



Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1203

Case No. 1248(a): HJELMQVIST

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 1 May 1997, Lars J. Hjelmqvist, a former staff member of the United Nations filed an Application requesting the Tribunal, *inter alia*, to find that his medical evacuation from Iraq to Lund, Sweden, was not in accordance with procedures concerning medical evacuations; that the Respondent failed to provide adequate security so as to allow him to conduct his official duties with the degree of protection that would have avoided the injury he sustained; that the Respondent failed to properly deal with the issues related to his injury; that the compensation and reimbursements paid to him were inadequate in amount and were unduly delayed; that the Respondent was mistaken in determining the location of his home and family leave, thereby denying him daily subsistence allowance (DSA) while medically recuperating in Sweden; and, that the Respondent improperly denied him access to certain medical files.

Whereas on 31 July 1998, the Tribunal rendered Judgement No. 872, *Hjelmqvist*, finding that the Applicant had been adequately compensated for his injury attributable to official duties and that DSA payments were properly denied; however,

that the Respondent unreasonably withheld the reimbursement of the Applicant's salary payments and that he should be compensated for the delay; and, that the Applicant should be compensated for the injuries he suffered as a result of his improper evacuation from Iraq to Sweden. Consequently, it ordered the Respondent to pay the Applicant three years of his net base salary as compensation.

Whereas, on 18 September 2003, the Applicant again filed an Application containing pleas, requesting the Tribunal, *inter alia*:

- "7. ...
 - (d) *to hold* oral proceedings ...
- 8. On the merits ...
 - (a) *to rescind* the decision of the Secretary-General refusing reimbursement of the Applicant's medical bills;
 - (b) *to order* that the Applicant's pending medical bills and expenses be reimbursed and that bills for future medical treatments and medications for his post-traumatic stress disorder covered under Appendix D be reimbursed promptly;
 - (c) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant ...
 - (d) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
 - (e) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

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 31 December 2003 and periodically thereafter until 31 July 2004;

Whereas the Respondent filed his Answer on 26 July 2004;

Whereas the Applicant filed Written Observations on 29 September 2004;

Whereas, on 28 October 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to those contained in Judgement No. 872 are as follows:

On 23 February 1996, the Applicant was informed of the United Nations Staff Pension Committee's determination that he was incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF). On 2 April 1996, the Applicant's employment was terminated.

On 9 May 1996, the Director of the Medical Services Division (the Medical Director) wrote to the Applicant's psychiatrist, Dr. Paul Nassar, regarding his bill for treatment and requested him to provide the Respondent with a plan for the Applicant's present and future treatment. On 23 May, Dr. Nassar stated that to reverse the serious physiological, neurochemical and psychological changes caused in the Applicant, further time and treatment was required. On 27 June, the Chief of the Insurance, Claims and Compensation Section advised the Applicant that the outstanding bills of his psychiatrist could now be certified, but that further certification of his psychiatrist's bills would be subject to a "full psychiatric assessment with a psychiatrist recommended by the Medical Services Division". Subsequently, the Applicant was evaluated by Arthur M. Perlman, the Assistant Clinical Professor of Psychiatry, Columbia University College of Physicians and Surgeons. In his report of 17 October, which was transmitted to the Medical Services Division, Dr. Perlman recommended "to reduce [the Applicant's] sessions to one 45 minute session per week, and to continue for a period of six more months". On 4 November, the Secretary of the Advisory Board on Compensation Claims (ABCC) advised the Applicant as follows:

"Based on [the] evaluation, we recommend [...] that the psychotherapy bills be approved up to 13 October 1996. From the week of 16 October [1996, one] 45 minutes-session of therapy could be approved per week for a period of maximum 6 months, upon presentation of appropriate documents."

On 21 October 1998, the Secretary of the ABCC wrote to the Applicant, advising that the Medical Services Division would not certify any further bills until the Applicant underwent a further psychiatric assessment with Dr. Perlman. On 20 January 1999, the Applicant requested the designation of another medical expert.

On 24 May 1999, the Secretary of the ABCC advised the Applicant of the nomination of Dr. Paul Podell for a further psychiatric assessment. On 17 June 1999, Dr. Podell examined the Applicant and issued a report to the Medical Services Division, recommending that he "be gradually weaned from [psychiatric] treatment over a 2-3 month period".

On 2 September 1999, the Secretary of the ABCC advised the Applicant regarding the reimbursement of outstanding bills and noted, in particular, that the Medical Director had rejected the reimbursement of bills for a certain prescription medication and for psychotherapy beyond April 1997. She further advised him that the Medical Director did not recommend any reimbursement for psychotherapy beyond 30 April 1997 since he did not consider the continuation of such expenses beyond that date as “reasonable”.

At its 394th meeting on 4 November 1999, the ABCC recommended that the Applicant’s request of 21 September 1999 for the convening of a Medical Board be granted. It also recommended that the determinations by the Medical Services Division, pursuant to which psychotherapy sessions beyond 30 April 1997 and certain medical expenses were not approved for reimbursement, should be upheld. The ABCC’s recommendation that a Medical Board be convened pursuant to article 17 of Appendix D was approved by the Respondent on 11 December 1999, and the Applicant was informed accordingly on 13 December. The Medical Board was convened on 23 July 2002. Its report was rendered on 5 August 2002, and provided to the ABCC on 19 December.

At its 412th meeting held on 20 March 2003, the ABCC, concurring with the Medical Report, recommended as follows: (a) reimbursement of 80% of the cost of psychotherapy at a rate of one fifty-five-minute weekly session for the next five years and retroactively to the time reimbursement for such treatment was discontinued by the Respondent; (b) reimbursement of 80% of the cost of psychotropic medications; and (c) reimbursement of the cost of 8 tablets of the prescription medication per month. The Respondent approved the ABCC’s recommendations on 13 April 2003, and the Applicant was advised accordingly. Subsequently additional payments of outstanding medical bills were made by the Respondent in the amount of US\$2,328.56.

On 18 September 2003, the Applicant filed the above-referenced Application with the Tribunal.

On 11 June and 2 July 2004, the Secretary of the ABCC advised the Applicant that the Respondent had authorized the payment of medical expenses in the amount of US\$7,913.55 and US\$1,396.58, respectively.

Whereas the Applicant's principal contentions are:

1. The infinite postponement of the calling of the Medical Board constituted a denial of the Applicant's right to procedural due process.
2. It was procedurally incorrect and illogical for the Medical Services to recommend the suspension of the Applicant's disability benefit without having first followed the proper procedures to make a final medical determination on his service-incurred injury and the treatment it required, knowing that the medical reports on which it was relying were being contested.

Whereas the Respondent's principal contentions are:

1. The Applicant's requests that the Tribunal rescind the Respondent's decision refusing the reimbursement of the Applicant's medical bills and that the Tribunal order the Respondent to pay the Applicant's pending medical bills and expenses are moot.
2. The Applicant is not entitled to compensation for "administrative delays".
3. The Applicant fails to produce evidence of a pattern of bias and discrimination.

The Tribunal, having deliberated from 28 October to 24 November 2004, now pronounces the following Judgement:

I. This case ultimately arises as a result of a gunshot wound incurred by the Applicant in 1992, in Iraq, in the course of his duties with the United Nations. The decision not to evacuate the Applicant to Kuwait, but instead to wait and transfer him to his home country of Sweden, was, as the Tribunal held in *Hjelmqvist* "only the first in a series of poor judgements in relation to the Applicant", the result of which almost certainly was the cause of the physical and psychological injuries sustained by the Applicant. It is these injuries, and the treatment afforded to him by the Respondent in respect of these injuries, which is the essence of the Applicant's claims in this matter.

II. The Applicant challenges the failure of the Respondent (1) to reimburse him for certain medical expenses incurred as a result of his service-incurred injury and previously certified by the Medical Director to be paid; and (2) to reimburse him for other medical expenses allegedly resulting from the same injury, which have been submitted but which the Respondent has refused to pay on the basis that these expenses

are not attributable to the injury, and, therefore, not reimbursable. The Applicant also alleges that the Respondent improperly delayed the constitution of a medical board to consider the Applicant's outstanding medical claims. The Applicant seeks compensation for the Respondent's acts and omissions in this respect and for the stress and anxiety directly caused by the Respondent's conduct, as well as costs.

III. The Tribunal first addresses the Respondent's failure to reimburse the Applicant for certain medical expenses certified by the Medical Director as reasonably related to his service-incurred injury, in accordance with Appendix D. The Tribunal finds that with respect to those medical expenses properly certified by the Medical Director, the Respondent is obligated to reimburse the Applicant in a timely fashion. There is a dispute, however, between the parties as to which claims currently are outstanding: the Respondent claims that all claims filed before July 2004 have been fully reimbursed, while the Applicant claims that this is not so. In addition, there is a dispute as to whether all bills for psychiatric therapy sessions provided to the Applicant by Dr. Nassar have been submitted and paid. These are questions of fact that should easily be determined by an audit of the relevant bills and payments, and the Tribunal finds that the Respondent should conduct such an audit to determine which amounts, if any, are still owed to the Applicant. If any amounts remain unpaid, stemming from bills already submitted and certified, such expenses should be promptly reimbursed, but no later than sixty (60) days from the date of the circulation of this Judgement.

IV. As for those expenses that the Medical Director refuses to certify, on the basis that such expenses are not related to the Applicant's service-incurred injury, the Tribunal concludes that, absent any evidence that the Medical Director acted with prejudice or was motivated by extraneous factors, the Tribunal, having no medical competence, will not seek to substitute its subjective opinion for the judgement of the administrative body charged with making medical decisions. (See Judgement No. 635, *Davidson* (1994).)

V. On the issue of prejudice or motivation by extraneous factors, the Tribunal has previously held that, where a staff member seeks to vitiate the Respondent's decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence. (See Judgment No. 1134, *Gomes* (2002), citing Judgement No. 834, *Kumar* (1997).) The Applicant has submitted no evidence of discrimination or

bias or that the Respondent was motivated by extraneous factors. Therefore, the Tribunal will not substitute its subjective judgement for that of the Medical Director in relation to which medical expenses are properly attributable to the service-incurred injury.

VI. Notwithstanding the above, however, there appears to be a continuing dispute between the parties as to which expenses are properly certifiable, with respect to future expenses as well as those previously incurred. The Tribunal is concerned that the same impasse between the parties as to which expenses are properly reimbursable will continue, and the Tribunal notes that it is in the interest of both parties to agree upon the scope and limits of reimbursable medical and related expenses as envisioned by Appendix D, in respect of the Applicant. Therefore, the Tribunal finds that the Medical Director should, after audit of the past expenses, with the Applicant and his medical representative, in good faith establish clear guidelines for the reimbursement of such expenses and develop a clear treatment protocol for future expenses, based on what is reasonable in light of the Applicant's medical needs. If this cannot be accomplished cooperatively by the parties within three months of the date of distribution of the Judgement, the Respondent should constitute a medical board for such purpose. The Tribunal further concludes that the Respondent should pay all future bills relating to expenses that are properly certified in a timely fashion.

VII. The Tribunal next turns to the Applicant's allegations of excessive delay occasioned by the Respondent, not only with respect to the payment of the Applicant's claimed medical expenses but also in relation to convening a medical board, which took three years to convene and another year to issue its report. The Respondent concedes, on more than one occasion, that he did subject the Applicant to delays in the handling of this case. In his defense of the innumerable and repeated delays in this matter, the Respondent asserts that while there were delays, they were not of such a nature as to result in "significant injury" to the Applicant or to deny the Applicant his rights to due process. The Respondent further asserts that its admitted delays were neither inordinate nor unconscionable. Finally, the Respondent asserts that the Applicant was responsible, at least in part, for some delays and, therefore, the Applicant has no basis to claim compensation relating thereto.

VIII. The Tribunal disagrees with the Respondent's assertions. The Respondent's assertion that no compensation may be awarded to the Applicant unless it is shown that

“significant injury has occurred” or unless such delays are inordinate or unconscionable is misguided. The Tribunal has previously held in Judgements No. 917, *Ali* (1999) and No. 1190, *Sirois* (2004) that procedural delays may be injurious *per se*:

“... undue delay in taking an administrative decision is a procedural irregularity which adversely affects the administration of justice (cf. Judgements No. 310, *Estabial* (1983), No. 353, *El-Bolkany* (1985), and No. 784, *Knowles* (1996)). ... The violation of the Applicant’s procedural rights is in itself adequate moral injury which warrants compensation (cf. Judgements No. 702, *Beg* (1995), and No. 774, *Stepczynski* (1996)).”

IX. Moreover, in the instant case, the Tribunal finds that the Respondent’s admitted delays were indeed inordinate and unconscionable and did, in fact, cause the Applicant “significant injury”. It is undisputed that the Applicant was injured in 1992 as a result of a gunshot wound suffered in the course of his service with the United Nations. From the moment of his injury, the Respondent has engaged in a course of conduct, perhaps unintentionally, that has caused repeated physical, emotional and employment injury to the Applicant. (See *Hjelmqvist*, *ibid.*) This most recent spate of delays has further exacerbated the Applicant’s already tenuous physical and emotional state stemming from a diagnosed post-traumatic stress syndrome. The Applicant has been plagued by financial concerns resulting from having to expend, out of pocket, monies for medical and psychiatric treatment and health insurance over the course of numerous years, in order to ensure that he receives the necessary medical care. In addition to the stress that such financial uncertainty occasions, the Applicant has lost the use of that money. The Respondent’s only retort is that he “very much regret[s] not having been able to take action on the medical expenses on a more timely basis, which was due to an extremely heavy workload being handled by [the ABCC]”. The Tribunal finds this no excuse and an inadequate explanation for the dilatory pattern of conduct of the Respondent. The Tribunal further finds that, contrary to the Respondent’s assertions, the delays in this case were not the fault of the Applicant or his representatives. The record makes clear that the Applicant and his agents and representatives consistently acted in a timely fashion, and that it was the Respondent who caused unnecessary delays and who failed to act in a timely way when sound business practice would require him to do so. For this and other reasons set forth above, the Tribunal finds that the Applicant is entitled to compensation for the

unreasonable delays, now covering a period of over 12 years, occasioned by the Respondent.

X. The Tribunal is also struck by the callous and insensitive way the Respondent has handled certain claims for medical expenses submitted by the Applicant, thus subjecting the Applicant to humiliation and embarrassment. The Tribunal has taken into account the Respondent's conduct in fashioning its award to the Applicant.

XI. The Tribunal finds that the Applicant's claim that the Respondent had an obligation to cover the Applicant under a malicious acts insurance policy is time-barred and not receivable. The Applicant's claim is made over 14 years after the Applicant's injury, and the Applicant never sought administrative review of this matter. It is not properly before the Tribunal. (See Judgement No. 1172, *Ly* (2004).)

XII. Lastly, the Tribunal believes that, in view of the particular exigencies of this case, including those set forth fully in *Hjelmqvist* and the fact that the Applicant has been forced to bring three separate actions to obtain benefits to which he is entitled, it seems appropriate to make an exception to its general practice of not granting reimbursement of legal and procedural costs. The Tribunal finds that the Applicant is entitled to such costs.

XIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to audit all medical expenses which have been certified by the Medical Director to determine which expenses remain outstanding, and to pay all outstanding expenses promptly, but in no event later than sixty (60) days after the date on which this Judgement is circulated;
2. Orders that the Medical Director and the Applicant, cooperatively, use good faith efforts to establish clear guidelines for the reimbursement of medical expenses and to develop a clear treatment protocol for future expenses, based on what is reasonable in light of the Applicant's medical needs, or in the alternative, if no such agreement can be reached, that a Medical Board be convened for this purpose, within three months of the date of circulation of this Judgement;
3. Orders that the Respondent pay to the Applicant the sum of \$25,000 for the ongoing pattern of undue delay in handling the processing of

the Applicant's medical expenses and in convening a medical board,
and for the Applicant's humiliation and embarrassment suffered at the
hands of the Respondent;

4. Orders the Respondent to pay to the Applicant \$5,000 in costs; and,
5. Rejects all other pleas.

(Signatures)

Brigitte Stern
Vice-President, presiding

Omer Youssif Bireedo
Member

Jacqueline R. Scott
Member

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary