Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2419

The Administrative Tribunal,

Considering the complaint filed by Ms M. A. against the Universal Postal Union (UPU) on 22 December 2003, the Union's reply of 12 March 2004, the complainant's rejoinder of 28 April and the UPU's surrejoinder of 3 June 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, who has dual Egyptian and Swiss nationality, was born in 1956. She joined the UPU on 1 May 1982 with a fixed-term contract as a grade G.2 typist. With effect from the same date she was admitted to the UPU's Provident Scheme. She received a permanent appointment on 1 November 1985 and was promoted to grade G.3 with effect from 1 January 1990, then to grade G.4 with effect from 1 November 1997.

On 17 January 1996 the head consultant of the clinic where the complainant had been hospitalised since 8 December 1995 wrote out a certificate for the attention of the UPU stating that it was important for health reasons that the complainant should work in an office on her own. She returned to work on 4 September 1996 and was allocated an office to herself. In 2000 she submitted several medical certificates, including one dated 2 June indicating that as of 22 May 2000 she was totally unfit for work, for an indefinite period. She returned to work on a 30 per cent basis from 6 February 2001.

In a letter of 6 July the UPU's medical adviser, referring to the opinion of the specialists treating the complainant, wrote that her state of health did not seem to be improving and that a total incapacity for work was to be expected in the long term. He proposed that the Director General should offer the complainant early retirement on health grounds. On 16 October 2001 the Director General wrote to the complainant asking for her views on the matter. The following day she agreed to receive a disability benefit. Before deciding whether to grant the benefit, the Management Board of the UPU's Provident Scheme asked the complainant to undergo a further examination in a medical observation centre in order to ascertain her degree of incapacity for work. It may be noted that the degrees of disability corresponding to degrees of incapacity are set out in paragraph 7 of Article 34 of the Scheme's Regulations as follows:

"Degree of incapacity (%)	Degree of disability (%)
0 - < 40	-
40 - < 50	25
50 - < 66.67	50
66.67 – 100	100"

The medical assessment took place on 17 October 2002 and was conducted in Arabic. According to the specialist's report, the complainant's capacity for work in her then current working conditions was assessed at 50 per cent, but in "normal" conditions could be as high as 80 per cent. The UPU's medical adviser proposed that the Secretary of the Provident Scheme rate the complainant's work capacity at 50 per cent, and that rate was applied as from 17 February 2003.

In a letter of 25 April the Secretary of the Provident Scheme informed the complainant that the Management Board had decided, on 14 April, not to grant her a disability benefit – on the grounds that her degree of incapacity for

work, as evaluated at the time of the medical assessment, was below the minimum degree for entitlement to a disability benefit. By a letter of 1 May the Director of Human Resources informed the complainant that, on that basis, her degree of incapacity was set at 20 per cent as from 12 May 2003, and that her work capacity was to be 80 per cent. The complainant then asked for a French-speaking doctor to carry out a further medical assessment in order to enable the Management Board to review its decision. She was informed in a letter of 26 September 2003 from the Scheme's Secretary that her request had been rejected and that the decision of 14 April was final. That is the impugned decision.

B. On the basis of various medical opinions, the complainant considers that her capacity for work may in no way be rated at more than 50 per cent. She maintains that in the course of the medical assessment her right to be heard was disregarded. As the assessment was carried out by a doctor who did not speak French, she argues that she was unable to respond adequately to factual questions he asked her, which in her view were sometimes offensive or not directly related to her state of health. The complainant also considers that the specialist's report and his attitude lacked objectivity and impartiality: she has doubts as to whether the medical observation centre was independent in relation to the defendant, since it was appointed by the latter "on the basis of a private law relationship".

As a preliminary request, the complainant asks the Tribunal to set aside the impugned decision and to order the Provident Scheme to seek a further medical opinion, subject to the medical specialist being chosen by common agreement between the parties. Her principal claims are that the Tribunal should recognise that she is entitled to a full disability benefit as provided for in Article 34 of the Provident Scheme's Regulations, that it should dismiss all other or contrary claims put forward by the Provident Scheme, and that it should order the latter to pay costs. Subsidiarily, she wants three doctors to be heard as witnesses.

C. In its reply the UPU, acting on behalf of the Provident Scheme, explains that insofar as it seeks to have the impugned decision set aside and to obtain a further medical opinion the complaint is receivable. On the other hand, the claim for payment of a full disability benefit is in its opinion irreceivable since the impugned decision concerns neither the degree of disability nor the amount of the benefit. The chief purpose of the decision under challenge was rather to reject the complainant's request for a further medical assessment and hence refuse to grant her disability benefit. She, according to the defendant, never claimed entitlement to such a benefit. Since she has not exhausted all internal remedies, she cannot now submit a claim in that respect to the Tribunal.

On the merits the Union recalls that, according to its case law, the Tribunal may not substitute its own views for those of the doctors; it can only express an opinion as to whether the medical assessments were conducted in accordance with the correct procedure.

With regard to the granting of disability benefit, it points out that the Management Board consulted several doctors before giving an opinion and that the Board's decision of 14 April 2003 to refuse her the disability benefit was therefore taken in full knowledge of the facts.

The UPU considers that the complainant's health problems are partly due to her family situation and thus refuses to bear the consequences of her choice of lifestyle. It considers that the specialist was at liberty to ask whatever questions he felt were relevant. In its opinion, moreover, the medical observation centre cannot be accused of partiality simply because it was appointed by the Scheme, since according to Article 34bis of the Scheme's Regulations, it is the responsibility of the Management Board to obtain the opinion of other doctors or of a specialised medical observation centre. The defendant takes the view that a further assessment is not justified, considering that the selected observation centre is a "leading authority in Switzerland" and that it was more appropriate to conduct the assessment in Arabic. Furthermore, Appendix 3c of the Regulations does not make provision for the consultation of more than one medical observation centre.

D. In her rejoinder the complainant takes issue with the report of the medical observation centre, holding that it did not qualify as "a medical opinion", it was simply a report produced by one of the parties in the case. She reiterates that her right to be heard was disregarded. She wishes the Tribunal to conclude that the findings of the centre and those of the UPU's medical adviser are "diametrically opposed" and that under those circumstances it is the medical adviser's views which should prevail, since he was better acquainted with her case. She points out that she was never offered a post involving duties that were "reasonably compatible with [her] abilities", in breach of the provisions of Article 34, paragraph 1, of the Scheme's Regulations.

She further contends that, in the event that the Tribunal accedes to her request for a further medical opinion, and that opinion establishes the presence of a long-term incapacity for work, the degree of which entitles her to a disability benefit, that benefit must be paid retroactively in respect of the past five years, in accordance with Article 41 of the Swiss Federal Act on occupational old-age, survivors' and invalidity insurance (known as "LPP").

E. In its surrejoinder the Union maintains its position regarding the receivability of the complaint. It argues that the Scheme is not bound to apply the LPP since it enjoys the same immunities from jurisdiction and enforcement as the UPU. The grant of a disability benefit is governed exclusively by the Scheme's Regulations; moreover, granting a benefit retroactively is out of the question if no provision is made to that effect in the Regulations. The UPU also disagrees with the complainant's interpretation of Article 34, paragraph 1.

The defendant asserts that the medical assessment was carried out in a perfectly correct manner. In its view, the medical opinions obtained were not contradictory. On the contrary, they were complementary, despite some discrepancies.

The defendant adds that the complainant is not justified in arguing that her right to be heard was disregarded, since in the course of the assessment she was able to express herself freely in her mother tongue.

CONSIDERATIONS

1. The complainant joined the UPU on 1 May 1982 and was admitted to the Union's Provident Scheme from that same date. On 1 November 1985 she received a permanent appointment.

2. The complainant was away on sick leave increasingly often from 1995 onwards. She resumed full-time work only in June 1997. She performed her duties normally until the end of 1999 but from 2000 onwards her absences on sick leave became once again increasingly frequent. The defendant then decided to have her examined by its medical adviser. According to his report dated 18 September 2000, the complainant's incapacity for work was rated at 100 per cent. From 6 February 2001 the complainant was able to resume her work but only on a 30 per cent basis.

On 6 July 2001 the defendant's medical adviser submitted a further report in which he stated that in his opinion it was out of the question for the complainant to return to work and that her incapacity in the long term would be 100 per cent. He proposed early retirement on health grounds.

When asked to express her views on the matter, the complainant formally agreed to receive a disability benefit by letter of 17 October 2001.

3. At its meeting of 27 October 2001, the Management Board of the Provident Scheme considered that the information submitted to the Board did not provide clear indications regarding the state of health of the complainant and her incapacity for work, and so before taking a final decision on the grant of disability benefit it decided to ask the secretariat of the Provident Scheme to have the complainant examined by a medical observation centre or, if appropriate, by a panel of physicians of the United Nations Organization in Geneva.

The requested medical assessment, which was to take place at the Medical Observation Centre of the Hôpital de l'Ile in Bern (MEDAS), was conducted on 17 October 2002, in Arabic. In its report dated 23 October 2002 the MEDAS concluded that the complainant's capacity for work as a secretary at the UPU was estimated at 50 per cent.

On the basis of this medical report, of which he gave a summary, the UPU's medical adviser proposed to the Secretary of the Provident Scheme that the complainant's capacity for work should be rated at 50 per cent. In a letter of 14 February 2003 the Director of Human Resources informed the complainant that that rate would apply as from 17 February.

4. At its meeting of 14 April 2003 the Management Board of the Provident Scheme decided not to grant the complainant a disability benefit.

On 25 April the Secretary of the Provident Scheme notified the complainant of the decision taken by the Management Board adding that: "This decision is based on the practice of provident institutions in Switzerland,

which inter alia establish a link between a participant's degree of incapacity for work and the degree of disability giving entitlement to the Scheme's benefits. In this case the MEDAS rated your degree of incapacity for work below the minimum rate for entitlement to a disability benefit." He added that the complainant would be informed of the effects that this decision would have on her employment relationship with the International Bureau of the UPU by a separate letter from the Directorate of Human Resources. On 1 May the complainant was informed by the Director of Human Resources that, on the basis of the indications given in the letter from the Scheme's Secretary, the degree of incapacity for work would be set at 20 per cent, in lieu of the 50 per cent established on the basis of the MEDAS report.

5. The complainant wrote to the Secretary of the Provident Scheme on 19 May 2003 asking for a further medical assessment to be carried out by a French-speaking physician in order, she added, to enable the Management Board to review its decision of 14 April 2003, in accordance with Article 19 of the Provident Scheme Regulations.

Paragraph 1 of that article is worded as follows:

"A participant or any other person able to show that he is entitled to rights under these Regulations by virtue of the participation in the Provident Scheme of a staff member who considers that a decision of the Management Board is prejudicial to him may, within 60 days of its notification to him, submit a written request to the Board asking it to review the decision."

The members of the Management Board decided in July 2003 to reject the appeal on the grounds that the MEDAS was fully qualified to provide an opinion and that there was therefore no reason to seek another one.

In a letter of 26 September 2003, which constitutes the impugned decision, the Secretary of the Provident Scheme informed the complainant of the Management Board's final decision, which consisted in maintaining the decision of 14 April 2003 and therefore not acceding to her request for a further medical opinion.

6. The complainant's claims are set out under B, above.

The defendant agrees that, insofar as the complaint is aimed at setting aside the impugned decision and obtaining a further medical opinion, it must be found receivable. It maintains, on the other hand, that her first principal claim is irreceivable since the degree of disability and the amount of the benefit are not at issue in the impugned decision.

The Tribunal considers that it need not give a ruling on that matter until it has determined whether the request for a further medical assessment was justified.

7. Appendix 3 to the Regulations of the Provident Scheme, entitled "Procedure for granting a disability benefit", reads as follows:

"The following stages are provided for:

a […]

b […]

c discussion and decision by the Management Board, taking account of the following aspects (on the basis of a case history prepared by the Secretariat):

– adequacy of the medical opinion; in particularly difficult, complex cases, a second (or even a third) medical opinion should be obtained, which may involve consulting a medical observation centre to evaluate the degree of incapacity and the appropriateness of a specific gainful activity;

[…]"

It emerges from these provisions that the Management Board, when ruling on whether to grant a disability benefit, should discuss and decide the matter only if provided with an adequate medical opinion, and that in particularly difficult, complex cases it should obtain a second or even a third medical opinion.

8. In the Tribunal's view, the conditions were met for a further medical assessment to be ordered. It appears from the submissions that the first (according to the complainant) or second (according to the defendant) opinion was given by the MEDAS and it was therefore possible to seek a second (or third) opinion.

The submissions also show that the MEDAS' opinion could not be considered adequate in view of the complexity of the case. The Tribunal notes contradictions between the medical opinion given by the MEDAS and that of the defendant's medical adviser, and differences of interpretation of the MEDAS report by the medical adviser and the Management Board. On the basis of that report the medical adviser had proposed "accepting a 50 per cent capacity for work", which would have entitled the complainant to a disability benefit, while the Management Board stated that the MEDAS had rated the complainant's incapacity for work below the minimum rate for entitlement to a disability benefit.

If one adds to that the fact that, in a note from the Secretary of the Provident Scheme addressed to the members of the Management Board, it is acknowledged that the MEDAS' services were not entirely satisfactory (owing to language problems and excessive delays) and that the complainant objected to the conditions in which the medical assessment was held, stressing in particular the misunderstandings due to language difficulties, it may be admitted that the request for a further assessment was fully justified.

9. The impugned decision must therefore be set aside and the case referred back to the UPU for the latter to seek a further medical opinion from a specialist appointed by agreement between the parties.

10. As the complainant partially succeeds, she is entitled to costs which the Tribunal sets at 2,000 Swiss francs. The Tribunal considers that there is no need in the circumstances to give a ruling on her other claims.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is referred back to the UPU, which shall proceed as indicated under 9, above.

3. The UPU shall pay the complainant 2,000 Swiss francs in costs.

4. There is no need in the circumstances to give a ruling on her other claims.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.