

arise from an illegal base. In any event, the Tribunal stresses that a claim for compensation for unjustifiable delay may succeed only when firmly based on proof of fault on the part of the Organization, fault that was instrumental in causing delay, and from which the Applicant suffered injury. At the same time, the Tribunal reiterates its concern over undue delays in appeals procedures, and welcomes the request of the General Assembly in Resolution 39/245, paragraph 6 (e) that the Secretary-General should "... strengthen the various appeals machineries, with a view to eliminating the backlog of cases ...".

XI. At the outset of his application, the Applicant presented pleas for the production of certain documents. These had to do with fees charged in Santiago for health services and with possible falsification of receipts and income tax returns. The Tribunal considers that the documents would not provide information relevant to the legal issues raised in this case and accordingly denies these pleas.

XII. For these reasons, the Tribunal rejects all of the pleas advanced by the Applicant.

*(Signatures)*

Arnold KEAN  
*Vice-President, presiding*

Herbert REIS  
*Member*

*New York, 29 October 1985*

Roger PINTO  
*Member*

R. Maria VICIEN-MILBURN  
*Executive Secretary*

## Judgement No. 352

*(Original: English)*

**Case No. 346:**  
**Smart**

**Against: The Secretary-General  
of the United Nations**

*Request by a former staff member of the United Nations for the rescission of the decision to deny him compensation for loss of earning capacity resulting from a service-incurred accident; request for medical and legal expenses.*

*Direct submission of the application to the Tribunal under article 7.1 of its statute.*

*Applicant's claim for compensation for diminished capacity for post-retirement earnings.—Consideration of the Applicant's career with the United Nations.—Finding that the Applicant did not experience any diminution in his earning capacity in the 11 years which elapsed between the injury and his retirement.—Applicant already received payments from the Organization as compensation for the injury.—The Tribunal holds that article 11.2 (d) of appendix D implies no liability during post-retirement years to a person who suffered no diminution in his earning capacity.—The Organization is not responsible for any particular level of earnings after retirement.—Claim rejected.—Dispute as to the proper mandate of the Medical Board constituted by the Advisory Board on Compensation Claims (ABCC).—Finding that the controversy is not material to the issue.—Applicant's claim for full reimbursement of the fee paid to his nominee on the Medical Board.—Interpretation of article 17 (d) of appendix D.—Finding that the successful claimant is entitled to reimbursement of reasonable fees only.—Claim rejected.—Applicant's claim for reimbursement of legal fees in connection with the presentation of his case to ABCC.—The Tribunal holds that legal costs are not reimbursable under article 17*

(d) of appendix D.—*Claim rejected.*—*Applicant's claim for compensation on account of procedural delays.—Finding that there was no delay in this case giving rise to compensation.—Request for expenses rejected.*

*Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Arnold Kean, Vice-President; Mr. Herbert Reis;

Whereas, on 13 December 1984, George Oliver Smart, a former staff member of the United Nations, filed an application the pleas of which read as follows:

“The Applicant requests the Tribunal to consider his case at the Spring, 1985 session of the Tribunal.

“A. *Preliminary measures*

“1. The Applicant requests the President, under Article 10 of the Rules of the Tribunal, to call upon the Respondent to produce the file opened on his case by the Advisory Board on Compensation Claims (hereinafter called the Advisory Board). [This request was withdrawn by the Applicant in his subsequent written observations filed on 9 October 1985.]

“2. The Applicant requests the Tribunal, under Article 9.2 of its Statute, to order the case remanded to the Advisory Board for correction of the procedure by which the Advisory Board arrived at its erroneous recommendation to deny the Applicant's claim for compensation under Article 11.2 (d) of Appendix D to the Staff Rules (hereinafter called Appendix D).

“3. Should the case be remanded, the Applicant requests the Tribunal to order payment to the Applicant of compensation equivalent to three months' net base salary at the date of his retirement from United Nations service for such loss as may have been caused by the procedural delay.

“B. *Measures under Article 9.1 of the Statute of the Tribunal*

“1. The Applicant requests the Tribunal, in the event that correction of procedure is not carried out, to order the rescinding of the decision to deny the Applicant compensation under Article 11.2 (d) of Appendix D, and to rule that the Applicant's claim dated 30 June 1981, appealing against the Respondent's decision notified to the Applicant on 6 May 1981, be reconsidered in accordance with the provisions of Article 17 of Appendix D.

“2. In the event that the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under Article 9.1 of the Statute, the Applicant requests the Tribunal to fix compensation at an amount equivalent to the benefits which the Applicant would have received under Article 11.2 (d) of Appendix D if the findings of the Medical Board had been respected, and to permit the Applicant to make further interventions concerning the calculation of this amount.

“3. The Applicant requests the Tribunal to order the rescinding of the decision not to reimburse \$US 300 of the \$800 medical bill from Dr. Briggs, incurred by the Applicant in connexion with the convening of the Medical

Board in terms of Article 17 (b), and submitted under Article 17 (d) of Appendix D.

"4. The Applicant requests the Tribunal to order the rescinding of the decision not to reimburse legal fees in the amount of \$NZ 1,750 incurred by the Applicant in connexion with presenting his case to the Advisory Board, and submitted as 'incidental expenses' under Article 17 (d) of Appendix D.

*"C. Other relief*

"1. The applicant requests the Tribunal to order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings.";

Whereas the Respondent filed his answer on 26 July 1985;

Whereas the Applicant filed written observations on 9 October 1985;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 10 March 1966. He was initially offered a probationary appointment at the P-4 level, as an Auditor at the Office of the Controller, Internal Audit Service. On 1 March 1968 his appointment was converted to a permanent appointment.

In May 1969, before travelling on an official mission to Africa, the Applicant was inoculated against typhus by a nurse at the U.N. Medical Service. The nurse injected the serum into the radial nerve of his left arm and, as a result of this action, the Applicant suffered severe pain. The Applicant was subsequently examined by a series of physicians in New York and in New Zealand, his home country. The Applicant's personal physician in New Zealand diagnosed that, as a result of the improperly administered injection, there had been chemical injury to the left radial nerve affecting motor and sensory nerve fibres.

The Applicant filed a claim with the Advisory Board on Compensation Claims, hereinafter referred to as ABCC, for compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, under Appendix D to the Staff Rules. On 21 June 1972 the Secretary of the ABCC informed the Applicant that the Secretary-General had recognized that the injury to his left arm was attributable to the performance of official duties for the Organization and that "permanent impairment of 25% [had] resulted." Accordingly, pursuant to Article 11.3 of Appendix D to the Staff Rules, he was entitled to a lump sum compensation of \$US 3,937.50 which was paid to him.

On 1 April 1974 the Applicant was promoted to the P-5 level as Chief of Section in the Internal Audit Service, Field Section, Department of Administration and Management. On 15 September 1975 he was seconded to the United Nations University in Tokyo as Senior Financial Adviser to the Rector with a special post allowance to the D-1 level, which he retained until his return to Headquarters on 1 January 1976. On 1 April 1979 the Applicant was promoted to the D-1 level as Officer-in-charge of the Internal Audit Division, Department of Administration, Finance and Management. On 1 April 1980, the Applicant's appointment was extended for six months beyond age sixty, the statutory age of separation from service, until 30 September 1980, the date on which he retired from the Organization.

During the last extension of his appointment, the Applicant, in a memorandum dated 9 May 1980, had informed the Secretary of the ABCC that

at the suggestion of the U.N. Medical Director, he had consulted his private physician in New York regarding his injury. After re-examining the Applicant, his private physician had concluded that

“The patient’s disability has continued to be in the areas mentioned: activities of daily living, driving, office work with files and referencing and the use of office equipment. His original estimate of the disability was 10% to 15% but I do believe that now because of the pain it may be considered to be 25% or more.”

The Applicant asserted that in view of his impending separation from the service of the Organization and his “partial disablement as set out in Dr. Douglas’ report”, Article 11.2 (d) of Appendix D should be applied on the ground that his future earning capacity had been adversely affected as a result of the injury sustained and consequently he should be compensated therefor. On 6 May 1981, the Secretary of the ABCC informed the Applicant that the Secretary-General had

“approved the Advisory Board’s recommendation to:

“(a) pay you a lump sum of \$US 5,250 as compensation for a 20% permanent impairment of function, from which should be deducted the amount previously paid (\$US 3,937.50);

“(b) pay your medical expenses;

“(c) deny compensation under Article 11.2 (d) of Appendix D.”

Payment was made of the sum of \$US 1,312.50 and subsequently of an additional sum of \$US 1,606.00.

On 30 June 1981 the Applicant asked the Secretary-General to reconsider the decision to deny him compensation for loss of earning capacity under Article 11.2 (d) of Appendix D to the Staff Rules and on 2 November 1981 and 10 December 1981 formally requested that a Medical Board be convened pursuant to Article 17 (b) of Appendix D of the Staff Rules.

On 19 February 1982, the Secretary of the ABCC informed the Applicant that the ABCC had considered his request and that the Secretary-General had decided “in accordance with Article 17 (b) of Appendix D, that a Medical Board be convened with the sole function of considering the appeal against the decision made on 10 March 1981 to deny the claim for a benefit under Article 11.2 (d)”.

The Medical Board met on 10 January 1983. It consisted of a physician selected by the Applicant, the U.N. Medical Director and an independent practitioner and specialist in compensation medicine who acted as chairman. The minutes of the Medical Board read in part as follows:

“The Board had before them a series of documents, medical reports and other opinions assembled by Mr. Smart. These documents are attached to these minutes.

“The Board took cognizance of the fact that Mr. Smart, who has a good professional record with the United Nations as well as a good medical record of infrequent sickness, sustained an injury as the result of an injection of a vaccine (now very rarely used) as a requirement for travel to tropical areas. The opinion of the New York neurologist in 1969 was that recovery could be expected. However, no recovery took place and by the time the patient was examined by neurologists in New York and New Zealand in 1979 the disability had become permanent. Both these neurologists believed that whereas disability had previously been rated at

10-15 per cent it should by then have been evaluated at twice this amount or more.

"In assessing the medical status of the disability the Board took into consideration Mr. Smart's need to resume accountancy practice under all the difficulties and stresses of modern conditions after a lapse of more than fourteen years and without the support of the institutional staff, colleagues and subordinates.

"THE FINDINGS are as follows:

"(1) UNANIMOUSLY decided that Mr. Smart now has a permanent disability as the result of the 1969 injection.

"(2) unanimity could not be reached on the amount of the disability but the estimates of the Board members were as follows:

"Dr. Martin: 25% of the whole man

"Dr. Irwin: 20% of the whole man

"Dr. Briggs: 25% of the whole man".

In a letter dated 23 February 1983 the Secretary of the ABCC informed the Applicant that after consideration of his case by the Medical Board, the ABCC had reviewed his claim at its 277th meeting held on 8 February 1983 and that the Secretary-General had approved

"the Board's recommendation to award you at this time a lump-sum payment of \$US 8,570.00 (from which the amounts previously paid to you will be deducted) under Article 11.3 (c) of Appendix D to the Staff Rules, representing a 25 per cent permanent disability . . . ."

The amount of \$US 1,714 was paid to the Applicant.

The Applicant requested an explanation as to why the decision did not refer to the Applicant's claim under Article 11.2 (d) of Appendix D to the Staff Rules. In a cabled reply dated 17 August 1983 the Deputy Controller stated that the Medical Board had not made "any recommendation as to compensation for loss of earning capacity as this was not within their purview" and that

"THE ABCC MAINTAINED ITS ORIGINAL POSITION THAT NO EVIDENCE HAD BEEN SUBMITTED TO DEMONSTRATE THAT THE ACCIDENT WHICH OCCURRED IN 1969 HAD RESULTED IN LOSS OF EARNING CAPACITY IN YOUR NORMAL OCCUPATION. YOU CONTINUED TO EXERCISE YOUR DUTIES AT THE UNITED NATIONS UP TO THE TIME OF YOUR RETIREMENT ON 30 SEPTEMBER 1980, AT WHICH TIME YOU RECEIVED UN PENSION . . . ."

On 5 September 1983 the Applicant requested the Secretary-General to review the decision to deny his claim under Article 11.2 (d) of Appendix D to the Staff Rules. On the same date he requested the Director, Accounts Division, for reimbursement of \$US 800 for medical fees charged by his medical doctor, \$US 250 for medical fees charged by the third medical practitioner acting on the Medical Board and \$US 1,750 for incidental expenses charged by a barrister at law. In a letter dated 21 October 1983, the Secretary of the ABCC denied the Applicant's request for reimbursement of legal fees on the ground that "this type of expense [was] not reimbursable under Appendix D to the Staff Rules" and asked the Applicant to provide further explanations on the other claims. On 6 April 1984, she informed the Applicant that the consulting physician's fees—\$US 250—would be paid in full. However, only \$US 500 of his personal physician's fees would be reimbursed because the Medical Director considered that the amount of \$800 was unjustified.

In a letter dated 6 April 1984, the Secretary of the ABCC informed the Applicant that the Secretary-General had reiterated his previous decision that his "permanent, partial impairment of function did not affect [his] earning capacity and that compensation under Article 11.2 (d) of Appendix D to the Staff Rules be denied."

On 1 September 1984 the Applicant lodged an appeal with the Joint Appeals Board. On 19 September 1984 the Chief, Administrative Review Unit, OPS [Office of Personnel Services] informed the Applicant that the Secretary-General agreed to direct submission of his application to the Tribunal. On 12 December 1984 the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The recommendation of the Advisory Board on Compensation Claims to deny the Applicant compensation under Article 11.2 (d) of Appendix D to the Staff Rules misinterprets the report of the Medical Board of 10 January 1983 and is vitiated by lack of due process. The Secretary-General's decision taken on the basis of the ABCC's erroneous recommendation suffers from the same effect.

2. The Medical Board convened on 10 January 1983 properly addressed the question of the Applicant's entitlement to compensation under Article 11.2 (d) of Appendix D to the Staff Rules by assessing the effect of the Applicant's disability on his earning capacity upon his separation from the United Nations.

3. The ABCC's recommendation was totally at variance with the Medical Board's report because it did not mention the Applicant's claim for compensation under Article 11.2 (d) which had been the only issue before the Medical Board. The erroneous recommendation constituted the basis for the Secretary-General's decision.

4. Article 17 (d) of Appendix D to the Staff Rules does not qualify the obligations of the Respondent to bear the medical fees and incidental expenses incurred by the claimant in the convening of a medical board when the Secretary-General alters his original decision in the claimant's favour. The ABCC's recommendation to deny reimbursement was arbitrary because it was based solely on the opinion of the Medical Director who did not ask the physician to provide a justification of his charges.

5. The Applicant should be reimbursed his legal fees because no free legal assistance is provided to staff members claiming compensation for service-incurred injury or illness before the ABCC.

Whereas the Respondent's principal contentions are:

1. The documentation which is available to the Tribunal in this case satisfies the Respondent's obligation in respect of production in cases on appeal from the Advisory Board on Compensation Claims.

2. Since the Applicant not only remained in the employment of the United Nations after his injury, but also continued at the same salary level in the same function, and even advanced to higher salary levels on promotion to more responsible functions, prior to his separation six months beyond the age of retirement, there was never any question of his injury having an adverse effect on his earning capacity.

3. The Respondent's refusal to pay part of the Applicant's claim in respect of the physician's fees and his denial of the Applicant's claim in respect of the

lawyer's fees reflected a correct interpretation of article 17 (d) of Appendix D to the Staff Rules.

The Tribunal, having deliberated from 18 October to 1 November 1985, now pronounces the following judgement:

I. The principal issue in this case concerns the claim of a staff member, following his retirement on pension, eleven years after suffering a duty-related injury for which he received disability payments, of entitlement to compensation for diminished capacity for post-retirement earnings. The injury that is at the heart of this claim was caused by a negligent inoculation suffered by the Applicant in 1969 while serving as a P-4 at Headquarters. In the eleven years that followed this injury until he retired at the age of 60 with 14 and a half years of pensionable service, the Applicant pursued his career in the service of the Organization. Five years after the negligent inoculation he was promoted to P-5. The next year he was seconded to the United Nations University in Tokyo as Senior Financial Adviser with a special post allowance to the D-1 level. Ten years after the inoculation he was promoted to D-1 as Officer-in-charge of the Internal Audit Division, Department of Administration, Finance and Management. These facts demonstrate beyond doubt that, while suffering pain and permanent injury to his left arm, the Applicant experienced no diminution in his earning capacity in the years between 1969 and 1980, that is, the post-injury decade of his service with the United Nations. The regularity of his promotions at the higher levels of the Secretariat and the increasingly responsible positions he occupied demonstrate conclusively that his earning capacity during this period was not adversely affected.

II. Account must also be taken of a series of awards to the Applicant through the United Nations machinery established to consider compensation in the event of duty-related death, injury and illness. In 1972 the Advisory Board on Compensation Claims found that the 1969 inoculation had caused a 15 per cent disability. At the Applicant's initiative, the ABCC reconsidered the matter in 1981, finding that the disability should be raised to 20 per cent. In 1983, again at his initiative, the ABCC found a 25 per cent disability. In each instance, the Administration made payments to the Applicant to the full measure of these ABCC recommendations.

III. When he entered the service of the United Nations in 1966, the Applicant could have reasonably have hoped for a full career with the Organization. The Tribunal finds that he suffered no disappointment in this regard, as is evidenced by his eleven-year post-injury record of his performance. The question the Tribunal is required to decide is whether, in these circumstances, the Organization is obliged, by its rules or otherwise, to compensate a staff member retired on pension—in this case, at the top of the D-1 level—and who claims that his capacity to earn from possible employment following retirement has been diminished by reason of a duty-related injury for which he received repeated payments of disability compensation while in the service of the United Nations. The Tribunal considers that this claim for additional compensation must be answered in the negative. Appendix D to the Staff Rules, entitled "Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the United Nations" (ST/SGB/Staff Rules/Appendix D/Rev.1/Add.1), does not suggest any intention to provide compensation in such a case. Accordingly, the Tribunal cannot construe Article 11.2 (d) of Appendix D, concerning separation of partially disabled staff members, so as to hold the Organization liable during the post-retirement years in regard to a person who is fully pensioned after

having continued to work for the Organization without evidence of diminished earning capacity.

IV. The Applicant urges that retirement at the age of 60 should not have the potential of marking the end of his working life; however, the General Assembly, which has the power under the Charter to do so, has decided in Staff Regulation 9.5 that 60 shall be the age of retirement for staff members, except when the Secretary-General, in the interest of the Organization, extends that age limit in exceptional cases. The Applicant is of course entitled to enjoy his pension while seeking post-retirement employment elsewhere, but it is not the responsibility of the Organization to ensure any particular level of earnings.

V. The Tribunal notes a dispute as to the proper mandate of the Medical Board that, meeting in 1983, was constituted to assist the ABCC in making what was to be the third disability award to the Applicant. The Secretary of the ABCC informed the Applicant that the Medical Board would have as its sole function the determination of his claim for post-retirement diminished earning capacity; in fact, the Medical Board did not go beyond recommending a raised disability payment. Later, the Deputy Controller informed the Applicant that the Board had not made any finding as to diminished earning capacity because it had not had any such question within its purview. While regretting this confusion between the ABCC Secretary, on the one hand, and the Medical Board and the Deputy Controller, on the other hand, the Tribunal finds that this controversy is not material to the issues presented for decision. In the light of the evidence, there is no basis for charging the Medical Board, the ABCC or the Administration with failure to take proper account of the Applicant's claim of diminished earning capacity.

VI. The Applicant also asks in his pleas for the Tribunal to order the Respondent to reimburse \$300 of the medical bill submitted to him by his private physician in New York, who served on the Medical Board as the Applicant's nominee. The bill submitted by the physician was for \$800, of which the Respondent, acting on the advice of the Medical Director of the Organization, decided to reimburse the Applicant only \$500 on the ground that it exceeded by \$300 a reasonable professional fee. The Tribunal notes that, under Article 17 (d) of Appendix D to the Staff Rules, the United Nations is to bear "medical fees and incidental expenses" in the event that the Secretary-General alters his original decision in favour of the claimant, as he did here in agreeing to raise the disability award from 20 per cent to 25 per cent. But this provision of the Rules must be regarded as entitling a successful claimant to reimbursement for reasonable expenses only. There appears to be no basis for challenging the finding of the Respondent's medical expert, who found in good faith that the \$800 was in excess of a reasonable charge. Accordingly, the claim for \$300 is denied.

VII. The Applicant also requests that the Respondent reimburse him under Article 17 (d) of Appendix D \$NZ 1,750 for legal fees incurred by him in presenting his case to the ABCC. The Tribunal accepts the contention of the Respondent that the obligation of the Organization to compensate reasonable "medical fees and incidental expenses", set forth under Article 17 (d) relates only to those expenses of a successful claimant which are incidental to medical fees. The Respondent gives by way of example of an expense "incidental to" medical fees a charge such as that incurred by a medical practitioner who serves as the claimant's nominee in travelling to the Medical Board's meeting place. The Tribunal considers that "related expenses" in the phrase "medical and related expenses" must be directly related to the medical fees for which the



Article explicitly grants compensation. Therefore, the legal costs incurred by the Applicant in presenting his claim to the ABCC are his responsibility and are not reimbursable by the Respondent.

VIII. The Applicant has also advanced a claim for compensation equivalent to three month's net base salary for loss caused by procedural delay. The record does not, in the view of the Tribunal, reveal delay resulting from any fault on the part of the Respondent. Indeed, the ABCC reacted promptly to the Applicant's first request for upward revision of its earlier disability award from 15 per cent to 20 per cent in 1981 following his retirement, and two years later, it acted with reasonable despatch in convening the Medical Board to assist it in determining the Administration's response to his second request for upward revision of the disability award. Subsequently, the ABCC and the Secretary-General reached conclusions as to the claims for increased disability and diminution of earning capacity in a prompt manner, and the Respondent likewise waived the requirement that the Applicant have recourse to the Joint Appeals Board before proceeding to the Tribunal. Accordingly, there was no delay in this case of a character that might give rise to entitlement to compensation.

IX. In view of the foregoing, there is no legal basis for the claim of the Applicant for reimbursement of his expenses in prosecuting this appeal before the Tribunal. It is denied.

X. For all these reasons, the Tribunal rejects each of the pleas put forward by the Applicant.

*(Signatures)*

Samar SEN  
*Vice-President, presiding*

Arnold KEAN  
*Vice-President*

*New York, 1 November 1985*

Herbert REIS  
*Member*

Gurdon WATTLES  
*Acting Executive Secretary*

### Judgement No. 353

*(Original: English)*

**Case No. 351:**  
**El-Bolkany**

**Against: The Secretary-General  
of the United Nations**

*Request by a former staff member of the United Nations for the payment of the repatriation grant and for compensation for procedural delays.*

*Conclusion of the Joint Appeals Board that the Applicant was not entitled to the repatriation grant.—Recommendation to reject the application.*

*Question of the Applicant's entitlement to benefits of internationally recruited staff following her detail to mission from Geneva where she had the status of a locally recruited staff member.—The Tribunal notes that the Applicant was fully aware of the distinction between locally recruited and internationally recruited staff and that her request to be granted international status while in Geneva had been rejected.—Consideration of the circumstances under which various benefits of internationally recruited staff were granted to the Applicant while she was detailed to a*