

The Administrative Tribunal,

Considering the sixth complaint filed by Mrs S. L. d. S. against the United Nations Industrial Development Organization (UNIDO) on 20 November 2006 and corrected on 4 December 2006, UNIDO's reply of 3 April 2007, the complainant's rejoinder of 11 July and the Organization's surrejoinder of 22 October 2007;

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

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

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

A. Facts relevant to this case are to be found in Judgments 1464, 1834, 2189 and 2458. Suffice it to recall that in Judgment 2458, delivered on 6 July 2005, the Tribunal set up a timetable for the establishment of a medical board to consider and report to the Advisory Board on Compensation Claims (hereinafter "Advisory Board") on the medical aspects of the complainant's appeal seeking compensation for service-incurred illness under Appendix D to the Staff Rules. Accordingly, a medical board was established by the end of September 2005. It comprised Dr D., appointed by UNIDO, Dr T., appointed by the complainant, and Dr V., agreed upon by the other two members as chairman of the medical board. The members of the medical board met on 22 December 2005 and unanimously decided to seek a psychological assessment of the complainant. The psychologist who examined the complainant stated in her report of 30 January 2006 that the latter was "psychologically stable, clear and structured" and that her condition should be considered as a consequence of harassment at the workplace. In its report dated 6 April 2006 the medical board found that, given the passage of time and the conflicting accounts of the work situation, it was difficult to give a medical opinion on the question of attributability. It added that it had taken into account the lapse of time and had been cautious in its assessment.

That report was forwarded to the Secretary of the Advisory Board under cover of a letter dated 12 April 2006. On the basis of the findings of the medical board and the psychologist's assessment, the Advisory Board concluded at its 53rd meeting of 19 April 2006 that there was no evidence to support a recommendation that the Director-General change his original decision of 12 October 1994 not to deem the complainant's illness attributable to the performance of official duties and to deny her compensation under Appendix D. The minutes of the meeting indicated that the medical board's report was dated 12 April 2006. On 9 June the Managing Director of the Programme Support and General Management Division (hereinafter "Managing Director") approved on behalf of the Director-General the Advisory Board's recommendation. The complainant was notified of the outcome of her appeal by letter of the same date. On 30 June 2006 she wrote to the Director-General, asking him to confirm whether he endorsed the recommendation of the Advisory Board and, if so, to authorise her to have direct recourse to the Tribunal. She also asked for the disclosure of a copy of the medical board's original report in German together with an English translation thereof, as well as the minutes of the Advisory Board's meeting of 19 April. By a letter of 22 August 2006, which the complainant indicates as the impugned decision, the Managing Director confirmed that as the duly authorised officer and on behalf of the Director-General, he had approved the Advisory Board's recommendation. He allowed her to go straight to the Tribunal and he attached both the report of the medical board and the minutes of the Advisory Board.

In the meantime, in response to a request addressed by the complainant's counsel to the chairman of the medical board, Dr V., for a copy of his expert report, the latter stated in a letter of 22 July 2006 that he had not kept a copy of his report before transmitting it to Dr T. for signature. He referred the counsel to Dr D., noting that the conclusion of the expert report was "entirely in keeping with [the complainant's] expectations". Similarly, at the counsel's request, Dr T. stated in an *aide-mémoire* dated 24 August 2006 that, in February 2006, Dr V. had drafted a written opinion in consultation with her and had submitted a 30-page document to UNIDO. She affirmed that the medical board's members had agreed to classify the complainant's illness as service incurred. She added that in April 2006 she had signed the original document which had been hand-delivered and collected by a driver sent by Dr D. and that she had not been able to make a copy of it.

In a letter of 1 September 2006 to the Managing Director, the complainant argued that the documents she had been provided with were not complete, as one of the essential parts, namely Dr V.'s "original report" was missing. She contended that both Dr V. and Dr T. had confirmed that the said report was more than 30 pages long and favourable to her, and also that it had been transmitted to Dr D. for signature in early March 2006, after having been duly signed by the other two members of the medical board. She requested a copy of the German original and an English translation.

On 8 September the complainant again wrote to the Managing Director, stating that she failed to understand how the medical board's findings, dated 6 April 2006, could be practically the same as the medical board's report of a later date – in the minutes of the Advisory Board meeting, the medical board's report was said to be dated 12 April 2006 – and asked him to clarify whether indeed the medical board's report, including its findings, had been transmitted to the Director-General together with the Advisory Board's recommendation. Noting that the said report of 12 April 2006 was not among the documents she had been provided with, she requested a full copy, including all enclosures. In his reply of 23 October 2006 the Managing Director indicated that the date of the medical board's report was erroneously shown as 12 April 2006 instead of 6 April 2006 in the minutes of the Advisory Board's meeting and that the minutes had been amended to reflect the correct date. He added that the medical board's report dated 6 April 2006, a copy of which the complainant had received, was the complete report that had been agreed upon and signed by its three members. He confirmed that that report together with the recommendation of the Advisory Board had been transmitted to him for decision on behalf of the Director-General, as the duly authorised official. In a letter to the complainant's counsel dated 5 November 2006, Dr V. stated that he did not recall having written a report of more than 30 pages. He added that the final report, the exact date of which he could not recollect as he had not kept a copy, had been drawn up jointly by himself and the other two members of the medical board on the basis of documents which included the complainant's psychological assessment.

B. The complainant submits that the Organization concealed Dr V.'s "expert report" in an effort to "camouflage" the medical board's final conclusions, which, she asserts, were in her favour. She argues that UNIDO acted arbitrarily and breached the requirements of due process, in that it refused to disclose the "actual report" of the medical board and hence permit an objective review of her case. She also argues that the Administration did not give reasons for its decision not to consider her illness as service incurred, thereby breaching its duty to substantiate an adverse administrative decision.

In her view, both the medical board and the Advisory Board failed to conduct their proceedings in accordance with the applicable rules. The document which UNIDO presents as the medical board's report was drafted single-handedly by Dr D. without prior consultation with the other two members of the medical board, who were requested to sign it without being given sufficient time to review it. Furthermore, that document did not take into account the psychologist's assessment, which explicitly stated that her illness was attributable to work-related factors, and its attachments did not include the additional medical documents that she had submitted to the medical board. Moreover, contrary to the provisions of Appendix D, the Advisory Board's recommendation was not transmitted to the Director-General for decision together with the "actual report" of the medical board.

The complainant further argues that the medical board failed to comply with its terms of reference and produced a document which either ignores or distorts decisive conclusions showing that her condition is a consequence of harassment at the workplace. She contends that this document cannot be substituted for Dr V.'s expert report, which was entirely in her favour, as was confirmed by Dr T. in her *aide-mémoire* and by Dr V. in his letter of 22 July 2006. She cites the reference in the minutes of the Advisory Board's meeting to a report of the medical board dated 12 April 2006 as proof that another report exists. She accuses UNIDO and its appointee of "fraudulent manipulation" and bad faith and denies any responsibility for the delay in the internal appeal proceedings, noting that it would have been avoided if the Organization had recognised her illness as service incurred when she first raised the issue in 1994.

The complainant asks the Tribunal to quash the impugned decision, to rule that her illness is service incurred, and to award her compensation in accordance with the provisions set forth in Appendix D, without prejudice to her entitlements under other provisions of the Staff Regulations and Staff Rules. She requests that UNIDO be ordered to disclose the report written by Dr V., including all attachments, as well as the medical board's report of 12 April 2006. She seeks the quashing of UNIDO's decision to terminate her appointment with effect from 15 February 1996, reinstatement with full benefits (salary, allowances, health insurance contributions), recalculation and payment in full of her contributions to the United Nations Joint Staff Pension Fund from the date her participation was discontinued. She also seeks reimbursement of her health insurance contributions to a local company until she

becomes eligible for “after service health insurance (Van Breda)”, as well as of her life insurance contributions. She claims compound interest at the rate of 10 per cent per annum on all amounts due, material and moral damages and costs.

C. In its reply the Organization submits that the complaint is irreceivable because it was filed beyond the ninety-day time limit set forth in Article VII, paragraph 2, of the Statute of the Tribunal. It contends that on appeals under Appendix D, the Director-General is required to make his “final determination” upon receipt of the Advisory Board’s recommendation together with the report of the medical board. Accordingly, its final administrative decision on the complainant’s appeal was not the decision of 22 August 2006, as the latter maintains, but the decision of 9 June 2006, which she received on 12 June 2006.

On the merits the defendant dismisses the complainant’s allegations as unfounded. It denies that there is a report of more than 30 pages written by Dr V., and emphasises that there is only one report of the medical board, namely the report dated 6 April 2006. In support of its argument, it cites Dr V.’s statement that he only signed one report, which had been prepared by all three members of the board, and Dr D.’s declaration to the same effect. It argues that the *aide-mémoire* which the complainant presents as evidence should not be taken at face value since it was drafted by her counsel, and Dr T. only signed it after being threatened with legal action. It characterises the reference in the minutes of the Advisory Board’s meeting to a medical board report dated 12 April 2006 as an error which the complainant should not have “turned [...] into a non-existent report”.

According to UNIDO, the complainant cannot challenge the decision to reject her appeal on the grounds of procedural irregularities or omission of material facts, since she has failed to substantiate her allegations of bad faith and lack of due process, and has not shown that the medical board reached a unanimous conclusion in her favour, or that the medical report is incomplete, or that the Organization has failed in its “duty to inform her of the basis of the impugned decision”.

The defendant denies that the medical board ignored or distorted conclusions or that it did not comply with its terms of reference. It affirms that the medical board reviewed the relevant medical evidence, including the complainant’s psychological assessment and the evidence provided by the complainant herself, and argues that it correctly exercised caution in its assessment of the question of attributability by taking into account “the passage of time and the conflicting accounts of the work situation”. UNIDO considers the complainant responsible for the excessive delay in the internal appeal. It invites the Tribunal to reject her claims concerning termination and reinstatement on the grounds that these matters are *res judicata*.

D. In her rejoinder the complainant asserts that the complaint is receivable. She argues that the impugned decision was the final decision on her appeal because it was the decision by which UNIDO agreed to waive the jurisdiction of the Joint Appeals Board. She presses her pleas on the merits.

E. In its surrejoinder UNIDO reiterates its objections to receivability and maintains its position on the merits.

CONSIDERATIONS

1. The complainant indicates in her complaint form that the decision communicated to her by the Managing Director’s letter of 22 August 2006 is the decision she challenges before the Tribunal. However, she refers in her submissions to the letter of 9 June 2006 as “UNIDO’s official notification to [her] of its formal adverse decision – which is now being impugned”. Consequently, the Tribunal takes it that she in fact impugns the decision of 9 June 2006, by which the Managing Director rejected on behalf of the Director-General her internal appeal pursuant to Article 17 of Appendix D. This decision sustained the Director-General’s original decision of 12 October 1994 not to deem the complainant’s illness attributable to the performance of official duties and accordingly to deny her compensation for service-incurred disability.

2. The complainant challenges the decision on the grounds of fraudulent manipulation of documents, non-completion and inaccuracy of the medical report’s findings and procedural irregularities. She alleges that UNIDO concealed two documents, namely a report of more than 30 pages authored by Dr V., the chairman of the medical board, and the report of the medical board dated 12 April 2006. She claims that the findings of the medical board were drawn up by Dr D., the Organization’s appointee, “according to UNIDO’s interests” and that Dr V.’s expert report, which was in her favour, was neither mentioned nor considered in the preparation of the medical board’s

final report. The complainant also claims that she was placed on permanent total disability by the UNIDO Staff Pension Committee after she exhausted her sick leave entitlements in September 1994, and that this was not considered by the medical board. In her opinion, there is a clear contradiction between the favourable conclusions of the external medical experts (Dr V., Dr T., and the psychologist who examined the complainant) and “the adverse conclusions reached by the Advisory Board at its 53rd meeting held on 19 April 2006 on [Dr D.’s] medical advice and on the [f]indings drawn up by him”. She therefore submits that the proceedings leading to the Director-General’s final decision are tainted with procedural irregularities. Furthermore, the complainant notes that the Administration failed to consider the updated medical information and the certificates regarding her illness, nor did it consider her work situation. Her claims are set out under B above.

3. The Organization argues that the complaint is time-barred and hence irreceivable. It submits that although the complainant was notified of the impugned decision on 12 June 2006, she filed her complaint with the Tribunal on 20 November 2006, that is beyond the ninety-day time limit set forth in Article VII, paragraph 2, of the Statute of the Tribunal. UNIDO rejects the complainant’s assertion that the letter of 22 August 2006 waived the requirement in that Article that the internal remedies be exhausted. It asserts that the letter merely confirmed the decision of 9 June 2006, which was to be considered as a final administrative decision within the meaning of Article VII, paragraph 1, of the Statute.

4. The Tribunal concurs. The Organization’s letter of 9 June 2006, which referred to the complainant’s appeal under Article 17 of Appendix D of 10 November 1994, was clearly the final decision taken on that internal appeal. Its wording that “the [Advisory Board] unanimously recommended to the Director-General, and it was so approved, that there was no evidence to recommend to the Director-General a change [in] the original decision to reject the claim” did not leave room for interpretation. It was a decision which was challengeable before the Tribunal. The fact that the complainant wrote on 30 June 2006 to the Director-General asking him “for formality keeping purposes” for confirmation that he endorsed the Advisory Board’s recommendation did not have the effect of changing this fact and of suspending the statutory time limit.

5. The question of receivability depends on the interpretation of Article 17 of Appendix D and Chapter XII of the Staff Rules. Article 17 of Appendix D provides for the establishment of a medical board to consider and report to the Advisory Board on the medical aspects of appeals in case of injury or illness. The Advisory Board shall then “transmit its recommendations together with the report of the medical board to the Director-General who shall make the final determination”.

Staff Rule 112.03(a) stipulates that “[s]taff members shall have the right of further appeal against administrative decisions by applying to the Administrative Tribunal of the International Labour Organization in accordance with the provisions of the Statute of the Tribunal”. Pursuant to Staff Rule 112.03(b) “[a]n application to the Tribunal shall not be receivable unless the applicant has previously submitted the dispute to the Joint Appeals Board under rule 112.01 and the Board has communicated its opinion to the Director-General [...]”.

6. In the Tribunal’s view, it is illogical that appeals in case of injury or illness must, before being allowed to go to the Tribunal, go through two distinct appeals processes, first the medical board and the Advisory Board and then the Joint Appeals Board. Likewise, it is unreasonable to expect that the Director-General must decide on an appeal three times before that appeal is brought before the Tribunal. The Tribunal considers that appeals lodged before a medical board and the Advisory Board run parallel to appeals brought before the Joint Appeals Board. Therefore, upon receipt of the Director-General’s final decision the staff member was entitled to lodge a complaint with the Tribunal, in accordance with Article VII of its Statute requiring the exhaustion of internal remedies. It should be noted that the use of the term “final determination” in Article 17 of Appendix D shows that appeals in case of injury or illness are governed by a “special rule” which takes precedence over “ordinary rules” unless the particular circumstances of a case require otherwise.

In light of the fact that the final decision dated 9 June 2006 was received by the complainant on 12 June 2006, and that the letter of 22 August 2006 was merely a confirmation of that final decision, the Tribunal holds that the complaint, which was filed on 20 November 2006, is time-barred and hence irreceivable in accordance with Article VII of the Statute of the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 16 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet