

**Administrative Tribunal**

Distr.: Limited  
31 January 2006

Original: English

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**ADMINISTRATIVE TRIBUNAL****Judgement No. 1273**

Case No. 1356

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Mr. Dayendra Sena Wijewardane;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2004 the time limit for the filing of an application with the Tribunal;

Whereas, on 25 May 2004, the Applicant filed an Application, which was amended on 12 October, requesting the Tribunal, inter alia:

“7. With respect to competence and procedure ...

...

(c) *to decide* to hold oral proceedings ...

8. On the merits ...

(a) *to rescind* the decision of the Secretary-General rejecting the unanimous recommendation of the Joint Appeals Board (JAB);

(b) *to find and rule* that based upon the findings of fact made by the [JAB], its conclusions and recommendations were fully justified;

(c) *to order* that the Applicant be paid three years of her net base salary as compensation, in view of the exceptional circumstances of the case;

(d) *to award* the amount of six months' net base pay as additional compensation to the Applicant for the delays in processing her appeal;

(e) *to award* the Applicant as cost, the sum of US\$ 7,500.00 in legal fees and US\$ 500 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 30 September 2004 and twice thereafter until 31 December;

Whereas the Respondent filed his Answer on 17 December 2004;

Whereas the Applicant filed Written Observations on 21 July 2005;

Whereas, on 10 November 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the summary of the Applicant's employment history, contained in the report of the JAB reads, in part, as follows:

***"Employment history***

... [The Applicant joined] the Department of Humanitarian Affairs (DHA), Headquarters, on 24 May 1993 as a Secretary (G-3) on a three-month short-term appointment, which was extended for two months and then converted to fixed-term (...). Her [fixed-term appointment] was regularly extended: effective 1 May 1995, she was promoted to G-4, and, effective 1 September 1999, she was promoted to G-5 and her functional title was changed to Information Assistant. Effective 22 March 2001, she was granted special leave without pay (SLWOP). Her appointment and SLWOP were twice extended until 31 December 2003[, when she separated from service.]

***Summary of the facts***

... In May 1996, [the Applicant] was sent on mission to the Democratic People's Republic of Korea (DPRK) with ... her supervisor, and [another staff member]. Prior to her departure on 11 May, [the Applicant] had been scheduled for a visit to the Medical Service for the required medical clearance. However, she [claims that she] was instructed by [her supervisor] not to take the time off from her work to go to the Medical Service.

... The mission was in the DPRK from 13 to 25 May 1996; during that time [the Applicant] began to experience flu-like symptoms. According to her, she continued to work long hours nevertheless - including 24 hours straight through the last day of mission, without medical attention, except for locally purchased over-the-counter remedies. On 25 May, while on the plane flight to Beijing, she experienced the first of three cardiac [syncopes],

and, then, a second [syncope] occurred at Beijing International Airport. She was hospitalized in Beijing, and released on 27 May. On 28 May, [the Applicant] had a third cardiac [syncope]. She states that her doctors in New York informed her that the [third] attack - the most serious of the three - had been exacerbated by the nitroglycerin which she had been advised to take by the doctors in the Beijing hospital. She was hospitalized in the Intensive Care Unit. On 29 May 1996, [a doctor with] AEA International, Beijing, stated in writing: 'It is our opinion that [the Applicant] should be returned with a medical escort to her home in New York for a full cardiological work-up'.

... [The Applicant] was released from the hospital on 14 June 1996, and on 17 June, accompanied by a nurse, left Beijing for New York, via Tokyo. In Tokyo she had to leave the plane because the nurse had failed to provide oxygen for her. She left Tokyo on 19 June ... for New York where she was hospitalized from 24 to 28 June ...

... On 11 September 1998, [the Applicant brought her case to the attention of] ... [the] then Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator ...

...

... On 13 January 1999, [the Applicant] sent a confidential memorandum to ... [the] then Assistant-Secretary-General, [Office of Human Resources Management (OHRM) informing her that on her first day back in the office, 21 July 1996 her supervisor discharged her as his Secretary without major explanation; and that even though she had been given another position, she had lost a promotion opportunity].

There was no reply.

... On 15 January 1999, [the Applicant] submitted a claim to ... [the] Advisory Board on Compensation Claims (ABCC) for reimbursement of medical expenses resulting from the illness incurred during the mission in [the] DPRK. [The Secretary of the ABCC] replied on 23 February ..., stating, on the advice of ... [the] Medical Director, that 'this unfortunate illness is not related to the performance of [the Applicant's] duties on behalf of the United Nations'. Therefore, her case could not be considered under the provisions of Appendix D.

... On 13 April 2000, [the Applicant] wrote again to [the Assistant-Secretary-General, OHRM,] reminding her of her earlier memorandum of 13 January 1999. [The Assistant-Secretary-General replied on 2 May ... and ... 7 June 2000, stating that the Applicant had not submitted any formal complaint and drawing her attention to information circular ST/IC/82/7 dated 3 February 1982, on Internal Recourse Procedures in the United Nations.]

... [The Applicant] in a letter of 24 July 2000 to the Secretary-General requested an administrative review of [the] decision affecting her terms of employment, specifically the procedures for dealing with serious illness or

injury while in the service of the Organization. She [lodged an] appeal [with the JAB in New York] on 23 October ...

... On 31 August 2000, [the Applicant] submitted her claim to the ABCC ... At a meeting held on 8 December ..., the ABCC

*‘Having further considered* that, although the illness was not medically attributable to the performance of official duties, the claim could be considered compensable for procedural reasons as the claimant had not received medical clearance prior to her departure on official business, as is the established procedure, and that she may not have received the proper level of medical treatment immediately upon the onset of her illness;

*Recommends* to the Secretary-General that:

- (i) the explanation provided by the claimant be considered sufficient to waive the time limit for the submission of claims under article 12 of Appendix D to the Staff Rules;
- (ii) the claimant’s illness (viral myocarditis) be recognized as attributable to the performance of official duties on behalf of the United Nations and that, therefore, all medical expenses certified by the Medical Director as reasonable and directly related to the illness may be reimbursed;
- (iii) the claimant’s request for compensation for a secondary illness (post traumatic stress disorder) and for permanent loss of function be reviewed by the Medical Service.’

The recommendations were approved on behalf of the Secretary-General by the Controller on 13 January 2001.”

The JAB adopted its report on 26 December 2003. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

18. Although Respondent did not raise the issue of timeliness and receivability, the Panel, nevertheless, decided to address it ... [and] decided that the exceptional circumstances of the appeal justified a waiver of the time limits under the terms of [staff rule] 111.2 (f).

19. The Panel found itself in strong disagreement with Respondent’s contention ... [that the wholly unforeseen health-related mishaps endured by the Appellant, were not the direct or indirect consequence of any specific act of commission or omission on the part of the organization.]

20. ...

As China is one of the countries listed in Annex A to circular PD/1/92 of 31 March 1992 on Medical Evacuation, there can be little doubt that, had the Appellant been serving in China, the head of the office would have taken the decision for her medical evacuation. The Panel had no doubt on the basis of the medical evidence provided by the Appellant that she should have been evacuated immediately. ...

21. The Panel can only condemn in the strongest and harshest terms the behavior of [the Appellant's supervisor] throughout this episode. From the day he instructed the Appellant not to take time off for medical clearance on 11 May 1996, to work demands made by him during [the] Appellant's illness in the DPRK, to his refusal to recognize the seriousness of her condition in Beijing, his decision to leave her behind under the somewhat remote care of the Resident Representative, a.i., his failure to follow-up with his department and the [United Nations] Medical Service of the need for evacuation, to his frigid reception when she finally returned to Headquarters, he displayed remarkable irresponsibility and insensitivity.

...

23. The Panel would not wish its condemnation of [the Appellant's supervisor] to be interpreted to mean that he was the only culprit. There was a complete failure by the Organization - and its agents - to take proper and timely action in a life-threatening situation. ...

24. Turning to [the] Appellant's contention that her removal from her post as Secretary to [her supervisor] resulted in a delayed promotion, the Panel could only consider it mere speculation. The Panel also noted that ... a decision had not yet been reached with respect to [the] Appellant's claims regarding post-traumatic stress disorder.

#### ***Recommendation***

25. The Panel recommends to the Secretary-General that, in view of the Organization's egregious failure to take adequate and timely action to effect a medical evacuation in a life-threatening situation, a failure which, according to the medical evidence submitted to the Panel, had long-lasting impact on [the] Appellant's health, the Appellant be paid - in addition to the reimbursement of all eventual medical and (perhaps) psychiatric expenses - three years of her net base salary as compensation.

26. The Panel makes no other recommendation with respect to this Appeal. [The] Appellant has suggested the invoking of staff rule 112.3 in this case. While the Panel does not intend to propose that [the Appellant's supervisor] - the presumed target of [the] Appellant's suggestion - should suffer financial consequences, it does believe that he should be made aware of the judgment of his peers concerning the manner in which he conspicuously failed to come to the aid of a colleague in need."

On 25 May 2004, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 28 July 2004, the Under-Secretary-General for Management informed the Applicant as follows:

“The JAB accepted your allegation that your former supervisor prevented you from obtaining a medical clearance before going on mission. However, as indicated in your psychiatrist’s report dated 13 March 2003, this does not seem to be what actually transpired. It seems that you were not able to keep your medical appointment and chose not to schedule another one before departing. ... Finally, the Secretary-General notes that the Administration accepted the ABCC’s recommendation to reimburse all your medical expenses. Thus, this issue has been resolved to your advantage.

The JAB also accepted your claim that the period during which the [United Nations] was organizing your evacuation from China, and the escort’s failure to have oxygen available during the evacuation, resulted in additional physical and/or psychological injury attributable to the [United Nation’s negligence]. While the Secretary-General empathizes with your situation and recognizes that being ill in a hospital in a foreign country was undoubtedly frightening for you, he regrets not being able to agree with the JAB that the Organization acted negligently in its handling of the matter ...

As regards the JAB’s conclusion that your former supervisor ‘displayed remarkable irresponsibility and insensitivity’ there is no evidence to substantiate such a conclusion. ...

In view of the foregoing considerations, the Secretary-General does not accept the JAB’s conclusion and recommendation concerning your former supervisor. He also does not accept the JAB’s conclusion that the Organization was negligent in dealing with your medical condition and its recommendation for exceptional compensation of three years’ salary. However, the Secretary-General has decided to accept the JAB’s conclusion that, pursuant to Personnel Directive PD/1/1992, you should have been evacuated from China immediately, rather than after you were pronounced well enough to travel. For this reason, the Secretary-General has decided to award you three months’ net base salary as compensation. Regarding the second aspect of your appeal, that your removal from your post resulted in a delayed promotion, the Secretary-General agrees with the JAB that this is mere speculation and has decided to take no further action in this matter.”

Whereas the Applicant’s principal contentions are:

1. The Administration acted belatedly and inadequately in dealing with her medical emergency.

2. Absent a demonstration of error, the findings of the JAB should be considered final. The Respondent had ample opportunity to contest all the Applicant's specific allegations in the course of the JAB proceedings and to present countervailing evidence, but chose not to.

3. During the days preceding her departure to the DPRK, the Applicant was instructed to work non-stop until late in the evening, with little or no time for breaks and her supervisor demanded that she cancel and not "postpone" her appointment with the Medical Service. She was subsequently told by the Executive Office to "comply with her supervisor's directive".

4. The Respondent's decision fails to address a number of charges of negligence.

5. The Applicant was mistakenly diagnosed and prescribed inappropriate medication throughout her entire stay in China.

6. The Applicant's supervisor acted irresponsibly and he was completely insensitive to her needs throughout the ordeal.

7. Her arbitrary removal from her post in DPKO affected her career. Even though she was later granted a special post allowance and promoted to G-5, she would normally have been promoted earlier in her original post. The resulting uncertainty also contributed to the severity of her post traumatic stress disorder.

Whereas the Respondent's principal contentions are:

1. The Organization handled the Applicant's medical condition in a proper manner, and the Applicant has been compensated in respect of the timing of her medical evacuation.

2. The Organization responded properly to the Applicant's medical condition and provided proper care to her.

3. The Applicant's former supervisor acted properly in respect of her case and the actions of the Organization in handling the Applicant's case were not tainted by prejudice or other improper motives, or by abuse of discretionary authority.

4. The Applicant's claim relating to a post-traumatic stress disorder is outside the scope of the Application.

5. The Tribunal does not have an obligation to adopt the findings by the JAB of "secondary facts".

6. The delays in the handling of the Applicant's appeal did not result in material injury to the Applicant, and there is no basis for the Applicant's claim for an award in respect of costs.

The Tribunal, having deliberated from 1 to 23 November 2005, now pronounces the following Judgement:

I. In considering the facts of this case, as well as the legal arguments that apply, the Tribunal distinguishes three different time periods: the first one stretching from early May 1996, just before the Applicant was sent on mission to the DPRK with her supervisor and another colleague, until the first cardiac syncope suffered by her on 25 May; the second comprising the time spent in Beijing until 19 June when she returned to New York, during which she suffered two more cardiac syncopes and was intermittently hospitalized; and the third and last one dating from her return to New York, where she was again hospitalized, until 21 July 1996, her first day back in the office, when she was discharged by her supervisor as his Secretary without explanation.

II. The first period seems to provide the parties to this litigation with no significant legal argument. There is, of course, the episode where the supervisor allegedly instructed the Applicant not to take time off from her work to undergo a medical examination before departing on mission. The Tribunal finds, however, only evidence that the Applicant's supervisor asked her once to cancel her appointment for such medical examination, but that there was no impediment for her to re-schedule. Instead, the Applicant claims to have consulted the Executive Officer, DHA, who agreed with the supervisor "adding that it was inconvenient to get tests and vaccines shortly before traveling". Consequently, out of "fear of reprisal" she cancelled the appointment, neither submitting herself to the prescribed medical check-up nor taking the injections and other precautions required for the travel she was about to undertake. It was a rather serious omission, namely, one of the major conditions a staff member must fulfill before being allowed to go on field missions, but it does not give support to any legal argument one way or the other in the present litigation. Obviously, the supervisor gave her too much work (a fact not denied by the Respondent) and did not



pay much attention to her symptoms, but these symptoms were similar to those of influenza and the Applicant was relatively young and in apparent good health.

III. In contrast, the second period shows the supervisor in a very bad light. He expressed disbelief at the seriousness of the Applicant's illness despite the new and grave symptoms experienced by her. Such disbelief led the supervisor to adopt a completely insensitive attitude towards the Applicant, such as slapping her in the face in the belief that she was being hysterical or trying to dissuade the third staff member traveling with them from calling a doctor when she was suffering a third and very serious cardiac syncope aggravated by her taking nitroglycerine which caused her blood pressure to drop to a dangerously low level at the hotel.

The Tribunal is of the view that the supervisor grossly neglected his duties and responsibilities regarding the well-being and safety of the staff members entrusted to his care during a field mission. The country they were in at that moment was one of those included in Annex A to circular PD/1/92. Under the terms of the circular, "[when] assigned to the countries listed in Annex A" the decision to evacuate could be taken by the head of the office without prior approval from the Medical Director, even in non-emergency cases. Thus, the decision to take the Applicant to a place where she could receive adequate treatment depended on the supervisor and he could easily have put an immediate end to the ordeal that the Applicant was suffering.

IV. However, the supervisor did nothing of the sort, and decided to wait and see if resting would have the result of improving the Applicant's condition to such an extent that she would be able to return to New York to receive efficient medical attention. Moreover, after a couple of days and alleging that he had been called from Headquarters to return to New York immediately, he left her in a hospital where she could hardly communicate with the doctors and other hospital personnel due to language difficulties and where medical treatment was unreliable.

In fact, the circumstance that the country in question was listed as a country considered inadequate by the Organization from a medical point of view as well as the categorical advice of the AEA doctor who had been consulted "that this woman should be returned with a medical escort to her home for a full cardiological workup" seem to the Tribunal decisive to qualify the supervisor's conduct as negligent from a legal point

of view. For the damages arising from such negligence, the Applicant deserves to be compensated.

V. The Tribunal will now examine the arguments of the Respondent in rejecting the JAB's recommendation. The Respondent adduces that (a) the case is distinguishable from Judgement No. 872, *Hjelmqvist* (1998) because, unlike in that case, the diagnosis of the Applicant's condition was unclear, (b) the doctors in the hospital in question were of the view that her state of health appeared to be improving with bed-rest, and, (c) she was left in a hospital where she was taken care of, and if the medication administered to her proved to be inadequate, that was not the fault of the United Nations. The Respondent seems to forget that the country where she was left was considered to be unreliable from a health and medical point of view by the United Nations medical authorities. Consequently, the hospital in which the Applicant was warded was unreliable, the diagnosis of her illness was also unreliable, and the inadequacy of the medication which put her on the threshold of death was, in its turn, also a direct consequence of having left her in an unreliable hospital, with unreliable doctors.

The Respondent also argues that there was, in the Applicant's case, no indication of urgency. The Tribunal finds that argument disingenuous: any illness related to the heart is urgent, and the AEA doctor prescribed for her "a full cardiological workup" and evacuation with a medical escort. The mere fact that the AEA doctor noticed a cardiological danger gave the whole matter great urgency and revealed the real nature of her symptoms. Moreover, even though the same AEA doctor offered the assistance of their "coordinator doctor" to arrange for the evacuation and provided a 24-hour phone number, there is nothing in the record to indicate that the Applicant's supervisor followed up on that.

There is little doubt that the vicissitudes suffered by the Applicant during this period were the cause of her later post traumatic symptoms that perhaps up to this day afflict her as indicated in the JAB report "according to the medical evidence submitted to the Panel". To be left alone in a hospital, in a state of great weakness and ill-health and practically unable to communicate with the people around her, was the cause of those traumatic symptoms. The Tribunal is satisfied that the somewhat perfunctory visits by staff members of the local UNDP office - the expenses of which were

apparently charged to the Applicant - did not efface the Applicant's impression of having been abandoned. For this, the Tribunal also decides to award compensation.

VI. The third and last period, i.e., the one starting with the Applicant's return to New York, also reveals the insensitivity of her supervisor - and of most of the Organization - towards the Applicant. Instead of trying to make things easy for the Applicant, after what she had suffered from his insensitive attitude towards her, the supervisor took the initiative to rapidly, and without any scruples, replace her. The Organization did not treat her any better, and she was assigned to a position inferior to her former one. It is true that her lost opportunity for promotion was a matter of speculation, even if the probabilities were very much in her favour, but it is a real fact that the special post allowance she received compensated her only for the difference in salary but did not make up for the two years in seniority that she lost due to the level of the new post assigned to her, for which she should also be compensated.

VII. In conclusion, the Tribunal cannot but agree with the JAB that the Organization acted negligently in its handling of the Applicant's case, and that her former supervisor "displayed remarkable irresponsibility and insensitivity" towards her. Thus, it rejects the Respondent's submission that "the Organization responded properly to the Applicant's medical condition and provided proper care to her in the specific circumstance of the situation", and decides to award appropriate compensation to her. The Tribunal notes that the JAB recommended to the Secretary-General that,

"in view of the Organization's egregious failure to take adequate and timely action to effect a medical evacuation in a life-threatening situation, a failure which, according to the medical evidence submitted to the Panel, had long-lasting impact on [the] Appellant's health, the Appellant be paid - in addition to the reimbursement of all eventual medical and (perhaps) psychiatric expenses - three years of her net base salary as compensation".

While the Tribunal agrees that the situation was serious, it is of the view that the circumstances are not so exceptional as to warrant compensation in excess of two years' net base salary. In this regard, it also notes that the Applicant's request for compensation for post traumatic stress disorder and for permanent loss of function is still pending before the ABCC. Thus, this issue is outside the scope of this Judgement.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of two years' net base salary, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;
2. Recommends that the Respondent expedite the procedures relating to the Applicant's claim for compensation for post traumatic stress disorder and for permanent loss of function; and
3. Rejects all other pleas.

*(Signatures)*

**Julio Barboza**  
President

**Spyridon Flogaitis**  
Vice-President

**Dayendra Sena Wijewardane**  
Member

New York, 23 November 2005

**Maritza Struyvenberg**  
Executive Secretary