
ADMINISTRATIVE TRIBUNAL

Judgement No. 505

Case No. 539: DAW THAN TIN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman,
Vice- President; Mr. Arnold Kean;

Whereas at the request of Daw Than Tin, the Applicant herein and the widow of U Khin Maung Gyi, a former staff member of the Economic and Social Commission for Asia and the Pacific, hereinafter referred to as ESCAP, the President of the Tribunal, with the agreement of the Respondent, extended to 15 November 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 6 November 1989, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 9 February 1990, the Applicant, after making the necessary corrections, again filed an application, containing pleas that read in part as follows:

"PLEAS

- 1.To rescind the decision of the Secretary-General rejecting:
 - a. The Joint Appeals Board's [JAB] conclusion contained in paragraph 49 ...

- b. The JAB's conclusion contained in paragraph 54 ...
- 2. To uphold the findings of the JAB contained in paragraph 48 of its report to the Secretary-General ...
- a. To uphold the findings of the JAB contained in paragraph 51 of its report to the Secretary-General ...
- 3. I request the Tribunal to order the Respondent to find out why my husband's medical file was destroyed as admitted by the United Nations Medical Director (paragraphs ... and 49 of JAB report dated 30 January 1989) ...
- 4. To order the eye witnesses, namely U TIN NYUNT and Mr. Ajit M. BANERJEE respectively whose addresses are: 330 E 46th Street, Apartment 11M, New York 10017 and UN Department of Technical Co-operation and Development (UNDTCD), New York, to testify before the Tribunal since my husband died in their presence at ESCAP Headquarters.
- ...
- 6. I respectfully request the Tribunal to fix the amount of compensatory damages equal to two years' net base salary because of the material and moral injuries sustained by me due to the negligent delays and apparent incompetence of officials involved. The amount of monetary compensation which I received from the Organization, that is, (\$US12,000) cannot be considered a fair sum ..."

Whereas the Respondent filed his answer on 11 June 1990;

Whereas the facts in the case are as follows:

U Khin Maung Gyi was serving as a Regional Advisor in Public Administration in the Department of Economic and Social Affairs at ESCAP in Bangkok. Mr. Gyi took annual leave on 26 December 1968. At the request of the Special Assistant to the Executive Secretary, he resumed his duties at the office on 3 January 1969, to prepare for a visit of Budget Officers from Headquarters on 6 January 1969. According to the record of the case, he left his house for work at 7 a.m. and later in the morning, at 10 a.m., he collapsed in the office and died shortly thereafter.

The Applicant subsequently received payments to which she was entitled under the UN Staff Rules and Regulations, as well as a widow's benefit from the United Nations Joint Staff Pension Fund (UNJSPF). However, the Applicant was not informed of her rights under Appendix D to the Staff Rules (Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on behalf of the United Nations).

On 20 March 1969, the Chief, Division of Administration, ESCAP, wrote to the Chief, Technical Assistance Recruitment Service (TARS) at Headquarters, regarding the terminal payments due to the Applicant. He sought confirmation that an exception could not be made to the pertinent provisions of Appendix D to the Staff Rules. In a reply dated 7 April 1969, the Chief of TARS stated that: "Since [Mr. Gyi] died as a result of a stroke which occurred while he was on duty, [he did] not believe that an exception [could] be made to article 1 (a) and (b) of Appendix D to the Staff Rules [sic]". Accordingly, ESCAP apparently deemed that Mr. Gyi's death had not "resulted as a natural incident of performing official duties" and that there were no grounds to grant an exception and hold the Organization responsible for his death.

It was only on 22 April 1980, that the Applicant filed a claim for compensation under Appendix D to the Staff Rules. After a lengthy exchange of correspondence between the Applicant and the Secretary of the Advisory Board on Compensation Claims (ABCC) and the Secretary of the ABCC and ESCAP, the Applicant's case was considered by the ABCC on 19 July 1982. The Applicant argued essentially that her husband's death was service incurred, and that she had only recently learned that she would have been entitled to compensation if her husband's death had been deemed attributable to the performance of official duties. As regards time-limits, she stated she was not aware they existed and argued that the question of a time-limit for submission of her claim would not have arisen

had ESCAP submitted her case to the ABCC in time and not taken it upon itself to determine the nature of the death.

The ABCC recommended to the Secretary-General that the claim be rejected because it was not lodged within the time-limit provided by article 12 of Appendix D. In a letter dated 6 August 1982, the Secretary of the ABCC informed the Applicant that the Secretary-General, having considered the recommendation of the ABCC not to waive the time-limits provided for in the Rules and noting that a death such as her husband's was "not usually deemed by the ABCC as being attributable to the performance of official duties" had decided not to accept her claim.

After a lengthy exchange of correspondence between the Applicant and the Administration, on 5 April 1984, the Applicant lodged an appeal with the JAB. The Board adopted its report on 30 January 1989. Its considerations, conclusion and recommendations read as follows:

"Considerations, Conclusion and Recommendations

47. The Panel observed with concern the fact that the death of the appellant's husband, which had occurred while he was in his office, and the possible benefits which might accrue to the appellant as a result thereof, a matter of quite serious dimensions, was treated in a rather casual manner. Moreover, her possible rights under Appendix D to the Staff Rules were dismissed on the basis of one memorandum which contained an opinion on the subject, namely the memorandum from Mr. Michel [Chief, Technical Assistance Recruitment Service] to Mr. El Haj [Chief, Division of Administration, ESCAP] which stated 'I do not believe that an exception can be made to article 1(a) and (b) of Appendix D to the Staff Rules [sic]'. (Emphasis supplied).
48. The Panel is convinced that the appellant had a right to be advised of the possibility of pursuing a claim before the ABCC and that failure to so advise her constituted not only a basis for a waiver of time-limits under Appendix D, but also a violation of her derivative rights to due process as the widow of a former staff member.

49. The Panel notes that the Respondent has now conceded the error and agrees that the ABCC should have waived its time-limits and considered the claim on its merits. The Panel, however, feels that even if the Administration now agrees that the time-limits of Appendix D should have been waived by the ABCC, to do so now cannot restore the status quo ante and cannot revive the appellant's rights to a full and fair consideration of her claim. With the passage of time, evidence has been lost (the Medical Director referred to the medical file having been destroyed), witnesses have left the area, and the memories of those witnesses who remain have become less acute. It would appear to the Panel that at this time any hope of ascertaining whether or not the appellant's husband's death was attributable to performance of his job is highly unlikely.
50. The Panel also noted with concern the fact that the appellant was never given a detailed explanation of the reasons for rejecting her claim, as had been specifically requested by Mr. Ruedas [Under-Secretary-General for Administration and Management]. Instead she received a reply which skirted around an examination of the merits and which advised the appellant that cases such as hers were 'not usually successful' before the ABCC. No in-depth examination of the facts was ever made, no witnesses were questioned, no medical records were studied.
51. The Panel also viewed with concern the delays imposed upon the appellant by the Organization at almost every stage of the proceedings. Aside from the delay in advising her of her rights, the Organization delayed still further when she sought consideration by the ABCC, and once again, when the matter was presented to the ARU [Administrative Review Unit]. The delays were of several months duration and on two occasions exceeded one year. The Panel viewed such delays as inexcusable.
52. Based upon the foregoing, the Panel concludes that the appellant was denied due process and was deprived [of] her rights as the widow of a former staff member.
53. For the inexcusable delays, the Panel recommends that the appellant be awarded the sum of \$2,000.
54. With regard to the matter of compensation under Appendix D to the Staff Rules, the Panel concludes that it is highly unlikely that the appellant's claim could be fully and fairly considered on its merits at this time because of the

unavailability of information which should have been considered earlier, and which would have been so considered had the Organization not violated the rights of the appellant. Accordingly, with a view to avoiding costly and possibly inconclusive proceedings before the ABCC, the Panel recommends that the appellant be awarded, in full and final settlement of her claim, the sum of \$10,000 (equivalent to approximately six months' net base pay of her husband at the time of his death).

55. The Panel also recommends that the Organization ensure that standing procedures in all duty stations require all dependants (as defined in Appendix D) to be advised of their rights to make a claim for compensation under Appendix D to the Staff Rules, in the event that a staff member were to die while performing official functions."

On 6 February 1989, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided:

"... in full and final settlement of [her] claim and taking into account the entire circumstances of [her] case, to grant [her] the sum of \$12,000 on humanitarian grounds and to take no further action on the matter."

On 9 February 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The statute of limitations normally barring the Applicant's claim for death benefits should be waived because she was not notified of her rights as a beneficiary of her husband and could not reasonably be expected to have been aware, either of these rights or of the time limitations governing determination of their award.

2. The death of the Applicant's husband is directly

attributable to the stress and the time pressures of the work he was performing on the date of his death, such work being a matter of urgency warranting his premature return from annual leave.

3. The circumstances surrounding his death suggest that the Applicant's husband might not have died had he received adequate medical care. This point cannot be properly discovered because the UN Medical Service destroyed his file.

Whereas the Respondent's principal contentions are:

1. Payment of compensation was in full and final settlement and acceptance thereof bars any further action.

2. In the absence of a legal obligation to pay, the Secretary-General's decision to accept a unanimous JAB recommendation to grant an ex-gratia payment was a valid exercise of discretion.

The Tribunal, having deliberated from 14 February to 26 February 1991, now pronounces the following judgement:

I. The Tribunal notes that the Respondent has waived the time-limits which might otherwise have been applicable.

II. The Respondent contends that compensation has been paid to the Applicant in full and final settlement of her claim, so as to preclude further action. For the following reasons, the Tribunal cannot accept this contention in this case. The letter addressed to the Applicant dated 6 February 1989, by the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided, in full and final

settlement of your claim ... to grant you the sum of \$12,000 ..." (Emphasis added)

This was a unilateral decision rather than an offer which the Applicant might have accepted or rejected. Even if the letter in question, followed by payment of \$12,000 to the Applicant, could be construed as an offer followed by acceptance, so as to constitute a contract settling her claim, the letter itself is inconsistent with such a construction in that it specifically states that the Applicant may have recourse to the Tribunal. Such recourse would be meaningless if the claim had previously been barred by a contract of full and final settlement.

III. The Tribunal therefore proceeds to examine the substance of the claim. It is aware that it cannot substitute its own opinion for that of the UN Medical Director to the effect that the death of the Applicant's husband was not attributable to the performance of official duties on behalf of the United Nations. The Tribunal must, however, consider whether the opinion of the UN Medical Director was given on the basis of evidence either inadequate or flawed for any other reason which may have interfered with the full and fair consideration of her claim. The Tribunal concurs in the view of the Joint Appeals Board (JAB) that:

"With the passage of time, evidence has been lost (the Medical Director referred to the medical file having been destroyed), witnesses have left the area, and the memories of those witnesses who remain have become less acute. It would appear to the Panel that at this time any hope of ascertaining whether or not the appellant's husband's death was attributable to performance of his job is highly unlikely."

IV. In the Tribunal's view, the Applicant was in no way to blame for the passage of some 11 years before she filed her claim under Appendix D. This resulted from the Administration's failure to draw

her attention to her rights under Appendix D and to the time within which a claim under that Appendix has to be made. The Respondent's waiver of the time-limit does not alter the fact that the evidence had evaporated, and in the case of the medical file wholly disappeared, as stated by the JAB. The Tribunal regards this as negligence on the part of the Administration and notes the recent Amendment No. 3 to Personnel Directive PD/4/78, dated April 1989, which indicates that the Personnel Officer will render such assistance to the deceased staff member's spouse, dependents, next of kin or designated beneficiaries as may be required to determine settlements and to settle payments.

V. The Tribunal finds it difficult to evaluate the injury suffered by the Applicant, bearing in mind that the amount of compensation (if any) which might have been awarded had the Administration not been negligent is a matter of speculation, and in particular that the advice of the UN Medical Director, had he been in possession of all relevant evidence, including the destroyed medical file, cannot be known. Taking all the circumstances of the case into consideration, the Tribunal considers that the sum of \$12,000 already paid to the Applicant, does not provide adequate compensation for the consequences of the fault of the Administration and that a further sum of \$15,000 should now be paid as damages.

VI. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the sum of \$15,000 in addition to the sum of \$12,000 previously paid.

VII. All other pleas of the Applicant, including her request to call witnesses, are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Arnold Kean
Member

New York, 26 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary