EIGHTY-SECOND SESSION

In re Fish

Judgment 1606

The Administrative Tribunal,

Considering the complaint filed by Mr. Maurice Fish against the International Labour Organization (ILO) on 4 December 1995 and corrected on 30 January 1996, the ILO's reply of 2 April, the complainant's rejoinder of 11 May and the Organization's surrejoinder of 9 July 1996;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

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, a British subject born in 1932, joined the staff of the International Labour Office in 1972. His duties included advising on the procurement of supplies for field projects. His last contract was to expire at 31 May 1991.

On 1 June 1984, while he was on duty in Pakistan, the motorcar he was driving was hit broadside by a bus and he suffered multiple injury. The Organization treated the accident as service-incurred and as entitling him to compensation under Annex II to the Staff Regulations, which is headed "Compensation in event of illness, injury or death attributable to the performance of official duties".

By a minute of 25 October 1990 he told the secretary of the Compensation Committee that he intended to take early retirement at the end of the year and was claiming compensation for the continuous partial invalidity he was suffering from because of the accident. By a letter of 9 April 1991 the secretary informed him that he would get a lump-sum award of 4,734.24 United States dollars in compensation for permanent loss of function, which the Organization's medical officer had assessed at 4 per cent. By a letter of 26 August 1994 the chief of the Personnel Administration Section told him that, his condition having worsened since 1990, the permanent loss of function was recognised as having increased to 6 per cent and that he was to get another $5,748.60 in compensation.

By a letter of 12 September 1994 his solicitors informed the chief of Personnel Administration that he was willing to accept the ILO's offer but was pressing a claim to compensation for loss of earning capacity.

In a letter dated one year later to the very day, the chief of Personnel Administration told him that the Director-General had rejected his claim for want of any evidence of impairment of his "professional ability". That is the decision he is impugning.

B. The complainant submits that the impugned decision is flawed, the Director-General having overlooked medical evidence that his inability to work as an international project adviser had lowered his earning capacity to "nil".

He seeks the quashing of the challenged decision, the grant of an invalidity pension and an award of 2,076.70 sterling in costs.

C. In its reply the ILO contends that the complaint is devoid of merit. In its submission the medical evidence does not suggest that the complainant is unfit to carry on his "normal" or an equivalent occupation. Besides, how could an ailment or injury affect the earning capacity of a pensioner of 64, who would have "little chance of obtaining employment" anyway, even if in perfect health? The Organization is liable only for salary lost on account of impairment of the complainant's health, the burden being on him to prove that his earnings have suffered. But he does not even suggest how much he should get by way of invalidity pension.

D. In his rejoinder the complainant says he need not put a figure on the amount he is claiming. As to the medical evidence, the Director-General had a duty to get hold of all the material information before taking a decision; if he fails to discharge that duty the Tribunal may order a medical enquiry at the Organization's expense. The ILO's

"ageist" attitude towards the complainant's prospects of employment does not square with recent demand for such experienced international consultants.

E. In its surrejoinder the Organization presses its pleas. In answer to the charge of "ageism" it observes that the general rule in the ILO is not to employ retired people.

CONSIDERATIONS

1. The ILO recruited the complainant in 1972. He served on field projects, mainly as an adviser on the procurement of supplies. In 1984, while on duty as an official at grade P.4 in Pakistan, he sustained injury in a motor accident. By a minute of 25 October 1990 he informed the secretary of the ILO's Compensation Committee that he had suffered "Since this accident a loss of muscle and subsequent constraints of activities with [his] left arm", that he intended to take early retirement at the end of that year and that he was filing a formal claim to "compensation for continuous partial invalidity".

2. The secretary replied on 9 April 1991 that "the ILO Medical Advisor assessed the rate of the permanent loss of function resulting from [his] accident at 4% of the whole man" and that under Annex II to the ILO Staff Regulations, which governs compensation, that assessment entitled him to lump-sum compensation of 4,734.24 United States dollars. That figure was 4 per cent of twice the amount of yearly pensionable remuneration at step 5 in grade P.4 as at the date of the accident.

3. The material provisions of Annex II read:

"9. In case of continuing partial invalidity affecting the professional ability of an official who does not remain in the service of the Office, the official shall be entitled to such proportion of the pension provided for in paragraph 8 as corresponds to the degree of his invalidity.

10. The degree of invalidity shall be assessed on the basis of medical evidence and in relation to loss of earning capacity in the official's normal occupation or an equivalent occupation appropriate to his qualifications and experience.

...

12. Regardless of whether the official returns to duty in the Office, or in the United Nations or another specialized agency, or not and of whether there is continuing invalidity which affects the official's earning capacity or not, an official shall be entitled to lump-sum compensation for permanent disfigurement or permanent loss of a member or function. The amount of such compensation shall be assessed on the basis of medical evidence and in relation to loss of enjoyment of life, by reference to a guide approved by the Director-General."

4. In a letter of 20 May 1991 to the ILO the complainant said that he wished to appeal. The protracted correspondence that ensued between his solicitors and the Organization shed light on the grounds of appeal. In reply to his solicitors' question as to why the ILO had applied paragraph 12 of Annex II, instead of 9, the secretary of the Compensation Committee told them in a letter of 5 February 1992:

"In view of the presumption that the relatively small impairment suffered affected enjoyment of life rather than professional ability, compensation was awarded under paragraph 12 only."

After further medical examinations and reports the complainant filed notice of appeal on 5 March 1993 seeking reassessment of the degree of his continuing partial invalidity at 10 per cent. Contending that the degenerative changes attributable to the accident would continue to affect him and had severely handicapped him in his social and domestic life "and also in his working environment", he claimed the award of an invalidity pension under paragraph 9 of Annex II.

5. To enable the Compensation Committee to assess the degree of his invalidity in accordance with paragraph 10 its secretary asked his solicitors in a letter of 6 May 1993 "to provide such evidence as [they considered] necessary for a determination concerning the possible loss of earning capacity". Their letter of 24 May replied that he wished -

"to claim for loss of amenities, due to his injury sustained in Pakistan in 1984. This has affected his ability to paint, garden, decorate and also his sporting hobby of playing golf."

The secretary pointed out -- quite rightly -- that such a claim came under paragraph 12, which was about "loss of enjoyment of life", rather than 9, which was about "partial invalidity affecting professional ability".

6. There were two more medical reports after further examinations of the complainant. One report, dated 7

September 1993, was by an orthopaedic surgeon whom he had consulted at Darlington, in England. It recorded "aching in his neck after sitting in one position for a period i.e. reading" or "when undertaking repetitive actions above shoulder level i.e. painting ceilings"; "stiffness of his neck"; "aching radiating down the left upper limb with certain activities"; a "feeling of weakness in the left arm"; and "aching in the left arm when carrying objects in the left hand". The consultant's findings were restrictions in neck movements -- flexion, extension and rotation -- "apparent wasting of the left biceps" and "gross degenerative change" in one section of the cervical spine. Though he did express the definite opinion that the symptoms had been caused by the accident in 1984 he said nothing of incapacity or impairment of function or of the effects on enjoyment of life, occupational skills and earning capacity.

7. The second report, dated 17 March 1994, was by a consultant neurologist in London whom the Organization itself had appointed to examine the complainant. From the description the report gives the symptoms and changes seem less severe: "mild difficulty" in using the left arm, for example for gardening and playing golf; "discomfort" in that arm when lifting suitcases and driving long distances; somewhat restricted movements of the neck, though not "outside the normal limits (which are wide) for a man of [the complainant's] age"; and a "troublesome" degree of stiffness in the neck, "particularly when travelling, (flying etc.)". There was "evidence of a left C7 [cervical] root lesion", but it had "clearly been present many years", even before 1984, though the accident had undoubtedly "exacerbated" the condition. Though there was "spondylitic change" it was "nothing very extraordinary for a man of his age". The consultant's report concluded "from the standpoint of his disability pension" that there was impairment of the motor function of the left arm and sensory impairment; that they accounted for "a total of 10% impairment of upper extremity"; and that the loss of function corresponded to "6% of impairment of the whole person".

8. In a letter of 26 August 1994 the chief of the Personnel Administration Section informed the complainant that the Director-General had decided, on the Compensation Committee's recommendation, to increase the award under paragraph 12 of Annex II from 4 to 6 per cent of the relevant figure, and to reject the claim made under paragraph 9 to payment of benefits for continuing partial disability for want of evidence of loss of earning capacity. In a letter of 12 September 1994 to the chief of Personnel Administration the complainant's solicitors stated that he was not challenging the first part of that decision but wanted reconsideration of his claim under paragraph 9:

"The condition of which our client complains forced our client to take early retirement in 1990 since the complaint would not allow the extensive travel required in his position as an Adviser. Our client's knowledge and skills are in the field of Project Advice and management internationally. Our client lives in North Yorkshire, England. There is, realistically, no prospect of him obtaining employment which would allow him to utilise his skills without him having to travel extensively. Our client's medical condition prevents him from so travelling.

... This partial invalidity of our client continues and we cannot foresee our client being able to obtain meaningful employment, given his age, medical condition, and location of living."

9. The Director-General's decision rejecting that claim was conveyed in a letter of 12 September 1995 from the chief of Personnel Administration. The Director-General noted, said the letter, that the complainant had not alleged when taking early retirement that the reason was that his condition barred extensive travel and that he had no prospect of obtaining employment. Not only was there no evidence to support the assertion but the ILO had offered him a short-term contract in 1991 and he himself had applied for a position in the Organization in 1993. The Director-General's view was that "the evidence produced to support the claim of impairment of professional ability and loss of earning capacity" was "manifestly insufficient".

10. The complainant is asking the Tribunal to quash that decision on the grounds that "it is manifestly unfair and ignores the medical evidence submitted to date". In his rejoinder he contends that because the loss of function has been assessed at 6 per cent -- and the rate of his disability "appears ... to be increasing" -- there must be "equivalent" loss of earning capacity. He argues that if the evidence obtained in the internal proceedings was insufficient the Tribunal should quash the decision founded thereon and order further inquiry -- as indeed it did in Judgments 141 (*in re* Miele), 875 (*in re* Muiga) and 1373 (*in re* Kogelmann) -- to ascertain whether further payments are due to him.

11. The complainant's case is that his earning capacity has been impaired, not directly, but merely indirectly in that travel is essential for any employment for which he is suited and his condition has made it difficult, if not impossible, for him to travel. The burden therefore lay on him in the internal proceedings to show that any suitable employment would entail an appreciable amount of travel. As the Director-General observed in the text of the impugned final decision, the complainant did not take that position when asking for early retirement. And even

though the secretary of the Compensation Committee was helpful enough to point out the lack of evidence in support of a claim under paragraph 9, he still did not offer any. Indeed, before the ILO took the decision of 26 August 1994 referred to in 8 above, all that he had ventured on that score was that he would be severely handicapped "in his working environment". Even the statements that his solicitors made thereafter amounted to no more than an unsupported assertion that, living in Yorkshire, he had no prospect of obtaining employment that would not require him to "travel extensively".

12. The conclusion from the foregoing is that the impugned decision did not ignore any medical or other evidence and was not -- as the complainant puts it -- "manifestly unfair". Though the Tribunal has indeed ordered further inquiry in some cases, it did so because the medical evidence before it was inadequate -- which in any event it is not in this case -- and where the inadequacy of such evidence was not attributable to any lapse on the complainant's part. Here the evidence that was lacking was of the need for the complainant to travel for the purposes of any suitable employment. That was a matter that fell within his own knowledge. Yet he neglected to offer such evidence, though given every opportunity to do so. So the Tribunal will not order any further inquiry.

13. The conclusion from the foregoing is that the complainant's claims must fail in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 30 January 1997.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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