United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1025
20 November 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1025

Case No. 1136: WALTON

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Ms. Marsha A. Echols;

Whereas at the request of Keith J. Walton, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), 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 May 2000;

Whereas, on 15 May 2000, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

7. On the merits, the Applicant respectfully requests the Tribunal *to find that*:

(a) The Respondent failed to act on the unanimous findings of the Joint Appeals Board [JAB] (i) that UNRWA was negligent in exercising a duty of care; (ii) that UNRWA did not act in a manner which might

have prevented damage to the Applicant's shipment of household effects; and (iii) that UNRWA accept full responsibility for its negligence in the handling of that shipment of household effects;

(b) In accepting the JAB recommendation to make a final compensation payment of $3,350 for damages suffered and for partial reimbursement of an insurance premium, the Respondent failed to address all elements of the claim for compensation entered by the Applicant;

(c) In respect of an *ex-gratia* payment for loss of use and anguish, the decision of the Respondent is not in accordance with the recommendation of the [JAB] upon which it purports to be based;

(d) The decision of the Respondent to offer a partial compensation payment of $3,350, contingent upon acceptance of this amount as full and final settlement of the claim, denied the right of the Applicant under Chapter XI of the International Staff Regulations of UNRWA to seek redress in the Administrative Tribunal, all other procedures for remedy having been exhausted,

(e) The Applicant has been subjected to further unreasonable delay since the filing of the appeal to the JAB, which has contributed to continued loss of use and anguish;

(f) The continuous involvement of the Legal Officer (Contracts) of UNRWA constituted a conflict of interest and was prejudicial to this case, thereby denying the Applicant's right of due process;

(g) The Respondent failed to take action for compensation within the 30 days following the communication of the opinion of the JAB, as set out under article 7 of the Statute of the Tribunal.

8. … [T]he Applicant most respectfully requests the Administrative Tribunal *to order that*:

(a) The Respondent, as a practical application of accountability for negligence, take recourse against the parties responsible for the damage to the Applicant's shipment of household effects;

(b) The Applicant be compensated for the damages to his household effects in the amount of $14,895.26, together with interest on that amount, from the date of the original claim in April 1997 until the present;

(c) The Applicant be compensated for loss of use and anguish as a result of damage to his shipment of household effects in the amount of at least $5,000.00;

(d) The partial compensation offered by the Respondent under contingent conditions be replaced with the full amount of compensation as specified in sub-paragraph (b) above;

(e) The Respondent compensate the Applicant for further unreasonable delay in settling the case, in the amount of one year's salary."

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 November 2000 and periodically thereafter until 30 June 2001;

Whereas the Respondent filed his Answer on 30 June 2001;

Whereas, on 14 September 2001, the Applicant filed Written Observations and, on 23 October, the Respondent submitted comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1973. At the material time, the Applicant held the post of Director of Administration and Human Resources, UNRWA, on secondment from the United Nations. He was appointed to this position on 15 June 1996, and served the first month of his new appointment in Vienna. On 15 July 1996, his duty station changed to Gaza.

On 25 September 1996, the Applicant's household effects were shipped from Ossining, New York, to the port of Ashdod, Israel. The shipment was insured with Marsh & MacLennan at the value of $80,975. The shipment arrived in Ashdod on 21 October 1996 but, unbeknownst to the Applicant, it was mistakenly delivered to the field office warehouse in Gaza on 12 November where UNRWA officials unloaded the container. The officials repacked the goods and arranged for their return to Ashdod. On 24 November 1996, the shipment was delivered to the Applicant who found extensive damage to his belongings. The following day, 25 November, he wrote to the Commissioner-General, requesting action and compensation.

On 1 December 1996, the Commissioner-General established an investigation team to "undertake … the necessary inquiries to establish the facts and the circumstances surrounding the said damage with a view to enabling the Agency to take the necessary action, including recourse against any party". On 12 January 1997, the investigation team reported back to the Commissioner-General. They concluded that the damage had resulted from a combination of factors: the UNRWA customs clearance agent Hevra Klalit Lehashgaha (HKL) mistakenly delivering the shipment to Gaza; the rushed security checking procedure at the Karni compound, which involved the unpacking and repacking of the shipment by local Palestinian laborers; and load shift due to the poor repacking.

On 15 January 1997, the Applicant sent an initial claim for repairs in the amount of NIS 21,710 to the Israeli agent for Marsh & MacLennan. On 30 January 1997, UNRWA forwarded the claim to HKL who replied on 2 February, accepting liability for the claim. On 7 February, UNRWA forwarded an additional claim from the Applicant to HKL. The claim included $12,885 for replacement furniture and $878 for a survey report.

On 11 February 1997, the Applicant wrote to the Legal Adviser, UNRWA, referring to International staff rule 106.6 and International Staff Personnel Directive ISPD I/106.6/Rev.2 dated 1 January 1993, concerning the Agency's responsibility for reasonable compensation for damage to or loss of personal effects attributable to service, and stated that unless he heard " by return" from him, he would have no alternative but to take recourse against the Agency. On 13 February 1997, the Officer-in-Charge, Department of Legal Affairs, advised the Applicant that his primary line of recourse for damage to his unaccompanied shipment was with the insurance. He further requested the Applicant to provide him with details regarding the status of his claim with the insurers. On 18 March 1997, the Applicant again wrote to the Legal Adviser, expressing concern about the delay regarding his case and expressing his intent to file a claim for compensation with the Agency's Claims Board. In his reply of 24 March 1997, the Legal Adviser advised the Applicant to

submit his claim to the Claims Board in accordance with ISPD I/106.6/Rev.2 as soon as possible but that he should "take all reasonable steps to recover from the insurance company, since any such recovery would form a reduction against any recommendation from the Claims Board".

On 25 February 1997, the Applicant received payment of NIS 16,695 from HKL.

On 30 March 1997, the Applicant filed a claim with the Claims Board. He sought compensation for repairs to damaged goods (NIS 21,710); replacement of furniture ($12,885); survey fees ($994.50); the refund of the insurance premium he paid ($1,147.85); and, loss and anguish ($5,000).

On 27 May 1997, the Applicant signed a release for HKL to the effect that $5,000 he had received, and an additional $6,000 HKL undertook to pay him within ten days of signature, constituted "final and complete settlement" in "complete, absolute and unlimited dismissal" of his claim. The Applicant received the additional $6,000 from HKL on 26 June 1997.

Following the submission of additional documentation in response to its requests, on 7 August 1997, the Claims Board asked the Applicant whether the amount received by him to date fully satisfied his claim and, if not, why he did not wish to pursue the balance of his claim against the insurers. The Applicant replied on 12 August that the Legal Adviser had advised him to file for compensation from the Claims Board and that he expected the Agency to "meet the residual amounts outstanding from the claim".

On 21 December 1997, the Applicant wrote to the Commissioner-General complaining about the length of time the Claims Board was taking to finalize his claim, and requesting compensation from UNRWA of the "residual amount remaining after the partial payment by HKL, i.e., $16,000". On 9 March 1998, the Board recommended payment in full of the repair aspect of the Applicant's claim and payment for such replacement items as were beyond repair and had not been compensated under the repair heading, but recommended that no payment be made for the survey or insurance costs, or in relation to loss and anguish. The total amount payable was $11,110.24, against which the $11,000 paid by HKL was offset, leaving a net payment due of $110.24. On 24 March 1998, the Officer-in-Charge, Department of Finance, advised the Commissioner-General that he had approved the payment and recommended an *ex gratia* payment for pain and suffering.

On 15 April 1998, the Commissioner-General transmitted a copy of the Claims Board report to the Applicant and advised him that he approved payment of $110.24 but that the "United Nations Secretariat in New York" had indicated there was "no practice for paying … claims [for loss of use and anguish]".

On 8 May 1998, the Applicant requested administrative review of the Commissioner-General's decision of 15 April, and requested permission to submit his case directly to the Tribunal. On 14 May 1998, the Commission-General denied both requests.

On 19 June 1998, the Applicant lodged an appeal with the JAB. The JAB issued its report on 22 September 1999. Its findings and recommendations read, in part, as follows:

"**Findings**

…

22. The Board … upheld the Appellant's contention that the Agency had been negligent in its handling of his shipment.

…

28. The Board takes issue with the Claims Board's interpretation of *unusual hardship*, which explicitly gave no recognition to the fact that the damage, loss and inconvenience to the Appellant was not only unacceptable but well beyond the bounds of risk normally inherent in the shipment of household effects. The Board further understands para. 8 (G) of ISPD I/106.6/REV.2 to exist to recognize those circumstances, not usual in normal cases, which give rise to claims for compensation for damage to personal effects. In this case, the Agency's negligence in the management of the Appellant's personal effects specifically contributed to a chain of events which resulted not only in the damages to them but also a significant loss of time in bringing about a reasonable conclusion to this affair.

…

30. The Board concluded that the Appellant's loss of use and anguish should be recognized in the computation of conpensation.

37. … [T]he Board believes that the Agency should refund the insurance premium proportionately …

…

Recommendations

41. The Board accordingly recommends to the Commissioner-General that:

a) The Agency accept responsibility for negligence in the handling of the shipment from the time of its receipt in Gaza;

b) The Agency make an additional payment to the Appellant of US$1,350 plus a discretionary amount, up to US$5,000, for loss of use and anguish."

On 21 October 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"…

… The Appeals Board concluded that the Agency had, through its actions, assumed responsibility for your shipment and had failed to exercise a duty of care. The Appeals Board also considered that the Agency had failed to act in a way which might have prevented the damage to your shipment. For these reasons, the Appeals Board recommended that the Agency accept responsibility for negligence in the handling of your shipment from the time of its receipt in Gaza. While noting the Appeals Board's recommendation, I do not consider it necessary for the purposes of your appeal, to act on such a recommendation.

The Appeals Board reviewed in detail the manner in which the Claims Board had arrived at the amount recommended for compensation, taking the view that the repair costs for certain suits, antique plates and a trunk should be accepted in the amount of $1,190.00. The Appeals Board also considered that the Agency should refund a proportion of the insurance premium (i.e. the ratio of the amount acknowledged by the Agency to be the compensable damage, to the total amount declared as insured value) being an amount of $160.00. Hence, the Board recommended that the Agency make an additional payment to you of US$1,350 over and above the amount previously recommended by the Claims Board.

I note that, in respect of the Appeals Board's recommendation to pay an additional amount for damage to these suits, antique plates and a trunk, that your claim put to the Claims Board did *not* include any claim for these items … It is only claims made to the Claims Board and which resulted in the recommendation and subsequent decision, which could properly be the subject of this Appeal ... As far as payment of $160 as compensation for a proportional part of your insurance premium is concerned, this was the subject of a claim submitted to the Claims Board, but the Claims Board did not recommend compensation in respect of it …

… I accept the Board's recommendation to make an additional compensation payment of US$1,350 …

The Appeals Board considered further that the compensation awarded to you did not recognize a number of relevant factors … The Appeals Board concluded that these factors contributed to your 'loss of use and anguish' and should be recognized in the computation of compensation by way of an *ex gratia* payment. It therefore

> recommended that the Agency make an additional payment to you for 'loss of use and anguish' of a discretionary amount, up to US$5,000 ...
>
> … I have decided to accept the Appeals Board's recommendation that an additional *ex gratia* payment of US$2,000 be made to you in compensation ... This total additional compensation payment of $3,350 is contingent upon you accepting this additional amount as full and final settlement of this matter."

On 15 May 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent's refusal to act on the findings and recommendations of the Claims Board and JAB was a denial of effective and appropriate remedy.

2. The terms and conditions of the Applicant's insurance policy were violated.

3. The *ex gratia* payment of $2,000 was an admission of liability on the part of the Respondent. Moreover, the Respondent erred in misrepresenting the JAB as having recommended that the Applicant be paid $2,000 in *ex gratia* payment.

4. The methodology applied to replacement furniture values was flawed.

5. The Respondent violated the Applicant's rights of due process in applying arbitrary conditions to the payment of partial compensation.

6. The manner in which the Claims Board was constituted represents a serious breach of administrative procedure, as one of its members was the Legal Officer (Contracts), who was also part of the initial investigative team.

7. The Respondent was aware that HKL had accepted liability for the damage to the shipment on 2 February 1997, but did not so inform the Applicant.

8. As the release signed by the Applicant on 27 May 1997 was conditional upon payment being made by HKL within ten days and HKL failed to fulfill this condition, the release is null and void. Further, the release was limited in scope, and the Applicant signed it under duress.

9. The Respondent made a serious misrepresentation of fact in its submission that it had paid $3,350 to the Applicant's personal account; the Applicant was never informed of this decision and no such sum has been credited to his accounts.

Whereas the Respondent's principal contentions are:

1. The case before the Tribunal is different from the one brought by the Applicant before the Claims Board and the JAB.

2. The Applicant does not explain the financial breakdown of his claim, which does not compute.

3. The Applicant has been compensated in full.

4. The Applicant signed a release "for final and complete settlement" upon receipt of the second installment from HKL.

5. The Respondent is not an agent for the insurance company; if the Applicant believes the company breached their contract with him, his remedy would be against the company and not the Respondent.

6. The Applicant has no right to a further *ex gratia* payment.

7. The sum of $3,350 was credited to the Applicant's personal account with UNRWA, which continues to reflect substantial balance owed to the Agency. The Applicant has seriously misrepresented this issue.

The Tribunal, having deliberated from 6 to 21 November 2001, now pronounces the following Judgement:

I. The Applicant appeals from a decision of the Respondent that offered him what he considers less than full compensation for damage to and loss of his furniture, which was shipped by UNRWA and mistakenly delivered to the UNRWA Field Office warehouse in Gaza instead of to Ashdod (Israel). The offer of settlement by the Respondent was based on the recommendations of the JAB. The JAB had concluded that the negligence and damage to the

furniture occurred when it was handled by UNRWA personnel in Gaza, although the Applicant also implicated others, and during its shipment from Gaza to Ashdod.

The Applicant also challenges as inadequate and inappropriately conditional the Respondent's offer of a $3,350 payment, instead of $5,000, for loss and anguish, among other claims.

This dispute largely centers around 21 items of furniture for which the Applicant claims compensation at a value higher than that used by the Agency. The Applicant's claim that he should have been compensated in the amount of $14,895.26 plus interest for damage to his household effects is the result of disagreements that required an examination of the furniture and its condition. The Tribunal cannot determine which of the items of the Applicant's furniture were repairable or whether the repairs restored the goods to a usable condition. On the other hand, as the Applicant requests, the Tribunal can identify and interpret the rules governing compensation and valuation.

II. UNRWA International staff rule 106.6 governs compensation for the loss of or damage to personal effects. According to it,

> "Staff members shall be entitled, within the limits and under terms and conditions established by the Commissioner-General, to reasonable compensation in the event of loss or damage to their personal effects, determined to be directly attributable to the performance of official duties on behalf of the Agency."

Both a Claims Board and a JAB concluded and this was accepted by the Respondent, that the damage to the Applicant's furniture resulted from the Agency's negligence. Consequently, the Tribunal will focus on the meaning of "reasonable compensation", noting also the language in staff rule 106.6 that gives the Commissioner-General authority to establish the limits, terms and conditions mentioned in that rule. The Commissioner-General exercised this authority in ISPD I/106.6/Rev. 2, which contains a section on the consideration by UNRWA of claims. That document distinguishes between articles that are "lost" (paragraph 8 (D)) and articles that are "damaged" (paragraph 8 (E)).

III. According to paragraph 8 (D), when an article is "lost" the compensation must be determined having regard to several factors, including the age of the article, its original cost and depreciation, the replacement cost and other relevant factors. Paragraph 8 (D) seems unrelated to this dispute, except to the extent that it forms a basis for calculating compensation under the second part of paragraph 8 (E).

Paragraph 8 (E) distinguishes between a damaged article that can be repaired and one that cannot. When an article is damaged and can be repaired, the compensation is equal to the "actual cost of repairs" but the compensation may be no more than the amount that would have been payable under paragraph 8 (D). Both the Claims Board and the JAB awarded the Applicant the full amount of his claim made for articles that were repairable.

When a damaged article cannot be repaired, the compensation payable equals that under paragraph 8 (D), which, as stated, refers to replacement cost and other factors. Replacement cost is normally higher than the cost of repairs. The Applicant and the Respondent disagree about whether certain articles of furniture that were damaged could be repaired or were repaired so as to make them usable. Of the $12,885 the Applicant claimed regarding the articles he said were incapable of effective repair, the Claims Board accepted $4,368. Part of the difference related to the estimate for furniture repairs, with the Applicant claiming $7,185 using replacement value and the Claims Board using $1,818 based on a local contractor's estimate of local "economic repairs". The JAB added $1,190 to that amount for a total of $5,558 and added $160 as partial reimbursement of the $1,147.85 insurance premium that the Applicant claimed.

IV. The principal difference concerns furniture for which the Applicant wants to be compensated at replacement cost. According to the Applicant the repairs failed to restore the articles to a usable condition, thereby bringing his claim under the second part of paragraph 8 (E). The Respondent disagrees and says, in part, that some articles were double counted and another article was valued at more than the amount stated for insurance purposes. This disagreement raises a question of fact about the condition of the furniture, an issue more appropriately dealt with by the JAB than the Tribunal. Moreover, as stated in Judgement No. 1009, *Makil* (2001), paragraph IV, the Tribunal "will ordinarily operate on facts as found by

the … JAB … Unless such reasons [e.g., prejudice] are identified by the Tribunal, then facts as found by the … JAB will stand for the purposes of the Tribunal's deliberations".

There is no reason not to follow the *Makil* rule in this dispute. There is an exception to this support for the findings of the JAB in this dispute. If, as the Applicant claims, articles of furniture were valued at their local "economic" value, these calculations must be re-done. The Staff Regulations and Rules nowhere refer to this method of valuation.

V. In addition to the compensation provided in paragraphs 8 (D) and 8 (E), when the Claims Board concludes that otherwise "unusual hardship would be caused" it may recommend that the Comptroller pay "reasonable" compensation. The JAB found that the loss and anguish suffered by the Applicant presented unusual hardship and recommended that the Respondent pay the Applicant "an amount to be decided at the discretion of the Commissioner-General", which was stated in a list of awards as "Loss of use and anguish - Discretionary, up to a maximum of $5,000". The payment of $3,350 offered to the Applicant falls within the recommended amount. The Tribunal does not believe that, under the circumstances of this case, the amount offered is unreasonable. However, in view of the agreed negligence of the Agency, the Tribunal believes it would be fair to settle all doubts in favor of the Applicant.

VI. The amount offered for the "unusual hardship" does not include compensation for the delay in the proceedings, which the JAB found to be in part a consequence of the Respondent's negligence. The Applicant has asked the Tribunal to order the payment of one year's salary as damages for the delays in the Claims Board (12 months) and JAB (15 months) proceedings. The Respondent replies that most of the money claimed was paid to the Applicant by June 1997 and argues that the Applicant was in part responsible for the delays. The Tribunal believes that the unusual hardship and the delay present separate issues. In the past the Tribunal has awarded damages for delay. (See Judgements No. 880, *MacMillen-Nihlen* (1998) and No. 892, *Sitnikova* (1998)). The Tribunal agrees that a small amount should be awarded to the Applicant for these delays.

VII. The Applicant complains that the requirement that he sign a release before receiving the compensation offered by the Respondent violates Chapter XI of the International Staff Regulations and Staff Rules and, including his right to appeal to the Tribunal, among other rights. Chapter XI does not mention the Tribunal. It concerns appeals to the JAB, a right that the Applicant exercised, having refused to sign the release. Staff rule 111.1 establishes the JAB to consider and advise the Commissioner-General on appeals.

The Agency included the release as a condition for compensation in paragraph 10 of the ISPD I/106.6/Rev.2. That paragraph makes "[p]ayment of compensation …conditional on the claimant signing an instrument … releasing the Agency from any liability with respect to the relevant claim". In the private sector it is usual to demand a release - including a waiver of future legal action - before paying claims such as these and the Applicant's insurance company did so. The issue presented is whether the rule should be different within the Organization. The answer can only be no. A settlement is an alternative to litigation and a means of ending a dispute. When a party declines to accept an offer of settlement, then the offer in its entirety is extinguished. It seems reasonable to the Tribunal to offer to staff members the choice between a settlement and an appeal. However, when because of her or his dissatisfaction with the settlement offered the staff member chooses to appeal, it is essential that the consideration of the appeal be completed expeditiously. In this case, in which the negligence of the Agency is undisputed and the appropriateness of some compensation to the Applicant is recognized, the speedy final resolution of all issues was essential but was not provided.

VIII. The Applicant also challenges the composition of the Claims Board, the body created to assess claims forwarded to it by the Chief, Personnel Services Division. The ISPD document states that a Claims Board shall consist of three persons, who represent the Personnel Services Division, Department of Finance and Department of Legal Affairs, respectively. The representative of the Department of Legal Affairs had been involved in the initial review of the Applicant's claims. The Tribunal notes that a Claims Board should conduct an independent review of the information assembled so that it may provide an objective assessment to the Chief, Personnel Services Division. The Organization must avoid even the perception of bias or prejudice in the administration of justice. As a consequence, the representative of the

Department of Legal Affairs who both investigated the claim and sat on the Claims Board should recuse himself from any involvement in this matter. The Agency should find representatives who have not been involved in a matter being considered by the Claims Board. However, because the Tribunal is awarding relief to the Applicant and because specific prejudice has not been shown in this case, the Tribunal orders no special relief.

IX. Another claim by the Applicant is that the Respondent failed to act on the JAB recommendation within thirty days, as mentioned in article 7 of the Statute of the Tribunal. The Applicant misconstrues the purpose of article 7. That thirty-day limit goes to the receivability of an application, not to a fault of the Agency.

X. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant US$2,500 in compensation in addition to the money he already received;

(b) Orders the Respondent to recalculate any valuations which were based on local economic value; and

(c) Rejects all other claims.

(Signatures)

Julio BARBOZA
First Vice-President, presiding

Kevin HAUGH
Second Vice-President

Marsha A. ECHOLS
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary