

## EIGHTY-NINTH SESSION

*In re Abdel Malek*

Judgment No. 1971

The Administrative Tribunal,

Considering the complaint filed by Mr Abdel Malek Wissa Abdel Malek against the World Health Organization (WHO) on 26 April 1999 and corrected on 7 May, the WHO's reply of 16 July, the complainant's rejoinder of 19 October 1999 and the Organization's surrejoinder of 18 January 2000;

Considering Article II, paragraph 5, 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 was born in 1924 and is a citizen of Egypt and the United States. He joined the staff of the WHO in 1974 and worked as a technical officer in dental health in Kinshasa, Zaire, at grade P.4 and then P.5. He fell ill in 1979 and was on sick leave for four months. After he retired in January 1984 he continued to suffer from bouts of ill health. In 1990 his illness was diagnosed as chronic hepatitis C and the complainant is of the opinion that he had initially contracted it in Zaire in 1979. He regarded it as being service-incurred and on 27 May 1994 submitted a claim for compensation.

The Advisory Committee on Compensation Claims reviewed his claim but concluded that it was time-barred because it was made some 15 years after the initial onset of the illness. In a decision of 17 February 1995 the Director-General endorsed the opinion of the Advisory Committee and rejected the complainant's claim.

In July 1995 the complainant appealed to the Headquarters Board of Appeal which recommended that the case be sent back to the Advisory Committee for further consideration after review by a Medical Board. In a letter of 18 July 1996 the Director-General gave the complainant leave to refer the matter of the relationship between his illness and his service in Zaire to a Medical Board. The Medical Board, composed of three doctors, met on 12 June 1997. Each doctor submitted a report to the Advisory Committee. Their majority opinion was that it was likely that the complainant contracted the virus before taking up service for the WHO. On 11 November 1997 the Advisory Committee concluded that the complainant's illness could not be regarded as service-incurred and recommended that his claim be rejected. On 17 December 1997 the Secretary of the Advisory Committee informed the complainant that the Director-General had endorsed that recommendation.

On 11 February 1998 the complainant appealed to the Headquarters Board of Appeal against that decision. It issued its report on 16 October 1998 concluding that in the absence of scientific proof determining the time of the onset of the disease, the benefit of the doubt should go to the complainant. It recommended that the WHO should reimburse all medical expenses related to his chronic hepatitis C. The Director-General did not uphold that recommendation and so informed the complainant in a letter dated 20 January 1999 which the complainant impugns.

B. The complainant claims that his illness was service-incurred and that he should be paid compensation under Annex E to WHO Manual Section II.7. He argues that there was a strong likelihood that he contracted it while performing his duties as a dental surgeon in Zaire where he was assigned in 1974. Hepatitis, he says, was endemic in that part of Africa and the nature of his profession exposed him to it.

He points to errors of fact and contradictions in the reports of two of the doctors on the Medical Board and contests the view that his health condition predated his appointment to the post in Zaire. Inasmuch as the Director-General's decision was based on their findings it too is flawed. The reason why his illness was not diagnosed as hepatitis C during his service was because that virus was not yet known in 1979. The Organization should have carried out a more comprehensive check-up to assess his state of health when he joined the WHO in 1974. Having omitted to

carry out appropriate tests at that time it cannot now in good faith contend that he already had chronic hepatitis when he entered its service.

The complainant asks the Tribunal to set aside the impugned decision and send his case back to the Organization so that it can determine his rights under the applicable rules on the assumption that he contracted hepatitis while in its service. He wants the Tribunal to specify that those rights will encompass: compensation due under Annex E to Section II.7 of the WHO Manual; his medical expenses resulting from his illness, including those incurred since he left the employ of the WHO plus the fees and expenses of the doctor who represented him on the Medical Board. He also claims costs.

C. In its reply the Organization says that for an illness to be declared service-incurred Annex E to Section II.7 requires that there should be a direct causal link between the illness and the performance of official duties. According to the Tribunal's case law the burden is on the complainant to prove that such a link exists. It argues that, on the balance of probabilities, it is more likely than not that he became affected by the hepatitis C virus before he began working for the WHO, and that his chronic hepatitis was not service-incurred.

In alleging errors of fact and flaws in the Medical Board's conclusions the complainant is merely seeking a reassessment of the medical findings. This Board had to determine whether the illness contracted in 1979 constituted the onset of hepatitis C, and whether the complainant could have contracted the virus directly as a result of his assignment in Zaire. The majority opinion of the Medical Board concluded that it was more likely than not that the virus had taken a hold earlier in his life. The fact that the three doctors on the Board held slightly different opinions was not evidence of any error. The correct procedure was followed in consulting them and their reports did not contain errors or contradictions.

D. In his rejoinder the complainant disputes certain findings of the Medical Board. He submits that he is not seeking a reassessment of the medical aspects of his case, but wants to show that the two members of the Board who recommended rejecting his claim "ignored the legal presumption in [his] favor that he was healthy" when recruited by the WHO and thus drew mistaken conclusions from the facts. He claims that they also overlooked essential facts in their clinical analysis of his illness.

The complainant says that when he fell ill in 1979 he did not ask to have his illness recognised as service-occurred because he had no idea at the time that it would be permanent. He underwent medical examinations prior to taking up his appointment with the WHO. He says he finds it surprising that considering the fact that he was a practising dentist the Organization did not carry out liver function tests at the same time. Even though hepatitis C was still unknown these tests would at least have revealed hepatic dysfunction if he was already infected by the virus. Had he already contracted the virus he could have put numerous patients at risk.

E. In its surrejoinder the Organization asserts that the members of the Medical Board gave careful consideration to all aspects of the complainant's case, and the fact that the complainant disagrees with their findings affords no basis for review.

It observes that the purpose of a medical examination on recruitment is to ascertain fitness for duty and not to search for clinical signs of illnesses that might evolve. Although no liver tests were performed when the complainant was appointed, failure to do so does not constitute negligence. The matter must be considered in the light of medical practice at the time.

The Organization considers that the complainant has failed to put forward any proof that his illness was service-incurred and says that in reaching a decision on the matter it complied with all the relevant rules.

## CONSIDERATIONS

1. The complainant is a dental surgeon who worked in Nigeria for two years just prior to joining the WHO in August 1974 as a technical officer on a dental health project in Zaire.
2. In late 1979 the complainant experienced clinical symptoms which were diagnosed first as amoebic hepatitis and later as toxic hepatitis. The condition was treated as an isolated incident and he remained on sick leave for four months. An echography of the liver showed no abnormalities in January 1980. He retired on 31 January 1984 on reaching retirement age.

3. On 31 October 1990 the complainant tested positive for antibodies to the hepatitis C virus. In 1991 he had intermittent fever. In March 1993 a liver biopsy confirmed established cirrhosis of the liver as a result of chronic hepatitis C.
4. In May 1994 he submitted a claim for compensation for a service-incurred illness saying that he had contracted the hepatitis virus in Zaire in 1979. The rules governing compensation in the event of death, injury or illness are laid down in Annex E to Manual Section II.7. After reviewing his claim the Advisory Committee on Compensation Claims recommended that it be dismissed as time-barred and the Director-General accepted the recommendation on 17 February 1995.
5. The complainant appealed to the Headquarters Board of Appeal which recommended that the case be returned to the Advisory Committee for further consideration following a review by a Medical Board. On 18 July 1996 the Director-General informed the complainant that, in accordance with Annex E to Manual Section II.7, he would be permitted to consult a Medical Board about the relationship between the chronic hepatitis C diagnosed in 1993 and his employment in Zaire.
6. The Medical Board was composed of three doctors, one - Dr C - chosen by the Director-General, and one - Dr B - by the complainant, and both choosing the third one - Professor H.
7. At a meeting on 12 June 1997 the Medical Board examined two issues which are summarised below:
  - "1. [The complainant's] contention that the chronic hepatitis C with which he was diagnosed in 1993 resulted ... directly from particular hazards to the health or safety to which the staff member ... was exposed solely as a result of the assignment by the Organization to an area in which these hazards existed in accordance with paragraph 4(b) of Annex E to WHO Manual, Section II.7; and
  2. The medical relationship, if any, between the abnormal hepatic function experienced by [the complainant] in 1979 and the diagnosis of chronic hepatitis C in 1993."
8. Each doctor wrote a separate report.
9. On the first issue, Dr C. concluded that the probability was very high in the complainant's case that contamination took place before he joined the WHO, and gave his reasoning. On the second issue, he concluded that there was no medical evidence - clinical or biological - to show that the episode suffered in 1979 was related to an acute viral hepatitis, and gave his reasons.
10. Professor H. concluded with regard to the first issue, that the statistical probability that the complainant was contaminated between 1974 and 1979 was low and gave reasons; from a clinical point of view, while the possibility of contamination did exist, it seemed more likely that contamination had occurred earlier in life, and he explained why. On the second issue, he said that clinical judgment suggested that the liver tests in 1979 were abnormal because of an existing chronic hepatitis C condition, and gave reasons.
11. Dr B. said the presumption must be that the complainant was healthy when he joined the Organization and recalled that the WHO never carried out liver function tests on the complainant. He asked what evidence was needed to decide if the complainant had contracted hepatitis C in Zaire: scientific proof would be non-existent. In 1979 hepatitis C was unknown, but he did have hepatitis in 1979 although science could not prove it was actually hepatitis C. The burden of proof was on the Organization to show that he had liver disease prior to his employment and it had failed to do so. In his opinion the course of evolution of the complainant's condition lands right on the decade he worked for the Organization.
12. The Advisory Committee met on 11 November 1997 to review the matter and in the light of the majority opinion of the Medical Board, it recommended rejecting the claim. This was accepted by the Director-General on 17 December 1997.
13. The complainant appealed against the decision to the Headquarters Board of Appeal on 11 February 1998. The Board of Appeal considered that the complainant had been given full medical clearance on entry to the Organization. The opinion of two of the medical practitioners that there was a high probability that the disease was contracted prior to entry could not lead to a definite conclusion. In the absence of scientific proof either way, the Board of Appeal said that, in accordance with long-standing principle the benefit of doubt should go to the staff

member. It felt that the liability of the Organization should be restricted to covering medical and other expenses connected with the disease, with no further compensation. It recommended that the WHO should pay all the medical expenses relating to the hepatitis C treatment as well as certified legal expenses.

14. The Director-General did not accept the conclusions of the Board of Appeal. By a letter dated 20 January 1999 she stated that, as reflected in the Tribunal's case law and based on the evidence available, the requirement should be to show that it was more likely than not that the illness was service-incurred. Taking into account all the material evidence, and in particular the findings of the Medical Board, she could not see this to be the case.

15. The Director-General, in reaching her decision, rejected the conclusion of the Board of Appeal that, while the probabilities were high that the hepatitis C was contracted prior to entry to the Organization, this could not lead to a definite conclusion. The test in this case is not whether there is definite or positive proof or proof beyond reasonable doubt, but whether on the balance of probabilities it is more likely than not that hepatitis C was contracted at a particular time (Judgment 1373 *in re* Kogelmann Nos. 1, 2, 3, and 4). In the present case the preponderance of opinion of the Medical Board was that it was more probable that it was contracted prior to entering into the WHO's service.

16. The burden of proof is on a complainant to show that, on the balance of probabilities, the facts which he alleges have been established. The Tribunal will not substitute its opinion for the opinion of the majority of the Medical Board. It will review the procedure and will only intervene in appropriate circumstances.

17. Contrary to Dr B.'s assumption, there is no presumption that the complainant did not have hepatitis C on entry to the Organization. He did not have any obvious disability so all the medical examination on entry could do was to pass him as being fit for work.

18. The Tribunal will not reassess the medical aspects of this case. There is no evidence that either Dr C. or Professor H. overlooked any relevant facts or drew mistaken conclusions from them. They gave their medical opinion based on the available facts. Therefore, the complaint must fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet