

NINETY-FOURTH SESSION

Judgment No. 2186

The Administrative Tribunal,

Considering the complaint filed by Mrs M. d. C. B. against the World Trade Organization (WTO) on 2 October 2001 and corrected on 11 January 2002, the WTO's reply of 2 April, the complainant's rejoinder of 8 July and the Organization's surrejoinder of 17 September 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a citizen of both Spain and Switzerland, was born in 1947. She joined the Organization in 1971. From 1986 to 1992 she was supervisor of the Spanish text processing unit. Her grade was G.6.

By a memorandum of 20 January 1992 to the Chief of the division to which her unit belonged she sought promotion to G.7, the grade ordinarily assigned in the United Nations common system to supervisors of text processing units. Her unit having been reorganised, she was appointed in March 1992 to a post of "quality controller". In October of the same year she was transferred to the Document Systems Section, but not assigned to specific duties. Dissatisfied with her position, she protested to the Director-General in a memorandum of 20 September 1994, but got no reply. In 1995, after returning from secondment to the United Nations for a peace-keeping mission, she was assigned to work which, in the words of the WTO, was "repetitive and affording little satisfaction". In May 1997 she was transferred to a post of documents control assistant. In comments of 10 June 1998 to the Chief of the Personnel Division the complainant, commenting on her performance report for the period from 1 May to 31 December 1997, objected that her career had been "blocked" since 1985. She got no reply. On 3 November 1999 she wrote a second letter of protest to the Director-General. The Chief of Personnel acknowledged receipt of it on 17 November 1999. In comments of 17 March 2000 on her performance report for the period from 1 January 1998 to 31 December 1999, the complainant repeated her objections, pointing out that the Director-General had still not answered them. In a memorandum of 12 April 2000, replying on the Director-General's behalf, the Deputy Director-General for personnel issues said that while understanding her "frustration", he could find "no evidence of any deliberate official act which affected [her] adversely, or which was not dictated by circumstances".

On 31 May 2000 she wrote to the Director-General requesting a review of the "decision" set out in the memorandum of 12 April. On 12 September the Chief of Personnel rejected her request on the Director-General's behalf. The complainant appealed against that decision on 31 October 2000, requesting a review of the decision of 12 September, a letter recognising the moral injury she had suffered, and 100,000 Swiss francs in damages. In a very detailed report of 8 June 2001 the Joint Appeals Board found that the Administration had caused her moral injury by discriminating against her and had failed in its duty to respect her dignity and good name. It recommended that the Director-General offer her an apology for the injury caused, pay her 10,000 Swiss francs in compensation and explore with her the possibilities of transfer within the Organization.

By a memorandum of 6 July 2001, of which the complainant acknowledged receipt on 23 July, the Deputy Director-General for personnel issues informed her that the Director-General endorsed those recommendations. The Deputy Director-General apologised on the Administration's behalf and she was offered 10,000 Swiss francs by

way of compensation for the injury. He also invited her to make known her wishes as to another post. That is the decision the complainant impugns. Subsequent negotiations between the complainant and the Administration bore no fruit.

B. The complainant pleads that the Joint Appeals Board failed to take its reasoning "to a logical conclusion as regards the substance of the case and the offer of financial compensation". She submits that, being based on the Board's report, the challenged decision is tainted with the same flaws, so in contesting the Board's conclusions she is in fact objecting to the lawfulness of the decision.

In her submission, the Board failed "to grasp" certain facts, such as the radical reorganisation of the Spanish text processing unit in 1992 and her assignment to subordinate duties on her return from secondment in 1995. However, she has no wish to revert here to the substance of the case since both the Board and the Administration acknowledged that her main pleas were sound and her appeal largely well-founded.

But she contends that the compensation offered - little more than one month's salary - is inadequate: it is commensurate neither with the seriousness of her charges against the WTO nor with the moral injury the latter caused her. Furthermore, it falls far short of what she spent on lawyer's fees and on medical treatment for psychological trauma. She accuses the Organization of deliberately erecting obstacles to receivability and asks the Tribunal to take this into account in determining costs. She points out that in the negotiations subsequent to the Board's report the WTO offered to pay her 18 months' net salary plus three months' notice if she agreed to leave. This offer - which she rejected - is proof that the amount recommended by the Board was not adequate.

She seeks the quashing of the impugned decision, an award of 100,000 Swiss francs in moral damages, and costs.

C. The WTO replies that the complaint is contradictory. On the one hand the complainant criticises the Board for falling short of a logical conclusion regarding the substance of the case, and on the other, states that she has no wish to revert to it. Contrary to her assertion, the Board did "grasp" the facts she refers to, but rejected them for want of evidence.

As to its offer of compensation, it did not misappraise the evidence in endorsing the Board's recommendation. The Board took the view that the moral injury could in part be "remedied other than by financial compensation", and the Organization had duly offered its apologies. Besides, the Board did not endorse all the complainant's objections: it found that she had herself added to the injury by not filing timely appeals against some of the decisions. As to her medical expenses, there is no indication that they are work-related. The Organization categorically denies that it created "obstacles to receivability". In fact it has not challenged the receivability of her complaint. The complainant's interpretation of the facts betrays bad faith. There is an informal but efficient system in the WTO whereby legal advisers assist staff members at no cost in asserting their rights. Lastly, compensation for injury and a settlement proposal are different and so bear no comparison.

D. The complainant rejoins that she sees no contradiction in the fact that she accepted the Board's position with a few reservations. She challenges the Organization's interpretation of the Board's report.

As to the compensation, she points out first that the apology was made neither in public nor by those responsible for the injury. Secondly, in order to back up its argument that the Board did not accept all her claims, the WTO divided them up in a manner which was misleading because it put all the facts on a par. The complainant denies exacerbating her own injury: she was in fact prevented from exercising her right of appeal, as the Board itself recognised. Thirdly, she provides a medical certificate, dated 22 April 2002, which found that "one of the factors most involved in her psychological suffering was her relationship with her working environment" and that "her emotional experience was chronically affected by feelings of being unappreciated, humiliated and treated unfairly at work", which contributed "to a large extent to causing and maintaining a depressive syndrome". Lastly, she reiterates her arguments about receivability and contends that she derived no benefit from the Organization's legal aid system because none of the legal advisers would take the risk of helping her. She points out that she is now doing a job that suits her and feels no need to change.

E. In its surrejoinder the WTO points out that the complainant accepted the Board's report and can no longer challenge it. The only issue, therefore, is whether the compensation offered is commensurate with the moral injury suffered. It upholds its interpretation of the Board's report.

It submits that it was not bound to make a public apology, and the complainant never asked for one. Besides, appeals against administrative decisions are directed against the Organization so it is the Organization - through the Deputy Director-General in this case - which must answer for the conduct of its officials. It also points out that the complainant could have appealed against the decision to assign her duties below her grade. Lastly, the WTO sees as "suspicious" the "unexpected and belated disclosure" of a medical certificate, which, it says, shows that there are serious doubts as to the causes of the complainant's psychological problems. It considers that it is for the Tribunal to decide whether a psychiatric expert should be appointed to verify the statement of the complainant's physician. The complainant alone must bear the legal costs she saw fit to incur during the internal appeal since she was not bound to engage a lawyer and has not shown that she contacted any of the legal advisers available in the Organization.

CONSIDERATIONS

1. In 1971 the complainant joined the Organization, at grade G.3. By 1985 she had reached grade G.6. From 1986 to 1992 she was supervisor of the Spanish text processing unit.

She wrote on 20 January 1992 to the Chief of the division to which her unit belonged seeking promotion to G.7 and, in the meantime, a special post allowance at that grade.

Following the reorganisation of the Spanish text processing unit she was appointed in March 1992 as a "quality controller" still at grade G.6. In October 1992 she was transferred to the Document Systems Section but not officially assigned to specific duties. She protested about her position to the Director-General in a memorandum of 20 September 1994, but got no reply.

From October 1994 to April 1995 she was seconded to the United Nations to participate in a peace-keeping operation. On her return she had no alternative but to accept work that was repetitive and gave her no satisfaction because, according to the Administration, there were no suitable jobs available at the time. Not until May 1997, after an interview with the Chief of Personnel, was she appointed to a post of "documents control assistant".

On 10 June 1998, in comments addressed to the Chief of Personnel on her performance report for the period from 1 May to 31 December 1997, she complained that since 1985 her career had been "blocked" at grade G.6. She got no reply.

She again protested to the Director-General on 3 November 1999, seeking "an end to this iniquitous situation obviously tainted with bias". The Chief of Personnel told her on 17 November that owing to a heavy workload she would be given an answer "when circumstances allow[ed]".

In a memorandum of 12 April 2000, replying on the Director-General's behalf to further objections from the complainant, the Deputy Director-General for personnel issues acknowledged with regret that the complainant had been given no written reply and that perhaps the reforms of the Spanish text processing unit had not always been to her advantage. He nevertheless concluded that there was no evidence of "any deliberate official act that affected [her] adversely, or which was not dictated by circumstances". On 31 May 2000 the complainant asked the Director-General to reconsider the decision contained in that memorandum. On 12 September the Chief of Personnel rejected her request on the Director-General's behalf.

On 31 October 2000 the complainant lodged an appeal against that decision. In a detailed report of 8 June 2001 the Joint Appeals Board found that the Administration had discriminated against the complainant and had failed to respect her dignity and good name thereby causing her moral injury. It recommended that the Director-General offer the Administration's apologies for the injury caused, pay her moral damages of 10,000 Swiss francs and explore with her the possibilities of transfer within the Organization. The Board responded as follows to the complainant's four pleas:

(a) Failure to grant a special post allowance

The statutory requirements for the grant of this allowance were not met because the complainant was not asked to carry out "temporarily" duties of a post in a higher grade because she herself held the post of supervisor of the Spanish text processing unit. The refusal of the post allowance was therefore not discriminatory in intent. However,

the situation could be indicative of "administrative inefficiency" since, unlike similar posts, hers had not been upgraded.

(b) Failure to assign the complainant to a suitable post

The Board noted that the complainant had agreed to nearly all the Administration's decisions to reassign her. Regarding the period from October 1992 to August 1993, the Board found that the Administration had proceeded with the transfer without either demonstrating that it was warranted or complying with the requisite procedure. For the period from 1995 to 1997 it found that although there was no obvious breach of the duty to respect her dignity, the Administration could have been more diligent in seeking a suitable post on her return from secondment.

(c) Failure to propose her for promotion after 1992

The Board found that the Chief of her division could not be blamed for not proposing her for promotion. In fact, since she had not held a post at grade G.7 after 1992, promotion would have involved a reclassification of her post, which the Chief had failed to obtain.

(d) Failure to reply in writing to the complainant's requests

The Board pointed out that as a rule staff members' comments on their performance appraisals call for no reply. However, it found that a response in this case "could have helped to alleviate [the complainant's] frustrations" whereas the absence of a response had added to her fears. The Board also found it regrettable that her memorandum of 20 January 1992 had elicited no written reply constituting a decision which she could have challenged; and she may have taken the absence of a reply to be evidence of hostility on the Administration's part. A talk is no substitute for an answer in writing. The Board also regretted the absence of a reply from the Director-General to the memorandum of 20 September 1994 which may have added to her feeling of discrimination, and his delay in replying to her letter of 3 November 1999, which he could, and should, have answered much earlier.

On 6 July 2001 the Deputy Director-General for personnel issues sent the complainant a memorandum, which reads as follows:

"1. The Director-General endorses the findings of the Joint Appeals Board, in particular that the Administration blatantly misappraised the evidence in taking the decision contained in the memorandum of 12 April 2000. The Administration obviously misappraised the facts, first as regards the duties assigned to you in 1992, 1993 and 1994 and secondly as regards the absence of any written response by your supervisor to your requests of 1992.

2. The Director-General acknowledges that the Administration failed in its duty towards you as regards non-discrimination and the heed that must be paid to a staff member's dignity.

3. The Director-General has asked me to offer you the Administration's apologies for the injury thus caused.

4. The Director-General proposes to grant you financial redress commensurate with the seriousness of the matter and endorses the Joint Appeals Board's finding that 10,000 Swiss francs would be an appropriate amount.

5. The Director-General is also asking the Administration to explore with you the possibilities of transfer within the Secretariat that would allow you to enhance your professional development and put your skills to better use. I accordingly invite you to inform the head of the Human Resources Section of your wishes in this respect.

6. I deliver to you by hand the report of the Joint Appeals Board so that you may ascertain that the Director-General has accepted in full the Board's findings and recommendations. The Director-General hopes that, in so doing, he has responded to your grievances and has proposed a series of measures that will enable you to forego recourse to any other means of redress. It goes without saying that he would have to review his position were you to decide to take your case to the ILO Tribunal.

[...]"

2. The complainant is asking, inter alia, for the Tribunal to order "the quashing of the Director-General's decision, notified by the Deputy Director-General's letter of 6 July 2001 insofar as it rejects most of [her] claims and award all consequent redress, namely, to order the Organization to pay [her] 100,000 Swiss francs in compensation for the

severe moral injury she has suffered".

The complainant expresses a number of regrets. She observes, for example, that the Joint Appeals Board failed to take matters "to a logical conclusion" and states that she does not "intend to revert to the substance of the case" since the Board and the Administration "clearly acknowledged that her main pleas were sound and that her appeal was largely well-founded". She finds the offer of 10,000 Swiss francs in damages insufficient. It amounts to barely more than a month's salary; she had to spend a great deal on lawyer's fees for the internal appeal which ought to be covered by an award of costs commensurate with the expenses incurred. She furthermore suffered a psychological trauma which involved her in substantial medical costs.

The WTO asks the Tribunal to dismiss the complaint and to uphold the memorandum (described as "letter/decision") sent to the complainant on 6 July 2001.

3. (a) The legal nature of that memorandum, sent on behalf of the Director-General, is unclear.

Both parties regard it as a decision. However, it has all the characteristics of a settlement proposal. To treat it as such would, in all likelihood and in the absence of a final decision, imply a finding of failure to exhaust the internal remedies as Article VII, paragraph 1, of the Tribunal's Statute requires. Furthermore, it is doubtful in this case that the absence of a decision would allow Article VII, paragraph 3, of the Tribunal's Statute (direct recourse to the Tribunal) to be applied.

But there is no need to rule on the issue, since both parties take the memorandum to be a decision and the case is ready for judgment. When those circumstances are met precedent allows waiver of the requirement that internal remedies be exhausted, and to save further proceedings the case need not be remanded to the Organization.

The defendant is nevertheless bound by its "decision", including the amount set for moral damages. Even if the complaint were to be dismissed on that score the substantive part of the impugned "decision" would stand, as the Tribunal may not award the complainant less than what the impugned decision granted her (contrary to what the Organization believes).

(b) In a complaint before the Tribunal the complainant may not enlarge the claims made in the internal appeal.

The complainant made it clear that she would not rely on facts or grievances other than those examined by the Joint Appeals Board. Even if she subsequently cited facts that might have prompted other grievances, she essentially held to her position, which is the one the Tribunal must base itself on.

(c) Although seeking no more than the 100,000 Swiss francs she claimed in the internal appeal, on coming to the Tribunal the complainant is claiming compensation in respect of her costs during the internal appeal procedure.

So long as the total amount of an award does not exceed that claimed in the internal appeal, the internal remedies will have been exhausted. Furthermore, the Tribunal will not be in breach of the rule *ne eat judex ultra petita partium* by awarding damages on grounds other than those initially cited (see Judgment 1590, under 3).

4. In moral damages the complainant claims more than the amount offered by the Director-General on the recommendation of the Board (10,000 Swiss francs).

As is clear from the impugned decision, the Director-General endorsed the Board's findings, and the Administration acknowledged that its decision of 12 April 2000 was flawed by an obvious misappraisal of the facts regarding the duties assigned to the complainant from 1992 to 1994 and the failure to reply to her requests and observations. That being said, staff members too must contribute to averting, or at least limiting, any injury. The complainant ought to have objected immediately to the way she was treated. But she refrained, probably because she was afraid of trouble, though there were no objective grounds for such fears.

The WTO takes the view that by apologising and acknowledging its wrongs it has offset the moral injury in part. An award of monetary compensation is nevertheless warranted as well.

The considerations warrant no criticism. Although it cannot be accused of actual harassment, the Organization failed on several occasions, and on some counts continuously, to respect the complainant's good name and dignity and caused her injury (see Judgments 1637, 1811, 1870, 1942, 2025, 2034, 2067 and 2100).

Is the WTO's offer of compensation adequate? In her submissions to the Tribunal the complainant has established that she suffered a nervous depression - for which she had received treatment since 1996 - and on the basis of the certificate from her doctor the Tribunal is satisfied that the ill-treatment she suffered at work contributed to making her health worse. In this connection, the medical certificate is not entirely devoid of evidential value, so to order an expert examination as well would not be justified. It has to be admitted that, although not the most injurious and although made over short periods, the Administration's mistakes had effects that lasted (in any event from October 1992 to July 2001).

In the Tribunal's view, the fact that she suffered from feelings of frustration over a long period warrants slightly more compensation than that proposed by the WTO in the impugned decision, and it sets the amount at 15,000 Swiss francs.

5. In the case of alleged damages, the burden of proof is on the claimant.

(a) The complainant cites medical costs which she says were incurred by an illness for which the Organization was at least partly responsible.

However, since she provides no proof, her claim must be dismissed.

(b) In the internal appeal procedure the complainant was assisted by a lawyer. There is no doubt but that the Joint Appeals Board conducted a thorough investigation, which contributed largely to establishing the facts and to the recognition by the WTO of liability. The complainant seeks compensation in respect of the costs. The defendant rejects her claim on the grounds that she incurred them needlessly, particularly as in the WTO there were lawyers prepared to help her.

Where an organisation's rules make no provision to cover costs incurred in internal proceedings, counsel's fees may be treated as a component to be counted in any damages awarded for injury. In Judgment 1870, under 9, the Tribunal ruled that such costs may be claimed only if the staff member had good reason to believe them necessary for the sound defence of his cause.

Here the complainant did. She was unsuccessful until her case went to the Joint Appeals Board, which may have caused her to doubt the adequacy of the assistance she would receive from a WTO legal aid adviser. The detail and subtleties of the Board's report show that the factual and legal issues of the case needed careful scrutiny. The complainant therefore had good reason to believe that she needed the help of a qualified lawyer from outside the Organization in asserting her claims. Given the particular circumstances of the case, the WTO is wrong in its assertion that she ought not to have spent money needlessly on lawyer's fees.

The complainant is therefore entitled to compensation, determined *ex aequo et bono* on the basis of the evidence. The Tribunal sets the amount at 5,000 Swiss francs.

6. Since she succeeds in part, she is entitled to legal costs. Having represented the complainant in the internal appeal, her counsel did not have to examine the case *ab initio* in the present proceedings. In view of that fact and of the costs awarded in respect of the internal appeal, the Tribunal sets the amount at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The amount of the moral damages which the Organization must pay to the complainant is set at 15,000 Swiss francs.

2. The Organization shall pay her, by way of compensation, 5,000 francs towards her costs during the internal appeal procedure.

3. It shall pay her 5,000 francs in costs for the present procedure.

4. Her other claims are dismissed.

In witness of this judgment, adopted on 8 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet