



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1162

Case No. 1240: DILLETT

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Ms. Brigitte Stern;
Ms. Jacqueline R. Scott;

Whereas at the request of Anthony Dillett, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 28 January 2002, the Applicant filed an Application, requesting the Tribunal, inter alia:

“II: PLEAS

...

(a) To rescind and reverse the Respondent’s denial of the compensation recommended by the Medical Board ...

(b) ... to consider and deliberate on the **Unanimous Recommendations of the Medical Board** for long-term total disability and to make its favourable award of adequate compensation ... in order to make the Applicant whole with regard to his serious personal injuries.

(c) To order the Respondent to pay such compensation as the Tribunal deems adequate ... The Applicant prefers the Tribunal itself to award the compensation directly instead of by reference to the Respondent/[Advisory Board on Compensation Claims] (ABCC).

(d) In the alternative, ... [to] direct the ABCC to consider and award the applicable compensation accordingly.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002 and periodically thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 20 January 2003;

Whereas the Applicant filed Written Observations on 31 July 2003;

Whereas, on 30 October 2003, the Tribunal put questions to the Respondent, to which he responded on 5 November 2003;

Whereas, on 18 November 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on a three-month fixed-term contract as a Clerk in the Registry and Documentation Service Section, at the G-2 level, on 12 April 1971. Effective 1 April 1973, he was granted a permanent appointment and, effective 1 January 1990, he was promoted to the P-3 level with the functional title of Assistant Resident Representative (Administration). At the time of the events which gave rise to this case, the Applicant was serving as an Operations Manager at the P-3 level, UNDP Office, Somalia. Effective 1 August 1994, the Applicant was assigned to Headquarters and, following an early separation agreement, on 31 July 1996, the Applicant separated from service.

In 1993, while on assignment with UNDP in Somalia, the Applicant contracted typhoid fever, in regard of which, on 20 January 1995, he submitted to the ABCC a claim for compensation for medical expenses under Appendix D. On 25 July, the ABCC recommended to the Secretary-General, in accordance with article 12 of Appendix D, to waive the time limits for submission of the Applicant's claim due to exceptional circumstances. The ABCC also recommended that the Applicant's illness and its complications "be considered as attributable to the performance of official duties on behalf of the United Nations" and that medical expenses related thereto be reimbursed. The Secretary-General approved the ABCC recommendations on 3 August.

On 18 December 1995, the Applicant submitted another claim for compensation, under article 11.3 of Appendix D, for the loss of his aorta and spleen.

On 22 August 1997, the ABCC recommended to the Secretary General that

"in accordance with the determination of the [Director, United Nations Medical Services (the Medical Director)] that [the Applicant] has sustained

a class 2 impairment (splenectomy), ... [the Applicant] be awarded compensation in the amount of US\$37,645.20, equivalent to a twenty-two and one-half (22.5) per cent loss of function of the whole person, under article 11.3 of Appendix D to the Staff Rules.”

On 8 September 1997, the Secretary-General approved this recommendation and, on 23 October, the Applicant appealed against the amount of compensation awarded and requested that, under Article 17 of Appendix D, a medical board be convened. On 5 April 1998, the Secretary-General approved the ABCC’s recommendation to convene a medical board.

On 20 May 1999, the Medical Director presented the Applicant’s case to the Chairperson of the established Medical Board. On 10 December, the Medical Board issued its report, as follows:

“1. For the very prominent, very large hernia that he has as a result of the incisions, we recommend a loss of function of 30% ...

2. We would recommend that for the loss of the spleen he be compensated 22%, but that has already been paid, and so we think that nothing else should be paid in that regard.

3. As far as the aorta is concerned ... we feel that there is a loss of function, and would award a 17% functional impairment.

We did not address pain and suffering because they are not included in the ... guidelines as set forth in Appendix D...

We did not award for sexual dysfunction and psychological problems because of lack of significant objective evidence.

