Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

B. (No. 2)

v.

IOM

121st Session **Judgment No. 3574**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. B. against the International Organization for Migration (IOM) on 24 July 2013 and corrected on 19 November 2013, IOM's reply of 27 February 2014, the complainant's rejoinder of 26 May and IOM's surrejoinder of 3 September 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the termination of his appointment for health reasons.

Facts relevant to this case are to be found in Judgment 3416 concerning the complainant's first complaint. Suffice it to recall that he entered the service of IOM in 2002 and received a regular contract on 1 December 2008.

As from 11 October 2007, the complainant, who suffered from an illness which has been recognised as being of occupational origin, alternated periods of part-time work and sick leave. On 27 September 2010 he underwent a medical examination in order to determine his

capacity to work. In a report submitted on 3 November 2010, the doctor who had been chosen to conduct the examination concluded that the complainant was fit to resume full-time work as from 1 December 2010.

On 15 December 2010 the complainant was informed that he should resume full-time work as from 1 January 2011. Further to a memorandum of 13 January 2011 in which he requested the reconsideration of that decision, he was examined by a second doctor, Dr F. In his report of 9 May 2011 the latter concluded that the complainant could not resume work at IOM and that he was completely unfit to work "in his current post, in the current circumstances". However, he added that the complainant "would be able to resume part-time or full-time work in a professional activity corresponding to his training, experience and ability" and that he might even "reach 50% capacity within three months and 70-100% after a few more months".

On 26 August IOM's Legal Adviser notified the complainant that the Organization's Medical Officer had examined the report of 9 May and, on the basis of the conclusions drawn by Dr F., he considered that the complainant would be able to resume full-time work outside IOM after a "short transition period". He therefore offered to place him on special leave with pay for a maximum period of one year as from 1 October. During that period, the complainant would receive job offers from one of the job placement firms identified by IOM. In addition, if the complainant was interested, IOM would try to arrange for him to be seconded to the Institute for Sustainable Development and International Relations (IDDRI) in Paris, a body with which IOM had signed a cooperation agreement. On 26 September the complainant presented some counter-proposals. On 5 December 2011, after an exchange of correspondence, the Legal Adviser submitted a "final offer" to the complainant which, apart from a few minor changes, was broadly similar to that of 26 August. It was made clear to him that, if he did not accept it by 19 December 2011, he would be separated from service for health reasons in accordance with Staff Regulation 9.3.

By letters of 27 January 2012 the complainant proposed that the Legal Adviser should make "some adjustments" to the offer of

5 December 2011 and submitted that, since IOM's Medical Officer had recognised that he was fully and permanently incapacitated for service in IOM, he should be awarded a total permanent disability benefit under subparagraph 16.1.1 of Annex B-2 to the Staff Rules.

On 17 February 2012 the Legal Adviser advised the complainant that, since he had rejected the offer of 5 December 2011, IOM was withdrawing that and all previous offers and would accordingly take a final decision concerning the award of a total permanent disability benefit and the possible termination of his employment under Staff Regulation 9.3. The complainant was informed by a letter of 27 February that the Director General had concluded that he did not meet the criteria for eligibility for such a benefit and that he had decided to terminate his employment for health reasons with effect from 31 May 2012, since he was medically unfit for regular and efficient performance of duty.

On 25 April the complainant asked the Director of the Department of Human Resources Management to review the decision to reject his request for a disability benefit or, at least, "to seek the opinion of a medical board". He also requested redress for the injury caused to him by the termination of his appointment. Lastly, he asked for the payment of 88.75 days of accrued annual leave. On 25 May an officer of that department confirmed that the complainant was not eligible for a total permanent disability benefit. She also explained that, bearing in mind the conclusions of the report of 9 May 2011, and since he had rejected the offer of 5 December 2011, the decision to separate him from service for health reasons was the only "reasonable conclusion". Since she considered that, in view of the efforts made by IOM, that decision had not caused him any injury, she rejected his claim for redress. She pointed out that under Staff Rule 5.014 the only compensation to which he was entitled was a sum equivalent to a maximum of 60 days' accrued annual leave. As far as the "possibility" of convening a medical board was concerned, she asked him to confirm – which he did on 31 May – that he disputed the conclusion that he was medically unfit for regular and efficient performance of

duties, in which case the matter would be referred to a medical board in accordance with Staff Regulation 9.3(b).

On 31 May the complainant lodged an appeal with the Joint Administrative Review Board. At his request, the examination of this appeal was stayed pending a decision from the Medical Board. On 15 August 2012 the complainant received a document entitled "Terms of reference and procedure" of the Medical Board. This document specified that the Board was asked to indicate whether it confirmed the decision to separate the complainant from service for health reasons by ascertaining whether IOM had correctly interpreted Dr F.'s report of 9 May 2011. It also stated that the Medical Board should base its decision solely on the documents that were in IOM's possession at the time when that decision was taken and that its terms of reference did not include an assessment of the complainant's "current" state of health. The next day the complainant supplied the name of the doctor who would represent him on the Medical Board. On 16 November 2012 the complainant wrote to the members of the Medical Board. In his letter he criticised their terms of reference and asserted that they could perform their assignment only by basing themselves on all the pertinent documentation, irrespective of its date. On 22 November 2012 the Legal Adviser informed him that the Medical Board's terms of reference would not be modified, since he had not objected to them prior to 16 November.

In its report of 11 March 2013, which constitutes the impugned decision, the Medical Board unanimously agreed with Dr F. that the complainant could not return to work at the IOM. However, with reference to Dr F.'s conclusion that the complainant was completely unfit to work "in his current post, in the current circumstances", the Board emphasised that the expression "current circumstances" was open to interpretation. If it meant "the usual way in which IOM generally operates", then the Organization had interpreted Dr F.'s report correctly.

Having received a copy of the Medical Board's report on 15 May 2013, that same day the complainant asked the Director of the Department of Human Resources Management whether IOM intended

to reinstate him. On 23 May 2013 the Director replied that he could not be reinstated because, in her opinion, the Medical Board had confirmed the decision to terminate his appointment for health reasons. She informed him that he would therefore have to bear the costs of the appeal to the Medical Board in accordance with Staff Regulation 9.3(b).

The proceedings before the Joint Administrative Review Board resumed after the complainant had sent it a "further summary brief" on 24 May 2013, in which he requested his reinstatement or, failing that, payment of a total permanent disability benefit, as well as redress for the injury suffered and payment of 88.75 days of accrued annual leave. In its undated report, the Joint Administrative Review Board concluded that, since the complainant did not have a permanent disability, he did not qualify for a permanent disability benefit; that the decision to separate him from service was not unlawful; that there was no reason to reinstate him; and that he was entitled to the award of a sum equivalent to no more than 60 days of annual leave. The Deputy Director General informed the complainant by a letter of 11 October 2013 that he endorsed all the "conclusions and recommendations" of the Board.

In his complaint filed on 24 July 2013 and corrected on 19 November 2013, the complainant requests the setting aside of the decisions of 11 March, 23 May and 11 October 2013 and, if appropriate, those of 27 February and 25 March 2012. In addition, he principally requests full redress for the injury which he considers he has suffered and, if appropriate, his reinstatement. Lastly, he claims 15,000 euros in costs.

IOM submits that the complaint is irreceivable in that the complainant is impugning the Medical Board's report, which does not constitute an administrative decision. It emphasises that not only has the complainant failed to exhaust internal remedies, but he is also submitting new arguments to the Tribunal. Subsidiarily it argues that the complaint is unfounded.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of 11 October 2013. He also seeks the setting aside of the Medical Board's report of 11 March 2013 on an appeal that he submitted to it while the internal appeal proceedings before the Joint Administrative Review Board were stayed at his request. Lastly, he seeks the setting aside of the decision of 23 May 2013 by which the Director of the Department of Human Resources Management confirmed the termination of his appointment in light of the Medical Board's report.

2. IOM's objection to receivability based on the fact that the internal appeal proceedings had not been completed when the complaint was filed with the Tribunal on 24 July 2013 is not accepted.

It is true that, in the complaint form, the complainant identified the Medical Board's report of 11 March 2013 as the impugned decision. However, he maintained the complaint after being notified of the Deputy Director General's decision of 11 October 2013, and in his brief he requested the setting aside of this decision. The situation is therefore similar, *mutatis mutandis*, to that where the impugned decision is an implied decision of rejection which is superseded by an explicit decision after the filing of the complaint (see Judgment 3373, under 3).

