Considering the second complaint filed by Miss Kogelmann against the IAEA on 18 March 1993 and corrected on 22 April, the Agency's reply of 10 August, the complainant's application of 30 August for the production of documents, the IAEA's submissions of 13 October, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering the third complaint filed by Miss Kogelmann against the IAEA on 18 March 1993 and corrected on 21 April, the Agency's reply of 10 August, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering the fourth complaint filed by Miss Kogelmann against the IAEA on 14 July 1993, the Agency's reply of 17 September, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Rules 7.04.1 and 12.01.1(D) of the IAEA's Provisional Staff Rules, Articles 11, 36, 38, 40 and 41 of Appendix D to those Rules and Article II.7.73 of the Administrative Manual;

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. The complainant, an Austrian who was born in 1933, joined the staff of the IAEA in 1965 as a technician at grade G.4 in the physics section of the Agency's laboratory. She retired on 31 March 1993 at G.7.

In 1970 she became a laboratory technician in the IAEA's isotope hydrology laboratory, then housed in underground premises. In 1979 the laboratory moved to modern quarters at the Vienna International Centre (VIC).

The complainant's duties included testing water samples for radioactivity by liquid-scintillation counting. From 1970 to 1985 she worked with a chemical substance based on a solvent known as xylene, which the supplier warned might have toxic effects on the skin, eyes, mucous membranes and central nervous system. In 1986 and 1987 she worked with another solvent, trimethylbenzene, to which the supplier attributed the risk of similar effects.

The complainant's sick leave in 1986 came to 63 days, as against 30 in 1983, 26 in 1984 and 27 1/2 in 1985.

By a memorandum of 7 December 1987 to the Deputy Director of Personnel her supervisor announced that she was to undergo treatment in hospital for symptoms which she thought the chemicals she was working with might have caused; he said she had failed to comply with the "rules" on safety; he enclosed a set of guidelines he had issued on 19 December 1986 and stated that "according to the information available about toxicity" there was no danger to her health from her use of trimethylbenzene.

In a memorandum of 29 December 1987 to the Deputy Director she asked how she might have complied with safety rules that she did not see until late 1986 and that even then made no mention of the chemicals which she had been using, and which her supervisor did not consider toxic anyway; she also expressed concern about the meaning

of safety instructions her supervisor had given her on 23 December 1987.

On 4 October 1988 the head of the toxicology information centre of the University of Vienna sent the chief medical officer of the VIC a report on the complainant's health linking her dermatological, neurological and other symptoms to the solvents, traces of which he had found in her blood.

By a memorandum of 21 October 1988 the IAEA's chief medical officer recommended that the head of the complainant's section should relieve her of work involving scintillation "cocktails" for three months and avoid exposing her to the solvents; he announced that before deciding any further measures he would have her blood tested against samples from other officials who worked in "the same occupational conditions".

In a memorandum of 17 November 1988 the complainant pointed out that comparative tests of her blood were not possible because no-one else had worked with the same chemicals for so long and she asked to be relieved of working with the solvents without further blood tests.

In a memorandum of 24 November 1988 to the Director of Personnel her immediate and higher-level supervisors said they had taken her off work with the solvents; observed that her average exposure to them had been two hours a week; concluded that her exposure to them was at worst only 1 per cent of the maximum allowable level; and suggested that there had never been any case of chronic intoxication from working with them elsewhere.

In a memorandum of 12 December 1988 to the acting Director of Personnel she set out her version of the facts for the file: her weekly exposure from 1970 to 1985 had been between eight and ten hours a week; the Administration had not informed her that the chemicals she had been using were toxic until December 1987, when it directed her to change her working methods; Austrian law required technicians working with chemicals to observe special precautions but the IAEA had left her unaware of them and exposed for 17 years.

On 10 January 1990 three doctors at the Clinic for Occupational Medicine of the University of Vienna reported that they had found neurological evidence of "chronic solvent intoxication" but were not sure whether solvents were to blame for her lung and liver disorders too.

In a letter of 15 February 1991 to the Director General the complainant's counsel claimed compensation on her behalf for service-incurred illness and suggested that the Agency should send her to the Medical University of South Carolina (MUSC) for diagnosis and treatment.

In a memorandum of 28 February the Director of Personnel referred her to the provisions in Appendix D of the Staff Rules on compensation for service-incurred illness and invited her to submit information on her claim as set out in the rules.

Having informed the Director in a letter of 1 March 1991 that she was "a very sick person with a fatal illness" and in great pain, she sent him in a memorandum dated 6 March the information he had asked for. The Administration then referred her case under Article 38 of Appendix D to the Advisory Board on Compensation Claims.

On 27 May the head of the Clinic for Occupational Medicine told the chief medical officer that on examination of the complainant on 13 April he had found evidence of scleroderma and concentrations of solvents in her blood above the maximum allowable values; lacking a full understanding of her case he suggested that she consult specialists in America.

At a meeting of 6 June 1991 the Board recommended in pursuance of Article 36 of Appendix D that she should go to MUSC for examination; it also decided to seek information from the Austrian authorities on the results of their inspection of her working conditions.

By a letter of 24 June 1991 the acting Director of Personnel told her to report to MUSC on 1 July. A rheumatologist examined her there from 1 to 11 July.

The rheumatologist said in a "hospital-discharge summary" that he found no evidence of scleroderma and that her "mild cerebral, mild liver, and mild lung abnormalities do not fit into a known toxicologic diagnosis in our experience".

In a memorandum of 7 October 1991 the secretary of the Advisory Board told her that the Director General had

endorsed a recommendation from the Board of 26 September to dismiss her claim. By a letter of 4 November 1991 she asked the Director General to review his decision under Article 40 of Appendix D and named a doctor she wanted to sit on the medical board which reports under Article 41 to the Advisory Board on Compensation Claims.

On 8 November 1991, having exhausted her entitlement to sick leave with full pay, she went on half pay.

The members of the medical board were the Agency's chief medical officer, the doctor she had appointed and a third doctor chosen by the other two. The third member, who did not examine her, served as chairman.

The board met on 12 December 1991. It said in a report dated "January 1992" that it had found no evidence of systemic sclerosis or any other solvent-related symptoms and it described her exposure to the solvents as "infrequent, at low concentration and of short duration".

After meeting again on 4 February 1992 the Advisory Board recommended that the Director General should maintain his earlier decision.

By a telegram of 12 February the acting chief medical officer asked the complainant to report for a medical examination. On 17 February her doctor sent him a certificate saying that she was unfit to work until further notice. In a telegram dated 17 March 1992 the Director of Personnel told her that since she had not reported for an examination or supplied a "medical status report" he was unable to authorise further sick leave.

On 20 March her doctor reported to the medical officer that she was suffering from lung, liver, brain and other disorders.

By a letter dated 27 March the chairman of the medical board told her the Director General had decided to uphold his decision of 7 October 1991.

In a letter of 30 March the Director of Personnel informed her counsel that she was in breach of Staff Rule 7.04.1 for failing to provide the medical officer an "acceptable" medical certificate with the nature of her illness and expected date of recovery.

The acting chief medical officer having examined the complainant on 13 April told her by a letter of even date postmarked 21 April 1992 that after "your full examination by me" he was ending her sick leave on 17 April and considered her fit to work on 21 April.

By a telegram of 23 April the Director of Personnel confirmed the chief medical officer's decision of 13 April and said he "reserves the right to take appropriate action" on what he considered to be her "unauthorized absence".

The Director of Personnel informed her counsel in a letter of 6 May that since the Administration had established "in accordance with the Staff Rules" that she was fit to go back to work on 21 April it regarded her absence from that date as unauthorised.

In a letter of 11 May she asked the Director of Personnel to refer her case to an independent practitioner under Staff Rule 7.04.1(L).*

(*Provisional Staff Rule 7.04.1(L) reads:

"A staff member may be required at any time to submit a medical certificate regarding his health or to be examined by the Medical Officer of the Agency. Further sick leave may be refused or the unused portion withdrawn if the Director General is satisfied that the staff member is able to return to his duties, provided that, if the staff member so requests, the matter shall be referred to an independent practitioner acceptable both to the Director General and the staff member.")

By a telegram of 13 May 1992 the Director agreed and indicated that her pay status - which he said his telegram of 23 April referred to - would not be "reconsidered" until the independent practitioner's report came in.

In a letter of 25 May the complainant asked the Director General to review his decision to reject her claim to compensation and she alleged a mistaken finding by the medical board. In a letter of 16 June the Director General refused to reverse his decision.

In four letters she sent between 11 June and 7 July she asked the Director General to review under Rule 12.01.1(D)(1) the decisions on her fitness for work and pay status which the Director of Personnel had notified on 23 April and 6 May.

In a letter of 10 July to which the Director of Personnel appended the report of the doctor who examined her in pursuance of 7.04.1(L) the Director of Personnel told her that the period from 21 April 1992 until she reported back for duty would be charged to her annual leave if she had enough left or treated as "leave without pay"; he warned her that failure to return to work might lead to non-extension of her contract, which was to expire on 31 August 1992.

By a letter of 14 July she asked the Director General to review the Director's decision of 10 July.

In another letter of 14 July she asked the Director of Personnel to extend her sick leave on the grounds that her doctors did not want her to work, pointing out that the conclusions of the independent practitioner were "subject to neurological and psychological examinations".

On 15 July she appealed to the Joint Appeals Board against the Director General's decision of 16 June.

In a letter dated 16 July the Director General upheld the decisions of 23 April and 6 May.

She put objections to the letter of 16 July to the Appeals Board on 14 August.

On 26 August she lodged an appeal against the Director's decision of 10 July.

By a telegram of 28 August 1992 the Director authorised review of her "neuro-psychiatric condition" under 7.04.1(L); he also gave her the first in a run of extensions of contract that took her up to retirement on 31 March 1993.

In a letter of 19 October 1992 her counsel asked the Director of Personnel to indicate, among other matters, when her entitlement to sick leave on half pay ran out and why she had not got the benefits due under the Agency's Temporary Disability Insurance Plan (TDIP).*

(*Article II.7.73 of the Administrative Manual on social security reads:

"The TDIP provides the following benefits:

(i) If a staff member continues to remain sick after he/she has exhausted his/her entitlement to sick leave on full pay, he/she will receive for the period of his/her authorized sick leave on half pay an additional benefit corresponding to one quarter of his/her net emoluments;

(ii) On exhaustion of sick leave with half pay, the staff member will receive benefits in the amount of half his/her net emoluments for a maximum period of twelve months.")

In his reply of 9 November the Director set out her record of sick leave as follows:

"Sick leave during last four years = 89 days

Sick leave with half pay from 1991.11.08 to 1992.08.08

Sick leave on full pay from 1992.08.09 to 1992.09.25

Sick leave with no pay from 1992.09.26".

He also said that because the chief medical officer had not certified sick leave for her beyond 17 April 1992 she did not qualify for TDIP benefits.

In its report of 16 November 1992 the Joint Appeals Board recommended rejecting her appeal of 15 July and in a letter of 22 December 1992 the Director General followed the Board's recommendation. That is the decision she impugns in her first complaint.

As to her appeal of 14 August the Board further recommended on 16 November that the Director General put her on special leave without pay as from 11 May 1992. But the Director General decided, also in his letter of 22 December 1992, not to follow that recommendation and that is the decision she impugns in her second complaint.

Also on 16 November 1992 the Board concluded that it was not able to make any recommendation on her appeal of 26 August since there had not yet been final assessment of her fitness to work. In his letter of 22 December 1992 the Director General said he would decide "whether my previous decision should be upheld or whether your sick leave status should be reinstated" after he had got a further medical opinion on her. That is the decision she challenges in her third complaint.

In a letter of 27 November she asked the Director General to review the Director of Personnel's decision to withhold TDIP benefits. The acting Director General refused in a letter dated 29 December 1992 and she put that case to the Appeals Board on 28 January 1993.

In a report dated 11 May 1993 the Board recommended paying the complainant the TDIP benefits due from May 1992 to March 1993. In a letter of 15 June 1993 the Director General rejected her appeal. That is the decision impugned in her fourth complaint.

B. In her first complaint she submits that her illness is service-incurred and puts forward three main pleas.

She contends first that the Director General overlooked essential facts. By accepting the medical board's finding that her weekly exposure was "infrequent, at low concentration and of short duration" he failed to consider the high levels of exposure she had experienced over three overlapping periods: from 1970 to 1979, when she worked in an unventilated cellar; from 1970 to 1985, when she was pipetting scintillation cocktails into vials without special precautions; and from 1970 to December 1987, when used vials were stored in her work room. The board considered her working conditions only after December 1987, by which time changes in procedure had brought her exposure down to two hours a week.

She alleges that the Administration did not give each member of the board access to the same documents, that it passed off her supervisor's rough estimate of her "worst-case" exposure as a reliable one, and that it never got a report from the Austrian authorities on working conditions in her laboratory despite the call for one by the Advisory Board on Compensation Claims.

Her second plea is that the Director General misappraised evidence in the experts' reports. The medical board misread tests on concentrations of one solvent in her blood as if they applied to another she had used in safer conditions. Although the head of the Clinic for Occupational Medicine in Vienna reported in May 1991 that the solvents were responsible for her psychiatric condition the Director General took that doctor's reservations about what might have caused scleroderma to apply to all her symptoms. He gave greater weight to the findings of the American rheumatologist than to the report of an Austrian toxicologist.

Her third plea is breach of procedure. Although a biopsy carried out by the Institute of Pathology at Klagenfurt, in Austria, prompted the diagnosis of scleroderma in December 1990, the Director General discounted that diagnosis in favour of the American rheumatologist's conflicting one. In cases where two diagnoses clash the proper procedure is to call for a third one. But the Administration never even told the American doctor about the first one. In any event a third biopsy the complainant had in Vienna in January 1993 confirmed the results of the first one.

She submits that the involvement of the Agency's chief medical officer at all levels of the proceedings was in breach of the case law. When an official is open to suspicion of partiality he should not be allowed to sway the Director General's decision.

The complainant acknowledges that the burden is on her to prove that her illness is service-incurred. But, as the Tribunal said in Judgment 641 (in re Farah), she need only show that there was a "fairly definite connection between the cause and the effect". She has submitted medical reports and test results which link her illness to exposure to solvents at the IAEA.

She says that the health risks the Agency exposed her to went beyond her contractual obligations. Although she relied on her employer for reliable safety information it failed to measure her exposure for 18 years to toxic substances, to inform her of the toxic properties of substances she was using and to take proper safety measures. Its

negligence warrants damages above the limit in Article 11 of Appendix D, which says that "... compensation payable under these rules shall be the sole compensation to which an official ... shall be entitled in the event of death, injury or illness attributable to the performance of official duties".

She seeks full compensation for permanent total disability, in particular the refund of past and future medical expenses not covered under her insurance, payment of salary including the grant of annual increment to retirement on 31 March 1993, compensation for annual leave, an award of damages for partial loss of injured organs and for loss of enjoyment of life and reduction in life expectancy, and the "provision of [her] complete retirement program" including the end-of-service allowance. Insofar as the compensation scheme under Appendix D does not meet those claims she "repeats all her claims and claims further damages to the fullest extent of all her claims". She also claims an award of costs.

C. In her second complaint she submits that she was at the material time on authorised sick leave and relies on procedural flaws as well as mistakes of fact and law. She accuses the Administration of departing from the rules on determination of fitness for duty; allowing the medical officer to exceed the scope of his authority; and misapplying the rules on pay applicable to staff members who belong as she does to the Austrian Health Insurance Scheme.

She wants the Tribunal to declare that she was on sick leave between 21 April and 10 July 1992; quash the decision to suspend her pay over that period and award her interest on the amounts due; remove from her personal file allegations that she failed to comply with the rules; pay her medical and legal fees, which she sets at 170,000 Austrian schillings at 14 August 1992; and award her damages for material and moral injury.

D. In her third complaint she submits that the Director General committed a mistake in law by linking her pay status to her sick leave: there is no provision in the rules for referral of an official's pay status to an independent practitioner. As long as the referral of her case under 7.04.1(L) was pending she was entitled to sick leave. She also relies on the same mistake of fact she pleads in her second complaint.

She seeks the quashing of the Director of Personnel's decision of 10 July 1992; payment of the sums due from 10 July to 24 September 1992 plus interest; removal from her personal file of "any prejudicial reference" to the decision of 10 July; moral and material damages; and costs.

E. In her fourth complaint she submits that the withholding of TDIP benefits was unlawful. As in her second complaint she alleges that the Director General was wrong to treat her absence from 23 April 1992 as unauthorised. She also alleges mistakes of law, notably breach of paragraph II.7.73(ii) of the Administrative Manual, which says that staff members "will receive benefits" on exhaustion of entitlement to sick leave with half pay. The provision being compulsory, applying it is not a matter of discretion; nor is there any need to consult the medical officer. To qualify for the benefits she had only to be a staff member, as she was, and to have exhausted her entitlement to sick leave on half pay, as she had.

She seeks the quashing of the Director General's decision; payment of TDIP benefits to 30 March 1993 plus interest and "inflation adjustments"; and awards of material and moral damages and costs.

F. In its reply to her first complaint the Agency submits that her claims are in part irreceivable and in part settled and that all are in any event devoid of merit.

She failed to file an internal claim to compensation beyond what Appendix D allows under the applicable appeal procedure. So the claim is irreceivable under Article VII(1) of the Tribunal's Statute because she has not exhausted the internal means of redress. Besides, Article 11 of Appendix D, which she accepted on taking up appointment, says that the compensation payable under Appendix D "shall be the sole compensation to which an official ... shall be entitled ...".

The IAEA observes that it settled her claim to completion of her retirement programme: she applied for retirement benefits in June 1993 and has since completed the formalities.

On the merits the Agency contends that her own account of her illness does not square with the objective views of the doctors who examined her: she described herself in March 1991 as "a very sick person with a fatal illness" but not one of the many medical reports in the file describe her as "fatally ill". According to the medical board she was suffering from various mild ailments and had a "neurotic personality".

In any event she has failed to show that her alleged illness is directly attributable to the performance of her duties. For her claims to succeed it is not enough to show that the chemicals she used have toxic properties. The medical opinions she submits suggest only that some link between the state of her health and her working conditions is possible. But the medical board concluded that there was no "documented" evidence of damage to her nervous system from exposure to the solvents nor any "conclusive" evidence of lung damage from long exposure, though it did acknowledge laboratory evidence of a mild liver disorder which appeared to be on the mend.

Insofar as the Agency complied with the procedures set out in Appendix D the Tribunal is not competent to substitute its views for those of medical experts. Far from misinterpreting the experts' reports the Director General followed them. It is the complainant who is challenging them.

G. In its reply to her second complaint the IAEA points out that after her approved sick leave ran out on 13 March 1992 she neither went back to work nor submitted a medical certificate. Though she was already in breach of the rules at the time the Administration delayed action until it had an assurance following medical examination that she was fit for work. So it complied with the material rules and indeed treated her leniently.

H. In reply to her third complaint the Agency submits that the decision she impugns is not challengeable since it merely referred to the possibility of a change in her status on the strength of further medical opinion. The matter of her absence and pay status being covered by her second complaint, the subject of the third one is already before the Tribunal.

The Agency's pleas on the merits are those it put forward on her second complaint. Since an application for referral under 7.04.1(L) has no suspensory effect she derived no entitlement to sick leave from making one.

I. In its reply to her fourth complaint the IAEA submits that she was not eligible for TDIP benefits after 23 April 1992. Paragraph II.7.73(i) of the Administrative Manual limits payment of benefits to periods on authorised sick leave, whereas at the material time she was on unauthorised leave.

J. In letters of 30 August and 1 September 1993 to the President of the Tribunal the complainant applied for the production of further evidence of relevance to her first two complaints.

K. On 13 October the Agency supplied the ventilation plan of the complainant's working place from 1970 to 1979; a list of the documents it put to the medical board and of those submitted to its chairman; the appendices to the board's report; and the medical report on her examination of 13 April 1992. In an accompanying brief relating to her first complaint the Agency says that other information she was seeking - on her clinical and occupational history and exposure to solvents - is already in the medical board's report.

L. In her rejoinder on her first complaint she dwells on the facts of her illnesses and the IAEA's failure to issue proper safety instructions before December 1986. She enlarges on her earlier pleas and invites the Tribunal to order an independent expert to determine what exposure to the solvents she suffered; she also applies for expert enquiry into such unsolved medical issues as the aetiology of her skin condition and other disorders.

She maintains that her claim to compensation beyond what Appendix D allows is receivable: she first filed the claim in her appeal of 15 July 1992 and the Board took it up in the report of 16 November.

The Agency has not yet settled her claim to completion of her "retirement program". Her end-of-service allowance would have been half as much again as she got. To obtain the normal retirement benefit in March 1993 she had to pay 197,507 Austrian schillings to the United Nations Joint Staff Pension Fund.

She objects to the IAEA's unwarranted attacks on her credibility. She had good reason to believe her life was in danger in 1990 after an open-lung biopsy and a skin sample led her doctor to diagnose systemic scleroderma, a life-threatening disease. The evidence on her skin condition is still "conflicting".

M. The rejoinder on her second complaint seeks to correct the factual record in the reply and to expand on her earlier pleas. She describes the reply as inaccurate and perfunctory. She questions the reasons for the Agency's arbitrary treatment of her. There was nothing lenient about infringing her right to sick leave: that, in her submission, amounts to a disguised disciplinary measure.

N. In her rejoinder on her third complaint she dwells on several factual errors in the reply. She denies trying to

acquire an entitlement to sick leave through referral under 7.04.1(L) to another doctor. Besides, it was the independent practitioner who recommended getting the opinion of an "independent psychiatrist and/or neurologist". What she objects to is the first decision on her pay status following the independent practitioner's "partial determination" of her fitness for work. So the subject of her complaint is not already before the Tribunal.

O. In her rejoinder on her fourth complaint she argues that she had good reason to believe she was on authorised sick leave: the Administration had given her notice thereof; her doctor and Austrian insurer had certified her as unfit for work; and the examination of her neurological and psychiatric condition was still pending. In any event there is no mention of authorised sick leave in paragraph II.7.73(ii) of the Manual, nor any call for one.

P. In its surrejoinder on her first complaint the IAEA restates the facts as it sees them, rebuts the arguments in her rejoinder and presses its earlier pleas. The Agency's information policy and up-to-date safety measures ensure that there could not have been any health hazards in her laboratory.

Q. In the Agency's surrejoinder on her second complaint it denies material inaccuracies in its reply. Nor was its brief perfunctory. Its pleas on the merits answer her arguments in full without dwelling on the irrelevant issues she raises.

R. In its surrejoinder on her third complaint the IAEA observes that there are no new material facts or arguments in the rejoinder. If she had gone back to work as the Agency repeatedly asked it would have given her suitable duties.

S. In its surrejoinder on her fourth complaint the Agency denies that she was on duly certified sick leave. It maintains that her case hinges on whether both parts of II.7.73 require authorised sick leave: she has not shown why the requirement should apply to only half of the provision.

CONSIDERATIONS:

1. The complainant joined the staff of the International Atomic Energy Agency at grade G.4, step 1, on 1 September 1965 as a laboratory technician in the Physics Section. In 1970 she moved to the isotope hydrology laboratory. She eventually reached step 12 in G.7 and she retired on 31 March 1993, a fortnight after filing her first complaint. Her work included the testing of water samples for varying low-level radioactivity, and it required her to use scintillation fluids containing volatile organic solvents. From 1970 until March 1986 she worked with Instagel, a substance containing xylene, and from March 1986 until 1988 with Picofluor, which contains trimethylbenzene. Until 1979 the Laboratory was in a windowless basement on former premises of the Agency. In 1979 it shifted to the Agency's present premises, where there are both air conditioning and windows.

2. In its report the medical board which met on 12 December 1991 to deal with the complainant's case describes in the following terms the toxic properties of xylene and trimethylbenzene:

"Xylene is an aromatic hydrocarbon that produces narcosis on prolonged exposure and may cause impairment of haemopoiesis. It is irritant to mucous membranes and causes a conjunctivitis. Inhalation may produce impairment of the upper airways and it may be hepatotoxic. Chronic exposure may result in general weakness, excessive fatigue, dizziness, headache, irritability, sleeplessness and impaired memory. Long-term skin contact causes drying and defatting of the skin which may lead to a dermatosis. Haematological effects include anaemia, poikilocytosis, anisocytosis and leukopenia (sometimes leucocytosis) with a relative lymphocytosis.

... trimethylbenzene is an aromatic hydrocarbon like xylene but less volatile. Its toxicological properties are similar to those of xylene and include irritation of the skin and mucous membranes. Following occupational exposure, nervousness, anxiety, bronchitis and a hypochromic anaemia have been observed."

3. From about 1985 the complainant showed several symptoms and in December 1985 she had to go into hospital. She had recurrent illnesses each year which required further examination and stays in hospital. After being examined by a medical expert, Dr. Hruby of the First Medical University Clinic of Vienna, she informed the Agency on 25 November 1987 that he suspected a causal link between her symptoms and her work. In 1987 the Agency told her to fill and empty vials in a fume hood in order to prevent the intake of vapours. In a report dated 4 October 1988 to the medical service of the Vienna International Centre, which covers the Agency, Dr. Hruby said about her case:

"All the conditions point to chronic intoxication with solvents of the Toluol or Trimethylbenzol type as a result of

her being exposed over a period of many years in her professional work. ... The essential requirement for a rapid improvement ... and to avoid continuing toxic damage is an immediate cessation to the professional exposure to the solvents."

The Agency thereupon took her off work with Picofluor.

4. On 15 February 1991 the complainant lodged with the Agency a claim to compensation for service-incurred disorders. At the Director of Personnel's request she developed her claim in a memorandum of 6 March. Her counsel sought from the Agency the cost of in-patient treatment and exact analysis of her disorders at the Medical University of South Carolina (MUSC) at Charleston, in the United States.

5. Dr. Jahn, a professor at the Clinic for Occupational Medicine of the University of Vienna, had her under examination from 28 August to 23 September 1989 and saw her again on 13 April 1991. He wrote about her at length in a letter of 27 May 1991 to the Agency's acting chief medical officer, Dr. Edwards. He said:

"In summary the complete case of Mrs. Kogelmann is not clear yet. There is evidence due to the investigation of the blood that the exposition was higher than the allowable value ... The chronic nervous disease, the liver disease and the complaints of her stomach can also be due to her chronic exposure. The question is that we could not find any links between trimethylbenzene and scleroderma in the literature at the moment ... To clear up the whole case it seems to be necessary that Mrs. Kogelmann has to contact the specialists in America. Even if the sclerotoma [sic] is not linked with the occupational situation, my opinion is that the nervous, specially the psychiatric situation of Mrs. Kogelmann, can be linked to the chronic exposure to organic solvents. For this reason also the neuropathy is another fact which confirms this hypothesis."

6. The Agency put the complainant's case to the Advisory Board on Compensation Claims, which met to discuss it on 6 June 1991. On its recommendation the Agency sent her at its expense to the MUSC to undergo tests. According to the Agency the purpose was to get final clarification of her case; but she says that it was just to determine whether she was suffering from scleroderma. Upon her discharge on 11 July 1991 Dr. LeRoy, who was director of the division of rheumatology and immunology at the MUSC, signed a "hospital discharge summary". Under the heading "Discharge diagnosis" he wrote:

"(1) Atypical left-sided chest pain of undetermined etiology.

(2) Minimally abnormal lung tissue by biopsy, of undetermined significance.

(3) Abnormal EEG [electro-encephalogram] of unknown significance.

(4) Anxiety.

(5) No evidence of scleroderma."

7. According to the medical board's report scleroderma occurs in systemic sclerosis, which the board describes as follows:

"Systemic sclerosis is a generalised connective tissue disorder characterised by fibrosis and degenerative changes in the skin (scleroderma), synovium, muscles and other organs especially the gastro-intestinal tract, lungs, heart and kidneys. [A named scientific study] concluded that the diagnosis of systemic sclerosis must be made from the presence of one major criterion (proximal scleroderma) and several minor criteria (sclerodactyly, digital pitting, fingertip scars or loss of digital fingerpad substance and bilateral basilar pulmonary fibrosis)."

8. In his discharge summary Dr. LeRoy went on:

"She also had a skin biopsy approximately six months ago that was read as scleroderma, and therefore she was referred here for evaluation of her connective tissue disease ... The patient was admitted to the Rheumatology Service for work-up of her diagnosis of scleroderma. By history and physical examination, there was no evidence of scleroderma ... The patient ... had extreme anxiety although with the cultural and language barriers [the psychiatrist consulted] found it difficult to truly assess the pathologic extent of this anxiety. ... We find no evidence for the diagnosis of scleroderma. The other abnormalities stated, are unclear as to etiology ... The combination of mild cerebral, mild liver, and mild lung abnormalities do not fit into a known toxicologic diagnosis in our

experience."

In a letter of 23 July 1991 to the Agency's chief medical officer Dr. LeRoy said: "Personally, I see no medical reason why she cannot continue her present employment."

9. What Dr. LeRoy did not say was that none of the abnormalities in the complainant's condition might have a toxic origin. His opinion related to the combination of her disorders, not to the possibly toxic origin of any one or more of them. Yet what Dr. Jahn had said in his letter of 27 May 1991 was that, even if the scleroderma proved not to be a service-incurred disorder, the complainant's other symptoms might be due to her chronic exposure to toxic substances.

10. The Advisory Board on Compensation Claims met again on 26 September 1991 to reconsider her case in the light of Dr. LeRoy's opinion. According to the "summary record" of that meeting it "agreed that there was no conclusive evidence that Mrs. Kogelmann's ailments were attributable to the performance of her official duties". By a memorandum of 7 October 1991 the secretary of the Board informed her of that opinion and said that on 2 October the Director General had, on the Board's recommendation, accordingly dismissed her claim as set out in her memorandum of 6 March 1991.

11. By a letter of 4 November 1991 to the Director-General the complainant's counsel applied for reconsideration of the decision under Article 40 of Appendix D to the Staff Rules and for the establishment of a medical board of arbitration under Article 41 to consider the medical aspects of the case. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties. The Advisory Board thereupon established the medical board and it was composed of the Agency's nominee, Dr. Edwards, the complainant's, who was Dr. Hruby, and Dr. Blain, a third doctor co-opted by the first two, who served as chairman.

12. The medical board met on 12 December 1991 and its report is dated "January 1992". Under the heading "Background" it states that the Agency "required arbitration on the medical evidence that [the complainant] had been exposed to excessive amounts of solvents during her work and this had contributed to the development of clinical signs of systemic sclerosis". It then considered two questions, which it stated in the following terms:

"1. Was Frau Kogelmann exposed to solvents at a level likely to cause ill-health[?]

2. Was there clinical evidence that she was suffering from systemic sclerosis[?]"

13. It is plain on the evidence that Dr. Blain and Dr. Edwards held a preliminary meeting without Dr. Hruby and together inspected the laboratory premises on which the complainant had been working from 1979 onwards. In fact Dr. Hruby took no active part in the board's enquiry into the levels of the complainant's exposure. When the three members of the board did meet, Mr. Stichler, an official of Physical and Chemical Sciences (RIPC) in the Department of Research and Isotopes, simply told them what in the Agency's view the levels of the complainant's exposure had been: they were not told that in a letter she had written on 12 December 1988 to the acting Director of Personnel the complainant had estimated the levels of her exposure to be much higher than the Agency's figures.

14. The determination of the level or levels of exposure that the complainant suffered is not a medical question but one that called for consideration of scientific evidence, and one of which no member of the medical board had any expert knowledge. Dr. Hruby is not to be blamed for failing to protest on the complainant's behalf against the findings by the other two doctors as to levels of exposure. Even though Dr. Hruby acquiesced in the board's findings the complainant should not be damnified on that account: the terms of reference of Dr. Hruby and of the other two doctors were to come to conclusions on the medical aspects of the case.

15. Under the heading "Conclusion on exposure" the board's report says:

"The Medical Board of Arbitration agreed that there was evidence that she had had long-term low level exposure, probably for a period of about two hours and at a frequency of twice per week, to xylene and most recently to trimethylbenzene."

But in the absence of agreement between the parties on the levels of the complainant's exposure the medical board was wrong to answer the first question set out in 12 above. First, it was informed of only the Agency's side of the case. Secondly, it based its findings only on the practice followed in 1986. Its report does refer to an experiment that Agency staff carried out in 1987 "to estimate the maximum air concentration" for what it calls a "worst-case

situation" involving the use of both trimethylbenzene and xylene. But the complainant had no part in that experiment; and the "worst-case situation" was based on the maximum number of samples prepared in 1986 and on the assumption of exposure for a period of two or three hours at a time, whereas the complainant alleges exposure for far longer periods - of up to ten hours a week - while experiments were going on. Thirdly, there should not have been inspection of the laboratory premises by only two members of the board: the gathering of any evidence was the responsibility of all three.

16. Under the heading "Overall conclusions" the board's report reads:

"1. The Medical Board accepts that Frau Kogelmann has had long-term potential exposure to the volatile solvent xylene and, more recently, trimethylbenzene but any exposure has been infrequent, at low concentration and of short duration during the working week.

2. The Medical Board did not see any conclusive documented evidence that Frau Kogelmann suffers from systemic sclerosis."

As was said in 14 above, the first of those findings was not a matter for medical experts to determine and rested, besides, on incomplete and possibly incorrect information. The board based the second of its findings on the lack of "conclusive" evidence. But that was not the standard of proof it was required to apply. Even in criminal cases the law does not require conclusive proof. Judgment 528 (in re Bastari) referred under 4 to the requirement of "positive proof", and Judgment 641 (in re Farah) said under 8 that there must be a "causal link in the legal sense, that is to say, some fairly definite connection between the cause and the effect". Such language is not to be taken to require more than a balance of probability in favour of what the complainant is alleging. In other words, if on the evidence taken as a whole it seems more likely than not that some or all of the complainant's symptoms were caused by exposure to toxic solvents she will have discharged the onus of proof. The medical board was wrong in thinking that conclusive evidence was required in any aspect of its enquiry.

17. Under the heading "Supplementary conclusions" the board said further:

"i) There is no documented evidence that she has functional impairment of either central or peripheral nervous systems as a result of exposure to xylene or trimethylbenzene.

ii) There is no conclusive evidence that she has impairment of pulmonary function or pathological changes in her lungs as a result of long-term exposure to volatile solvents.

iii) There is laboratory evidence that she has had a mild, recurring hepatic dysfunction although the abnormal parameters have been improving over the last 3-4 years ... A recent liver biopsy is essentially normal."

Finding i) is objectionable because it depends on the level of exposure that the board determined. Besides, it is incorrect to state there is "no documented evidence" of functional impairment of the nervous systems as a result of exposure. Dr. Jahn, for one, gave his opinion, which is referred to in 5 above, that there was such impairment. Finding ii) is objectionable because it again depends on the degree of exposure determined by the board and because the board again mistook the standard of proof by requiring "conclusive evidence". As for finding iii), the board offers no opinion about the origin of the "hepatic dysfunction".

18. What the medical board should have provided was an opinion based on the balance of probability as to which, if any, of the complainant's symptoms might have been caused by her exposure to toxic substances. Since its members were neither in a position nor, for that matter, qualified to determine the actual levels of her exposure or even the levels obtaining in the "worst-case situation", they should have confined their opinion to what in the abstract would have been a safe level, thereby leaving others to determine the probable level by a method allowing both sides to participate.

19. The Advisory Board on Compensation Claims met again on 4 February 1992 to reconsider the case in the light of the medical board's report. According to the record of that further meeting it recommended that the Director General uphold his previous decision. In a letter of 27 March 1992 to the complainant the chairman of the Advisory Board informed her that the Director General had done so, and she appealed eventually, on 15 July 1992, to the Joint Appeals Board. She also lodged appeals on 14 and 26 August 1992 on the matters that form the subject of her second and third complaints. In its report of 16 November 1992 on her three appeals the Joint Appeals Board held, as to the first and main appeal, that "the Agency had taken all reasonable measures to ascertain the

levels of her exposure, and that the impact of both estimated actual and 'worst case' exposure levels had been evaluated". It concluded that "the Agency's evidentiary inquiry had been thorough and proper".

20. This last conclusion by the Joint Appeals Board was plainly wrong for the reasons already stated in 16 to 18 above with reference to the medical board's findings. Since those findings and the Joint Appeals Board's report were flawed for the same reasons, the final, impugned, decision of 22 December 1992 that the Director General based thereon suffers from the same flaws and must be set aside.

21. In this judgment, which is an interlocutory order, the Tribunal will follow the precedent it set in Judgment 875 (in re Muiga). It orders two expert inquiries. It will appoint both a scientific expert and a medical expert, and their terms of reference will be as set out in the operative points of the decision below. Before the inquiries the parties may submit observations which the Registrar will forward to each of the experts, the time limits for filing to be set by the President. Each party may answer the other's observations.

22. The second and third complaints are about the withdrawal of the complainant's sick leave, her fitness for work and her pay status. Her fourth complaint is about the withholding of benefits under the Agency's Temporary Disability Insurance Plan pending the determination of her sick leave status and fitness for work. Such questions are all to some extent bound up with the determination of the facts material to her first complaint. It is, however, desirable that the medical expert give his opinion as to whether she was fit to return to work at any time in 1992 or 1993 and in particular by the date at which her sick leave expired, namely 17 April 1992.

23. In reply to the application of 1 September 1993 by the complainant's counsel for the production of documents the defendant submitted on 13 October 1993, among other things, "a list of all documents produced by the Agency to the medical board and Professor Blain". Counsel has sent the Tribunal a further application dated 12 November 1993 contending:

1. that the list of documents gives the total as 381 whereas the actual number is only 124;

2. that it fails to identify some documents unambiguously by the description given:

3. that it includes items that were not appended to the Agency's reply; and

4. that it does not distinguish between documents submitted to the medical board and documents put to Dr. Blain.

By a letter of 2 December 1993 the Registrar told counsel that the Tribunal invited him to incorporate his application of 12 November 1993 in the rejoinder he had yet to file. He did not do so. The Tribunal cannot rule on the matter until the Agency has had an opportunity to reply, though it may be observed that it is no longer relevant to distinguish between the items before the medical board and the items put to Dr. Blain. The Agency shall be granted thirty days from the date of receipt in which to comment on the complainant's application. If it has no objection to complying with what she asks there will be no need for the Tribunal to revert to the matter. If it does, she will have thirty days in which to comment on the Agency's reply and the Tribunal will rule on the matter later.

24. The Tribunal adjourns consideration of the other issues raised in the four complaints.

DECISION:

For the above reasons,

1. The Director General's decision of 22 December 1992 is set aside.

2. A scientific expert, to be appointed by order of the President of the Tribunal:

(a) shall carry out an investigation to determine the probable levels of exposure of the complainant to xylene and trimethylbenzene;

(b) shall distinguish between different periods and different toxic substances and, where the evidence conflicts, between the probable levels according to the complainant and the probable levels according to the defendant;

(c) may comment on the relative weight to be given to conflicting evidence;

(d) shall take into account the pleadings and documents on levels of exposure and any further briefs that the parties may submit as provided for in 21 above;

(e) shall inspect the laboratory premises, if necessary in the presence of both parties, and take such further additional evidence as either party may adduce.

3. The scientific expert shall submit a report, to be sent to the Registrar in eight copies not more than ninety days from the date of receipt of the pleadings, the documents and any further briefs submitted by the parties.

4. Copies of the scientific expert's report shall be communicated to the medical expert and to each of the parties.

5. A medical expert, to be appointed by order of the President, shall carry out a clinical and psychological examination of the complainant to determine:

(a) the nature and extent of any physical and psychological disorders from which the complainant is suffering or was suffering at the material time;

(b) on the balance of probability whether any of those disorders was attributable to her long-term exposure to xylene or her exposure for nearly three years to trimethylbenzene at the level or levels determined by the scientific expert;

(c) to what extent, if any, her work capacity was impaired by disorders wholly or partly attributable to her exposure to toxic substances;

(d) whether she was fit to return to work on the expiry of her sick leave on 17 April 1992 or indeed at any time in 1992 or 1993;

(e) where in the medical expert's opinion some disorder is not wholly or partly attributable to her exposure to toxic substances, identify as far as possible other probable causative factors.

6. The medical expert shall take into account the pleadings, the medical evidence on the case, the scientific expert's report and any further briefs that the parties may submit as provided for in 21 above and shall examine the complainant in consultation with any specialist or specialists of the medical expert's choosing whose assistance seems necessary and with the services of an interpreter, again if necessary.

7. The medical expert shall submit a report, to be sent to the Registrar in seven copies not more than ninety days from the date of receipt of the pleadings, the medical records, the scientific expert's report and any further briefs submitted by the parties.

8. Copies of the medical expert's report shall be communicated to each of the parties.

9. The Agency shall pay the fees and expenses of the scientific and medical experts, the amounts to be approved by the President of the Tribunal.

10. The Agency shall pay any expenses the complainant may incur, to be approved by the President failing agreement between the parties, for the purpose of the expert inquiries.

11. All other issues arising out of the first complaint and the complainant's other three pending complaints are adjourned.

12. The Agency shall pay the complainant 10,000 Swiss francs to cover costs incurred to date for her first complaint.

In witness of this judgment Sir William Douglas, Vice-President of the Tirbunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas

Mella Carroll
Mark Fernando
A.B. Gardner

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