Regarding long-term disability, it is our opinion that [the Applicant] is unable to work. After retirement, many people obtain another job, either full-time or part-time. We feel that [the Applicant] is unable to do that because of the large hernia which is the result of all his surgery for the aortic condition. We trust the [ABCC] will take this into consideration in making their compensation determinations.”

On 17 March 2000, the Applicant submitted an additional claim, for compensation for partial or total disability, pursuant to article 11.2 (d) or article 11.1 (c) of Appendix D.

On 24 April 2000, the ABCC, having considered the Medical Board’s report, recommended that the Applicant

“be awarded compensation in the additional amount of US\$61,068.88, based on a fifty-nine (59) per cent permanent loss of function of the whole person, taking into consideration that an amount of US\$37,645.20 had been

previously awarded for a twenty-two and one-half (22.5) per cent permanent loss of function of the whole person for the splenectomy.”

The following day, the Secretary-General approved the above recommendation.

On 3 May 2000, the Applicant was informed of the Secretary-General’s decision and was further informed that the ABCC noted that his claims pursuant to article 11.2 (d) or article 11.1 (c) were not part of the original case and that the Medical Board had not been instructed to consider them.

On 8 December 2000, the ABCC rejected a request by the Applicant to reopen the case in accordance with article 9 of Appendix D, stating that his request for compensation for partial or total disability constituted a separate claim. The ABCC also decided to defer consideration of this claim, pending further information from the Medical Services on whether the Applicant had sustained a partial or total disability as a result of his service-incurred illness.

On 9 February 2001, the Medical Services advised the ABCC that the Applicant sustained a partial disability and was granted 59 per cent loss of function of the whole person, but that this did not prevent him from fulfilling all his duties until he left UNDP. On 13 March, the ABCC, noting the above information, recommended that the Applicant’s claim be denied, since his partial loss of function “did not negatively affect his ability to earn a living”. The Secretary-General approved this recommendation on 15 March.

On 28 January 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent erred in denying the Applicant compensation for his service-incurred illness even though the Medical Board unanimously recommended compensation. The Applicant’s loss of essential parts and crucial organs in his body should be compensated for fully at 100% permanent disability.

2. The Director, Medical Services, improperly participated in deliberations of the ABCC and/or advised the ABCC on the issue of the additional compensation.

3. The Respondent denied the Applicant his right of due process.

Whereas the Respondent’s principal contentions are:

1. The Applicant was duly compensated for his service- incurred illness.

2. The advice provided by the Medical Service to the ABCC in relation to the Applicant's claim for compensation according to Articles 11.1 (c) and 11.2 (d) of Appendix D did not adversely infringe the Applicant's legal rights, nor was it arbitrary, capricious, unfair or unjust, nor did it constitute an abuse of due process and there was no lack in transparency.

The Tribunal, having deliberated from 28 October to 21 November 2003, now pronounces the following Judgement:

I. The Application arises from a decision of the Secretary-General, pursuant to Appendix D to the Staff Rules, to award to the Applicant US\$61,068.88, based on a fifty-nine percent (59%) loss of function of the whole person, attributable to a service-incurred illness. This award was a modification of a previous award made to the Applicant for the same service incurred illness, equal to a twenty-two and one half percent (22.5%) loss of function of the whole person (in the amount of US\$37,645.20).

II. Although the Applicant articulates his claim in several ways, the essence of his contentions is that he should have been awarded compensation for partial or total disability under articles 11.2 (d) or 11.1(c) of Appendix D, because the Medical Board that reviewed his case made reference to a long-term disability that left the Applicant "unable to work" and asked that the ABCC take this inability to work into consideration when awarding compensation to the Applicant. Instead, the ABCC determined that the Applicant's illness did not "negatively affect his ability to earn a living" and upheld its original award to him of a fifty-nine percent (59%) loss of function of the whole person under article 11.3. The Applicant also argues that the participation of the Medical Director in the determination of whether the Applicant was disabled was improper and that his due process rights were violated. The Applicant asks the Tribunal to rescind and reverse the Respondent's decision not to award him compensation based on disability, in addition to the fifty-nine percent (59%) loss of function of the whole person previously granted. The Applicant also asks the Tribunal to consider the Medical Board report with a view towards awarding additional compensation based on the disability or, in the alternative, to remand the case to the ABCC, directing the ABCC to take into account the Medical Board's comments regarding disability.

III. The Tribunal is well aware that the Medical Board issues a report, which may include recommendations, and the ABCC takes that report into account along with other advice and recommendations. Thereafter the ABCC makes its own recommendations to the Secretary-General, for final decision.

The Tribunal, having no medical competence, will not seek to substitute its subjective judgement for the judgement of the administrative bodies charged with making medical decisions. The Tribunal, however, can determine whether sufficient evidence exists to support the conclusions reached by those administrative bodies. If sufficient evidence does not exist, the Tribunal is obligated to set aside any decision made by such decision makers. (See Judgements No. 587, *Davidson* (1993); No. 1078, *Bakr* (2002); and, No. 1133, *West* (2003).) Thus, the Tribunal must consider whether the Respondent's award of a 59% loss of function of the whole person and his denial of compensation for disability was reasonably supported by the evidence.

IV. The Applicant has been awarded a 59% loss of function of the whole person, taking into account recommendations made by the Medical Board. The Applicant appears to have no quarrel with the determination of the 59% loss of function, which was properly determined by the Respondent in accordance with Appendix D. Rather, the Applicant claims additional compensation for partial or total disability, based on a report prepared by the Medical Board convened to review his case.

In its report, in addition to recommendations made with respect to the loss of function, the Medical Board also noted its opinion regarding long-term disability. Specifically, the Medical Board noted that "[r]egarding long-term disability, it is our opinion that [the Applicant] is unable to work. ... We trust the [ABCC] will take this into consideration in making [its] compensation determinations." Despite the opinions asserted by the Medical Board, the ABCC denied the Applicant's claims for compensation based on disability.

V. Before addressing whether or not the Respondent acted properly in denying the Applicant's claims for disability, the Tribunal wishes to address the issue of whether the statements made by the Medical Board, with respect to disability, were sufficient to rise to the level of a "recommendation" as alleged by the Applicant. The Tribunal is not convinced that they do. The statements made by the Medical Board were simply an opinion of whether the Applicant was able to work and a suggestion that the Respondent take into consideration the Medical Board's opinion in making compensation determinations. The Tribunal notes that, physically, the statements

regarding disability are not in the same section of the report as the very specific recommendations made with respect to loss of function, nor are they included in the section where the Medical Board identifies what it did not address. Rather, the statements appear to be almost an afterthought, and the tentative language - “We trust” and “take this into consideration” - leads the Tribunal to conclude that the statements regarding disability were not recommendations, just suggestions.

VI. The Tribunal now turns to the ABCC’s decision not to follow the suggestions of the Medical Board, and notes that, initially, the ABCC argued that the Medical Board “was not instructed to consider [the issue of disability]” because disability was not part of the Applicant’s original case. Thereafter, upon a request by the Applicant to reconsider the ABCC’s decision concerning disability compensation, the ABCC denied the request, based on the merits of the Applicant’s claim. The ABCC concluded that “as the [Applicant] had worked full-time at UNDP prior to his early retirement, the permanent loss of function which he sustained which resulted in a partial, not total disability, and for which he had previously been compensated, did not negatively affect his ability to earn a living”.

VII. The Tribunal does not find persuasive the ABCC’s first assertion – that the Medical Board was not instructed to consider the issue of disability, allegedly because that issue was not part of the Applicant’s original case. The Tribunal finds that, in fact, the Medical Director gave the Medical Board broad authority to review the Applicant’s case. Specifically, the Medical Director instructed the Medical Board to decide, “considering the Rules of the United Nations on compensation for work-related injury/accident set out in the ‘Appendix D’, whether the Advisory Board has compensated [the Applicant] in a satisfactory way. If not, what additional compensation should be granted”.

Taking the plain meaning of the words of the Medical Director’s instructions, the Tribunal finds that the Medical Board was allowed to consider the issue of disability as part of the bigger question of whether the Applicant had been adequately compensated, and if not, what additional compensation was necessary.

VIII. The Tribunal now turns to the issue of whether, on the merits, the Applicant was entitled to compensation based on partial or total disability.

The ABCC determined that the Applicant was not entitled to disability compensation, although the Medical Board opined that he was “unable to work”, because the ABCC determined that the Applicant was in fact capable of working. The ABCC relied on article 11.2 of Appendix D, which provides the basis for compensation for partial disability. The Tribunal recognizes that, because the Applicant had a 59% loss of function of the whole person, for which he was compensated under article 11.3, he was necessarily disabled, at least partially. However, this does not constitute a legal disability for which the Applicant could receive additional compensation under article 11.1 or 11.2.

Article 11.2 provides, in relevant part, for additional compensation as a result of partial disability where, upon the separation of a staff member from service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity.

Article 11.1 governs the determination of compensation for total disability, which compensation is in addition to compensation that might be awarded under article 11.3.

The Tribunal has examined the entire record and is satisfied that the facts in the record support the ABCC’s determination that, except for the period of approximately one year, during 1994, when the Applicant was on sick leave due to his service-related illness, the Applicant worked up until the day he separated from service pursuant to an early separation programme. Based on the Applicant’s attendance records, sick leave records and correspondence from the Applicant himself, the Tribunal is satisfied that the Applicant’s service-incurred illness did not affect the Applicant’s ability to work, and until the time of his early separation, in July 1996, and except for 1994, the Applicant did not have excessive time away from work due to illness.

The Applicant also was in the process of applying for a promotion to another post in the months leading up to his early separation from service. In communications relating to his job search, the Applicant made no reference to any disability or inability to work.

Finally, the Applicant's agreed separation from service in July 1996 was not a separation from service based on illness or disability, but instead was a separation pursuant to an early separation program available to UNDP staff members. It appears to the Tribunal that the Applicant, being close to retirement age, and having suffered a loss of function, determined that it was in his best interest to participate in an early separation program that was being offered by the Respondent for a limited period of time. As part of that early separation program, the Applicant received significant financial benefits, including special leave without pay for eight months, in order to complete twenty-five years of contributory service for pension fund purposes. In addition to his separation indemnity, the Respondent assumed the entire cost of the Applicant's contribution to the Pension Fund and his medical insurance during that eight month period. The Applicant also continued to receive the education grant for his two children.

The Tribunal also is satisfied that the Applicant has provided no evidence that he was totally disabled and therefore entitled to compensation under article 11.1.

IX. The Applicant also has provided no evidence that the decision of the Respondent was based on extraneous factors, such as discrimination, prejudice, improper motive or that the decisions were arbitrary, all factors that might vitiate the Respondent's decisions. Thus, the Tribunal affirms the Respondent's decision to deny the additional disability compensation to the Applicant.

X. The Tribunal now turns to the Applicant's allegations that the failure of the Respondent to award to him disability compensation violated the Applicant's rights to due process. The Tribunal finds no evidence that any of the Applicant's due process rights were violated. The Applicant availed himself of the Respondent's procedures for seeking compensation related to a service-incurred illness, and there is no evidence that the Respondent failed to follow his own procedures. The Applicant's allegation that the Medical Director improperly participated in the ABCC's decision-making process is without merit. The Medical Director properly reviewed the Medical Board's report and submitted her own report. The Tribunal finds that the ABCC properly considered the reports of the Medical Board and the Medical Director. The ABCC also had the right to review independently evidence regarding this matter and to either accept or reject recommendations, and it exercised its discretion in that regard. Thus, the Tribunal finds that the Respondent acted properly in this regard and did not violate the Applicant's rights to due process.

XI. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 21 November 2003

Maritza **Struyvenberg**
Executive Secretary