3. (a) The Organization contends that the complainant's submissions regarding the Medical Board's terms of reference must be dismissed as out of time. This objection to receivability must be rejected.

Since the Tribunal must review the lawfulness of the decision of 11 October 2013, it will necessarily have to examine, within the limits of its jurisdiction, not only whether the measures taken to terminate the complainant's appointment and deny him a total permanent disability benefit are based on a correct understanding of the medical experts' conclusions, but also whether the experts' terms of reference respected the complainant's rights.

(b) The Organization also challenges the receivability of several pleas on the grounds that they have been entered for the first time in the complaint. However, while a complainant may not submit new claims to the Tribunal, he may enter new pleas in support of his claims in the complaint (see Judgments 1519, under 14, and 2940, under 3).

4. IOM's submission that the Tribunal should disregard some of the facts presented by the complainant because they formed the subject of his first complaint or, in its view, are irrelevant must also be rejected.

The first complaint was dismissed by Judgment 3416, which has *res judicata* authority. The Tribunal may not therefore be asked to review or alter its appraisal of the facts at issue in that judgment. But this is not what the complainant is requesting. In recalling those facts in his second complaint, he is simply trying to support the arguments that IOM had a greater duty of care towards him because it was responsible for the vulnerable situation in which he found himself; that throughout his career at IOM he had suffered from "totally absurd and gratuitously injurious humiliations", the most recent being what he regards as the procedural flaws tainting the decision to terminate his appointment; and that he has suffered "very grave" moral injury on account of the fact that the Organization did not hesitate to terminate his appointment, although it was itself the root cause of the deterioration in his health.

5. The complainant submits that his right to be heard was breached by both the Administration and the Medical Board.

(a) Although he acknowledges that he was aware that his appointment might be terminated, he says that he was not placed in a position of knowing – precisely enough in order to be able to defend himself freely and effectively – that this measure was going to be taken.

This plea is devoid of merit.

IOM informed the complainant on several occasions, the first being on 5 December 2011, that if he did not accept the settlement offered to him, it would "have no other option than to terminate his employment". On 17 February 2012 he was warned sufficiently explicitly that, as he had rejected the settlement, IOM was going to consider the relevant elements in order to decide whether to terminate his employment.

The submissions therefore show that the complainant could have had no doubts as to IOM's intention no longer to retain him in its service and therefore to terminate his appointment, which is what then happened. In accordance with the Tribunal's case law, the complainant was given an adequate opportunity to express his views on the measure being contemplated (see, in particular, Judgment 3124, under 3, and the case law cited therein) and there is no evidence in the file that he was prevented from doing so before it was implemented.

(b) The complainant submits that he had no possibility of being heard by the Medical Board, and that the Board's mandate, entitled "Terms of reference and procedure", was improperly defined. He also takes the Board to task for disregarding documents which he submitted to it on 20 November 2012.

This plea is also unfounded.

The terms of reference which IOM proposed for the Medical Board – which were strictly confined to medical questions – stipulated that the Board should base its findings solely on documents that were in IOM's possession at the time when the decision of 27 February 2012 was taken.

The Organization sent these terms of reference to the complainant under cover of a letter dated 15 August 2012. There is no evidence that he was not given a reasonable period of time in which to object to them.

At all events, the Medical Board cannot be faulted for abiding by its terms of reference and not consulting the documents submitted to it by the complainant on 20 November 2012, since these documents lay

outside the Board's terms of reference and, indeed, outside the strictly medical scope of its investigations.

6. The complainant also submits that his right to be heard was breached by the Joint Administrative Review Board, which failed to forward to him information received from IOM regarding a possible cooperation agreement with the IDDRI.

At the complainant's request the Joint Administrative Review Board invited the Administration to send him a copy of the agreement with the IDDRI. The Administration replied that no such agreement concerning the complainant existed and explained that his possible secondment could rest only on a general cooperation agreement, the scope of which did not go so far as to confer any individual right on its staff members. The Joint Administrative Review Board did not pass on these explanations to the complainant in a timely manner.

It is clear that the document in question had no bearing on the outcome of the dispute and that there would have been no reason to seek the complainant's views on its contents. However regrettable this omission may be, because the complainant had asked for the production of this document and he learnt of its contents only through the Joint Administrative Review Board's report, the Tribunal will not therefore censure this omission as a breach of the right to be heard or of the adversarial principle.

7. In addition, the complainant submits that the Medical Board flouted IOM Staff Regulation 9.3(b). According to him, it did not attempt to determine whether he was fit to perform his duties regularly and efficiently, but sought only to ascertain whether IOM had correctly interpreted the findings of the report of 9 May 2011. Moreover, in his view, the Medical Board ought to have examined whether he was fit to work on the date when the case was referred to it, and not on the date when the decision to terminate his appointment was taken. Lastly, he submits that the Medical Board "inconsistently and inexplicably" stopped short of fulfilling its responsibilities by leaving it to the Administration to confirm the termination of his appointment.

8. The incapacity to work which is the underlying issue in this case stems from an illness of occupational origin. The case now before the Tribunal concerns only the consequences of this illness and, in particular, the complainant's ability to perform duties either within IOM, where the difficulties which undermined his health had arisen, or elsewhere, possibly with the assistance of the Organization.

9. Before going any further, it is necessary briefly to note some particularly relevant facts.

(a) The complainant, who entered the service of IOM on 1 January 2002, was placed on sick leave from 7 September 2005 to 31 March 2006 because of his illness, the occupational origin of which was recognised on 25 November 2005 and has never been disputed either by the medical profession or by the Organization.

Having been transferred to a senior position in a department other than that where his health had deteriorated, the complainant resumed work on 1 April 2006. However, since he was still suffering from this illness, he alternated periods of part-time work and periods of sick leave between October 2007 and October 2010. Shortly before he had exhausted his entitlement to 24 months of sick leave on full pay, IOM decided to have him undergo a medical examination. This examination, which was entrusted to a specialist who was ultimately chosen by the complainant, took place on 27 September 2010. Its purpose was to "determine medical functional limitations and indicate possible rehabilitation therapies". On 3 November 2010 this first independent expert concluded that the complainant would be fit to resume his duties on a full-time basis as from 1 December 2010.

It must be noted that on 27 December 2010 the complainant's treating physician concluded that resuming full-time work (within the Organization) "would lead to an exacerbation of the clinical symptoms" he had diagnosed.

The complainant returned to work on a part-time basis on 10 January 2010 but was placed on sick leave from 20 January 2011 until 31 May 2012, when his employment with IOM ceased.

(b) IOM and the health insurance company accepted the complainant's request for a second medical opinion, which was arranged in April and May 2011. In his report of 9 May 2011 the second expert, Dr F., found that it was "no longer possible for [the complainant] to resume work at IOM without the risk of his falling seriously ill again. He must be considered to be completely unfit to work in his current post, in the current circumstances." To the question of whether the complainant was able to perform different duties, Dr F. replied that "[the complainant] would be able to resume part-time or full-time work in a professional activity corresponding to his training, experience and ability, such as those which he had performed in recent years".

(c) On receiving Dr F.'s report, IOM endeavoured to reach an agreement with the complainant on a possible secondment to the IDDRI, amongst other things. As negotiations between the parties to that end were unsuccessful, on 17 February 2012 IOM advised the complainant that it would be taking a final decision on the possible termination of his appointment for health reasons and on the award of a total permanent disability benefit, which he had requested on 27 January 2012.

On 27 February 2012 the Administration rejected the request for the award of a disability benefit on the grounds that the complainant did not meet the conditions of paragraph 16 of Annex B-2 to the Staff Rules, which reads as follows:

> "A permanent disability exists when a person's ability to engage in gainful activity is reduced or when a person is absent because of an "impairment" […] and no fundamental or marked change in the future can be expected."

It also decided to terminate his appointment for health reasons with effect from 31 May 2012 because of his medically recorded inability to perform his duties within the Organization regularly and efficiently. This decision was taken under Staff Regulations 9.3(a) and 9.4(b)(iii), which read:

> "REGULATION 9.3
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> Medical Examination during Service and upon Separation
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> (a) Staff members may be required at any time to undergo a medical examination by a physician designated by the Administration. Staff

> members who refuse to be examined or who after examination are considered medically unfit for regular and efficient performance of duty, or a danger to other staff members, may be separated from service for health reasons. Refusal to be examined shall be considered as a waiver of all claims against the Organization arising on medical grounds.
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> […]
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> REGULATION 9.4
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> Termination
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> […]
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> (b) The Director General may terminate the appointment of a staff member:
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> […]
>
> (iii) for health reasons under the provisions of Regulation 9.3;
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> […]."

(d) While the proceedings in his internal appeal against the decision of 27 February 2012 were under way, the complainant availed himself of his right of appeal under IOM Staff Regulation 9.3(b) which provides as follows:

> "A staff member may appeal against separation from service for health reasons pursuant to Regulation 9.3(a) to a medical board composed of three qualified medical practitioners [...]. The findings of this board shall be considered as final and no further appeal of the staff member on medical grounds shall be considered. When the findings of the board confirm the original decision to separate the staff member from service for health reasons, the costs of the appeal shall be borne by the staff member. When the findings of the board do not confirm such original decision, the costs of the appeal shall be borne by the Organization and the staff member shall be reinstated with restoration of all emoluments and benefits as from the date of separation."

(e) According to its terms of reference, the Medical Board had to answer only one question, namely whether or not IOM had correctly interpreted Dr F.'s report of 9 May 2011 in which he had stated that "[the complainant] must be considered to be completely unfit to work in his current post, in the current circumstances", although he had added that the complainant would be able to do other "part-time or full-time work".

In its report of 11 March 2013 the Medical Board stated that "[t]he whole difficulty [lay] in understanding what [was] meant by the expression "current circumstances". It held that the IOM had correctly interpreted Dr F.'s report "insofar as the expression 'current circumstances' was meant to refer to the usual way in which IOM generally operates", but that it had incorrectly interpreted the report if "by the expression 'current conditions' [Dr F.] [had] meant the conflict still existing at that time between IOM and [the complainant] and [had] intended to convey the idea that not all the measures to resolve that conflict had been exhausted".

Closing the proceedings under Staff Regulation 9.3(b), the Medical Board approved Dr F.'s opinion, emphasising that in his view it was no longer possible, and never would be possible, "for [the complainant] to return to the work environment which [had] caused" his illness. Lastly, it accepted that Dr F.'s findings were "the best means of safeguarding the health" of the complainant.

10. On the basis of this concurring expert opinion which had been sought by agreement of the parties, IOM could not, as it did, simply confirm the termination of the complainant's appointment on medical grounds and the decision not to award him a disability benefit.

On the contrary, it was incumbent upon it seriously to consider whether there might still have been any real possibility of finding a post compatible with the state of health of the complainant, who was suffering from what was at least a partially disabling illness contracted in its service. If the search for such a position proved unsuccessful, given the particular circumstances of the case, the Organization should have enquired whether any such position could be contemplated outside IOM under cooperation agreements with other institutions which might have been able to offer the complainant a post, despite his health condition.

Having regard to the requirements of the duty of care and the principle of good faith, IOM could not simply take advantage of the understandable ambiguity of the complainant's claims and to seize the opportunity of his refusal of the conditions it had set for the

acceptance of the only serious offer which appears to have been made to him, in order to separate him from service and indiscriminately to apply to him the rules established in paragraph 16 of Annex B-2 to the Staff Rules in order to deny him his right to a disability benefit.

The decision of 11 October 2013 must be set aside for this reason, without there being any need for the Tribunal to rule on the merits of the complainant's other pleas.

11. The complaint must therefore be allowed and the case must be remitted to the Organization in order that it explore forthwith and thoroughly all real and reasonable possibilities of reinstating the complainant. If this search for a position proves unsuccessful, it shall be incumbent upon the Organization to examine the complainant's right to receive a total permanent disability benefit.

12. The complainant is entitled to damages in compensation for the moral injury caused by the unlawful treatment of his case. These damages may fairly be set at 15,000 Swiss francs.

13. As the complainant succeeds for the most part, he is also entitled to 5,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The decision of the Deputy Director General of 11 October 2013 is set aside.
2. IOM shall proceed as indicated in consideration 11, above.
3. It shall pay the complainant 15,000 Swiss francs in moral damages.
4. It shall also pay him costs in the amount of 5,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