



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1233

Case No. 1315

Against: The United Nations
Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas at the request of a former participant of the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2002 and periodically thereafter until 31 January 2003;

Whereas, on 29 January 2003, the Applicant filed an Application containing pleas which read, in part, as follows:

“...

3. ... [T]he Applicant asks the Tribunal, as a measure of equity, to conclude the following set of measures:

a. *To conclude the procedure concerning the Applicant's Disability Request* by convoking a Medical Board examining the actual evidence legally submitted by the Fund's Participant in support of his request ...;

b. *To set up special terms of reference for the functioning of the Medical Board* ...;

c. Upon the conclusions and advice of the aforementioned Medical Board, *to proceed with a final substantive and legal determination* of the merits of the Participant's request [for] disability, according to Article 33a of the Pensions Fund regulations;

d. ... *Instruct the Fund to proceed to the immediate installment of the disability benefit*, including the cumulated amount, with interest, for the period between the end of the Participant's services for the involved employer Organization, until the day of the actual installment.

...

4. Given the *material and moral prejudices* suffered by the Participant as a consequence of the irregular, illegal, and partial procedure applied to his case, the Applicant ask the Tribunal to settle *reparative compensation* for a global amount of US\$324,895 ...

...

8. ... [T]he Applicant ask[s] the Tribunal to impute all expenses involved in the Tribunal's procedure, including the expenses incurred by the Applicant for obtaining legal aid, to the ... Fund."

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 May 2004 and once thereafter until 31 July 2004;

Whereas the Respondent filed his Answer on 30 July 2004;

Whereas the Applicant filed Written Observations on 29 December 2004, and the Respondent commented thereon on 29 March 2005;

Whereas the Applicant submitted additional documents on 10 and 22 June 2005;

Whereas the facts in the case are as follows:

On 31 May 1999, the Applicant was summarily dismissed from the United Nations Educational, Scientific and Cultural Organization (UNESCO). As a UNESCO staff member, the Applicant was a participant in the Fund.

Also on 31 May 1999, the Applicant requested a disability benefit under article 33 (a) of the UNJSPF Regulations, in light of health conditions he allegedly suffered at the time of his summary dismissal. In accordance with rule H.1 (a) of the Administrative Rules of the Fund, on 10 December 1999 the UNESCO Staff Pension Committee considered his request. On 22 March 2000, the Applicant was informed that as the Staff Pension Committee was unable to reach a unanimous determination in his case, the matter had been referred to the Standing Committee of the United Nations Joint Staff Pension Board.

As a result, on 13 July 2000, at its 182nd meeting, the Standing Committee reviewed the Applicant's case. On 4 August, the Applicant was informed that the

Standing Committee had decided that it wished to obtain the advice of a medical board before reviewing the merits of the case. The Applicant was advised of the relevant procedures involved in the establishment of such a board and was asked to provide the contact information of the physician he wished to nominate. This request was subsequently repeated. On 11 November, however, the Applicant indicated that he wished to appeal the decision of the Standing Committee to consult a medical board.

On 11 December 2000 and 11 April 2001, the Applicant was advised that the Standing Committee would review his case again in July 2001. Thereafter, on 12 July 2001, at its 183rd meeting, the Standing Committee reviewed its earlier decision and confirmed that it required “the advice and assistance of a medical board”. The Applicant was informed accordingly on 27 July, and was again asked to provide the Fund with the contact information of the physician he wished to nominate for the medical board. The Applicant did not provide this information and, to date, no medical board has been established to review his request for a disability benefit.

On 29 January 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contention is:

The Fund acted illegally and in violation of the administrative and procedural rights of the Applicant.

Whereas the Respondent’s principal contentions are:

1. All administrative rules covering the procedures for disability benefit and review of administrative decisions were followed in this case and there were no administrative errors or mistakes committed during the process.

2. It is customary practice of the Standing Committee to seek the expert opinion of a medical board to advise and assist it in cases where medical evidence is not definite or otherwise sufficient to make a reasonable initial determination as to whether a participant is entitled to a UNJSPF disability benefit.

3. No actions by the Fund and/or the Standing Committee aimed at setting up the medical board would have deprived the Applicant of a possible benefit.

The Tribunal, having deliberated from 20 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant, a former staff member of UNESCO, was summarily dismissed on 31 May 1999. The Applicant first applied to the UNESCO Staff Pension Committee to secure payment of a disability pension under rule H.4 (b) of the Administrative Rules of the Fund governing incapacity on the date of separation. The UNESCO Staff Pension Committee referred the case to the Standing Committee, which on 13 July 2000 decided to convoke a medical board before considering the request for disability benefits on the merits. The Applicant appealed this decision first before the Standing Committee, which, however, confirmed its decision on 12 July 2001, and today before the Tribunal.

The Applicant contests the decision by the Standing Committee on the ground that it constitutes an administrative decision implicitly rejecting his claim, in violation of his rights. He also contests the procedure leading up to the Standing Committee's decision.

II. The Tribunal will first consider the decision of the Standing Committee to seek the advice of a medical board before reviewing the Applicant's claim on the merits.

III. The Tribunal recalls at the outset that,

“having no medical competence, [it] 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” (Judgement No. 1162, *Dillett* (2004)).

In this case, the Tribunal notes that neither the UNESCO Staff Pension Committee nor the Standing Committee has settled the basic issue in the claim, concerning the determination of incapacity for the purposes of disability pensions. The Tribunal will therefore consider the procedure provided for in the Administrative Rules of the Fund to determine if the Applicant is justified in contesting the Standing Committee's decision to establish a medical board.

IV. The facts in the record show that the UNESCO Staff Pension Committee referred the case to the Standing Committee because of a lack of unanimity that prevented it from taking a decision on the determination as to whether or not the

Applicant was incapacitated on the date of separation. The Applicant's claim was therefore referred to the Standing Committee on the basis of rule H.1 (a) of the Administrative Rules of the Fund, which provides that:

"The determination of incapacity for the purpose of disability benefits under article 33 (a) and (b) of the Regulations ... shall, by virtue of powers hereby delegated in accordance with article 4 (c), be made in each case by the staff pension committee of the organization by which the participant is employed, subject to the provision that, failing unanimity, a determination with respect to a disability benefit shall be referred to the Standing Committee for decision".

V. The Tribunal recalls that, in principle, it is the responsibility of the Standing Committee to make a decision on a claim of incapacity, on the basis of the report of a medical officer of the organization which had been unable to reach a decision for lack of unanimity, and, if need be, also on the report of the Medical Consultant, should the Standing Committee deem it necessary. Rule H.2 of the Administrative Rules of the Fund thus provides that:

"In each case in which a staff pension committee has determined that a participant or a child is incapacitated, or in which a determination with respect to a disability benefit has been referred to the Standing Committee for decision, the medical officer of the organization shall transmit a report on the medical aspects of the case to the Medical Consultant, who shall in turn report thereon as may be required by the Secretary of the Board".

From the texts it can be seen that at this initial stage of the decision, there is no provision for resorting to a medical board.

VI. Provision is made for such a recourse, however, at the second stage, if the decision thus taken is contested. Rule K.7 (a) of the Administrative Rules provides that:

"Where the outcome of the review turns in whole or in part on the medical conclusions on which the disputed decision is based, the staff pension committee, or the Standing Committee as the case may be, shall obtain the advice of a medical board on the correctness or otherwise of such conclusions before proceeding with the review".

VII. Accordingly, rule K.7 (a) of the Administrative Rules of the Fund applies in principle and *stricto sensu* to cases in which the applicant seeks revision of a decision taken by the Standing Committee as to the determination of his incapacity.

VIII. The Tribunal nonetheless wishes to emphasize that it has difficulty understanding the grounds on which the Applicant is challenging the decision of the Standing Committee to call upon a medical board. Indeed, the Applicant points out that

“he is not opposed to the setting up of a medical board provided that such an action: (i) is not the result of a decision made on the basis of an incorrect, illegitimate and demeaning procedure, and (ii) that such a body can operate under supervisory conditions that guarantee the fairness of the procedure as a whole”.

With regard to the first objection, the Tribunal will consider its validity in the reasoning that follows. However, it is difficult to see how the fact of establishing a medical board can constitute a demeaning measure in that it allows the opinion of professional physicians independent of the organization to be obtained. On the contrary, such a procedure makes it possible to ensure that the Respondent’s judgement is correct. With regard to the second objection, “it is worth stressing here the independence of this Board, which consists of three members, including one chosen by the Applicant” (see Judgement No. 1186, *Aouali* (2004), para. III).

IX. That being the case, the Tribunal notes that the Applicant himself invokes section K of the Administrative Rules to request a review of the Standing Committee’s decision to call upon a medical board. In his letter dated 11 November 2000, the Applicant informs the Standing Committee that

“this is a formal request for review, under section K in the Administrative Rules of the UNJSPF, concerning the decision taken by the Standing Committee, at its 182nd meeting held in Geneva on 13 July 2000, and related to my request for a disability benefit under article 33 (a) and (b) of the Pension Fund’s Regulations”.

Since the Applicant himself invokes this procedure, he cannot at the same time argue that it is improper. The Tribunal believes that in this instance, given the particular

circumstances of the case, the Standing Committee was justified in requesting the opinion of a medical board before ruling on the merits of the case.

X. Furthermore, the Tribunal does not agree with the Applicant when he maintains that the Standing Committee's decision to consult a medical board constitutes an implicit rejection of the Applicant's request. On the contrary, it should be borne in mind that the competent authority "was bound neither by the medical board's conclusions nor by the position of the Advisory Board -- which had made no recommendation at all -- and had broad discretion in the matter". (The Tribunal cites International Labour Organization Administrative Tribunal Judgement No. 1637, *in re Fahmy* (1997), para. 11.) Consequently, the fact of soliciting an opinion from a medical board does not prejudice the decision that the Standing Committee might have taken if the board had been established.

XI. Secondly, the Tribunal will consider the allegations of procedural flaws and of a violation of the Applicant's right of defence. These allegations are directly linked to his appeal for a review of the decision of the Standing Committee. In fact, the Applicant's reasoning shows that he does not object to the establishment of a medical board on the ground that formal procedures must be respected but rather for fear that his case will be decided arbitrarily and he will be unable to exercise his right of defence. The Applicant is thus contesting the Standing Committee's decision because he believes that the Committee would have been in a position to judge the substantial merits of his application if the Respondent had not committed procedural improprieties that would have undermined throughout the course of the procedure the credibility of his claim of incapacity.

XII. Concerning the procedural flaws, the Applicant invokes successively the Respondent's bad faith, prejudice and breach of procedure. The Tribunal recalls that the Applicant bears the burden of proving the bad faith, prejudice and procedural flaws he alleges (see Judgement No. 312, *Roberts* (1983)). The Applicant must present compelling evidence of his contentions of bad faith, prejudice and breach of procedure. Yet the Tribunal does not find, in the documents furnished by the Applicant, sufficient evidence to satisfy the burden of proof required for such accusations.

XIII. Concerning the Applicant's right of defence, the Tribunal believes that the Applicant has not proved that the two Committees did not comply with the applicable rules. Consequently, the Applicant's request for the setting up of

“an open and independent procedure under the direct control of the Tribunal to determine the medical merits of the Participant's request for the award of a disability benefit ... based upon the appraisal of the actual evidence legally submitted by the Participant in support of his request by one or more arbitrator medical experts independent from the Parties' influences and designated by the Tribunal”

must be rejected. The Tribunal is of the opinion that there is an independent procedure capable of guaranteeing his right to defence, and that this procedure is provided for in rule K.7 of the Administrative Rules of the Fund through the establishment of an independent medical board. The Tribunal agrees here with the Respondent and finds it rather surprising that

“some five years after the Applicant's separation, he has spent such a considerable time on first challenging the initial decision of UNESCO [Staff Pension Committee] and then disputing the established administrative procedures to review disability benefits, rather than utilizing the remedial procedures available to him”.

XIV. For these reasons, the Tribunal rejects the Applicant's request in its entirety.

(Signatures)

Julio Barboza
President

Brigitte Stern
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary