



ADMINISTRATIVE TRIBUNAL

Judgement No. 1308

Case No. 1368

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 18 August 2003, a staff member of the United Nations Development Program (hereinafter UNDP), filed an Application requesting the Tribunal, *inter alia*, to find that he had suffered from obstruction and harassment in the discharge of his official duties, and that a post to which he had applied had been filled in an irregular manner. Whereas on 24 November 2004, the Tribunal rendered Judgement No. 1217, finding that the recruitment in question was carried out in violation of applicable procedures and, in addition, was vitiated by discriminatory factors. Consequently, it ordered the Respondent to pay the Applicant 12 months' net base salary as compensation.

Whereas, on 18 May 2004, the Applicant filed another Application, requesting the Tribunal, *inter alia*, to find that: the decision by the UNDP Administrator not to investigate his allegations of interference, obstruction and manipulation of the internal justice system violated the Staff Regulations and constituted procedural irregularity and a conflict of interest; the harassment and obstruction experienced by the Applicant in the performance of his duties between 1998 and 2001 violated his terms of employment; and, the decision of the Secretary of the Joint Appeals Board (JAB) "imposing a joinder of cases, which led to a confusion of the evidence and procedures of one appeal with two other separate appeals of the Applicant" constituted procedural irregularity. Whereas on 23 November 2005, the Tribunal rendered Judgement No. 1271. With respect to the Applicant's plea concerning UNDP's refusal to conduct an investigation into allegations of interference in the internal justice system, the Tribunal found that it was "obviously not an application alleging non-observance of his contract of employment or a violation of his terms of

appointment, since it is not based on an administrative decision involving him”. Moreover, the Tribunal found that “the decision to conduct such an investigation is the privilege of the Organization itself” and that, in any event, such an investigation was then underway. Accordingly, it concluded that the plea was inadmissible and, even if it had been admissible, it was no longer applicable. The Tribunal also rejected the Applicant’s pleas regarding his allegations of harassment and intimidation, finding that the pleas were inadmissible as the subject matter was *res judicata*, having been rejected by the Tribunal in Judgement No. 1217. On the issues of due process, the Tribunal found that the joinder of several of the Applicant’s appeals by the JAB did not violate his rights. Accordingly, the Application was rejected in its entirety.

Whereas at the request of the Applicant, the President of the Tribunal extended to 30 September 2004 the time limit for the filing of another application with the Tribunal;

Whereas, on 28 July 2004, the Applicant filed an Application containing pleas requesting the Tribunal, inter alia:

“2.1.1 With regard to procedure

...

TO TAKE COGNIZANCE of the findings of fact by [the Advisory Board on Compensation Claims (ABCC)] (...) and [the JAB] (...), which established the existence of the illness, pain and suffering experienced by the Applicant attributable to incidents of harassment, obstruction, interference, slurs and sabotage in the performance of his official duties;

TO TAKE NOTE of the Respondent’s admission, explicitly contained in his decision of 2 April 2004, that he recognized the causal connection between the Respondent’s illness and the trauma suffered in the performance of his official duties;

2.1.2 On the merits

TO FIND that the harassment, stress, illness and physical and psychological trauma to which the Applicant was subjected in the performance of his official duties by the Respondent and his officials constitute a violation of the Charter of the United Nations, the Staff Rules and Regulations, the Universal Declaration of Human Rights and the Basic Principles on the Role of Lawyers;

TO DECLARE null and void the decision of the Secretary-General of 2 April 2004 to disregard the claim submitted on 21 July 2003 for salary and allowances due to the Applicant under article 11.1 (b) (ii) of Appendix D [to the Staff Rules] covering the period of illness and disability from April to September 2003;

TO ORDER the Respondent to pay the Applicant the salary and allowances provided for under the United Nations social security scheme pursuant to staff regulation 6.2 and article 11.1 (b) (ii) of Appendix D resulting from his illness and temporary total disability, which deprived him of occupational earnings from April to September 2003;

TO ORDER the Respondent to reimburse the Applicant for his transportation expenses between New York and Canada, totalling US\$ 2,300, incurred in order to receive medical care approved by the United Nations Medical Service and the [ABCC];

TO ORDER the Respondent, failing specific performance of the above, to pay the Applicant two years' net base salary in accordance with article [10], paragraph 1, of the Statute of the Tribunal.

...

2.3 Provisional measures

TO ADMIT in support of these claims and take cognizance of the evidence already submitted to [the] ABCC and the Medical Service and to the Administrative Tribunal ..., which demonstrates the acts of harassment and obstruction deliberately committed by the Respondent and his officials against the Applicant, tending to undermine his health, sully his reputation and sabotage his work, thereby producing repeated stress, illness and trauma and making it impossible for him to return normally to the exercise of his profession as an attorney on 1 April 2003.

TO ORDER the hearing of expert witnesses ...

... [and] ...

TO FIND that the incidents of harassment, obstruction, interference, sabotage, slurs and disguised disciplinary measures described in the Applicant's appeals and in the reports of the JAB panels not only brought on and produced a highly stressful, unhealthy and disabling effect on the Applicant and his health but also caused him a loss of earnings from April to September 2003;

TO HOLD that the Respondent is liable to staff members separating from service, including the Applicant, for disability and loss of earnings resulting from traumas attributable to their previous service with the United Nations and covered by staff regulation 6.2 and the regime of social security of the Organization;

..."

Whereas, on 1 November 2004, the Applicant submitted additional documentation;

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 28 February 2005 and twice thereafter until 15 April;

Whereas the Respondent filed his Answer on 8 April 2005;

Whereas the Applicant filed Written Observations on 28 May 2005;

Whereas, on 7 December 2005, the Respondent submitted additional documentation;

Whereas, on 8 January 2006, the Applicant submitted additional documentation;

Whereas, on 28 June 2006, the Tribunal decided to postpone consideration of the case in order to consider it together with case number 1464, also filed by the Applicant, at its forthcoming autumn session;

Whereas, on 27 October 2006, the Respondent submitted comments on the Applicant's Written Observations and, on 30 October, the Applicant responded thereto;

Whereas, on 7 November 2006, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts additional to those contained in Judgements No. 1217 and No. 1271 are as follows:

On 18 July 2001, the Applicant submitted a claim to the ABCC requesting reimbursement of medical expenses and “leave entitlements/adjustment and compensation for injury” with request to post traumatic stress disorder which he alleged was the result of “harassment, hostile work environment, and work-related stress and intimidation”. He attached to his claim a list of expenses he had incurred in relation to treatment: medical bills; the cost of airline tickets to visit his physician in Canada (actual cost or imputed value based on travel using air miles); terminal expenses; and, courier service. The total amount was listed as US\$ 4,554.51. On 10 October 2002, at its 410th (resumed) meeting, the ABCC deferred consideration of this claim, in anticipation of the outcome of a related appeal pending before the JAB.

On 24 March 2003, the Applicant, who was then 62 years old, went on sick leave. He retired on 31 March, at the end of his final fixed-term contract. He submitted sick leave certificates for the period from March until September. His sick leave was initially certified by the Director, Medical Services Division, for the period 24 March until 23 April but, following notification that the Applicant’s contract had expired on 31 March, the Medical Director adjusted the period of certified leave, stating “[s]ince [his] contract was not extended beyond 31 March 2003, his certified period of sick leave should only be considered through that date”.

On 21 July 2003, the Applicant submitted a second claim for compensation in connection with his illness, requesting reimbursement of medical expenses. On the claim form, under the category “Other” claims, he marked “Art. 11.1.b Appendix D”, which article provides for payment of salary and allowances during periods of total disability, but gave no explanation in support of this aspect of his claim.

On 4 March 2004, at its 417th (resumed) meeting, the ABCC considered both claims and, on 24 March, it recommended that the Applicant’s post traumatic stress disorder “be recognized as attributable to the performance of official duties” and that all “directly related”, “reasonable” medical expenses be reimbursed. The ABCC denied his request for travel expenses. No reference was made to the Applicant’s claim under article 11.1 (b); in a subsequent internal memorandum to the Office of Legal Affairs, the Secretary, ABCC, explained that “the Applicant had not substantiated his claim for compensation under article 11.1 (b) and, as the Board had proceeded on the basis that he had already retired as of 31 March 2003 ..., there was no discussion of compensation under [that article] as it did not appear to be applicable”. On 2 April, the ABCC’s recommendations were approved on behalf of the Secretary-General.

On 28 July 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant was entitled to compensation under article 11.1 (b) (ii) of Appendix D, for loss of earnings due to total disability from April to September 2003.
2. UNDP forced the Applicant to retire without extending his contract in order to permit him to exhaust the balance of his sick leave, contrary to usual practise.

3. The recommendation of the ABCC with respect to the Applicant's travel claims was arbitrary and illogical, as the cost of such medical services in New York would have been "at least three times more than in Canada".

4. The procedures of the ABCC are obscure and non-transparent.

Whereas the Respondent's principal contentions are:

1. Transportation expenses between New York and Canada should not be reimbursed.
2. The Applicant is not entitled to payment under article 11.1 (b) (ii) of Appendix D.

The Tribunal, having deliberated on 28 June 2006, in Geneva, and from 7 to 22 November 2006, in New York, now pronounces the following Judgement:

I. This Application arises out of the recommendations of the ABCC of 24 March 2004, approved on behalf of the Secretary-General on 2 April. The Tribunal has considered related medical claims of the Applicant in Judgement No. 1309, also issued at this session.

II. On 18 July 2001, the Applicant submitted a claim to the ABCC for reimbursement of medical expenses under Appendix D to the Staff Rules. The Applicant alleged that he had suffered post-traumatic stress syndrome in December 2000 due to harassment, hostile work environment and work-related stress and intimidation. The claim was for:

- (i) reimbursement of medical expenses;
- (ii) sick leave entitlement/adjustment; and,
- (iii) compensation for injury.

The Applicant claimed US\$ 4,544.51, for treatment by his psychiatrist in Quebec over the period 9 February to mid-April 2001 and airfares for a number of return trips to Quebec at US\$ 481.68 per trip.

On 10 October 2002, at its 410th (resumed) meeting, the ABCC, noting that the Applicant had also filed a case with the JAB and that the JAB would examine the merits of that appeal, deferred further consideration of his reimbursement claim pending receipt of the findings of fact from the JAB.

After his retirement on 31 March 2003, the Applicant submitted a second claim for compensation on 21 July. This time the injury/illness was described as "harassment at work/high blood pressure, mental strain and physical exhaustion" caused by "[p]reparation of harassment and internal justice cases for the [JAB] and UNAT". On the nature of the claim, the Applicant indicated that he was claiming reimbursement of medical expenses and, under "Other" claims, noted "Art. 11.1.b Appendix D".

On 4 March 2004, at its 417th (resumed) meeting, the ABCC met and considered the Applicant's two claims. On 24 March, it issued the following recommendation:

“(i) the [Applicant’s] illness (post traumatic stress disorder) should be recognized as attributable to the performance of official duties on behalf of the United Nations and . . . , therefore, all medical expenses certified by the Medical Director as being directly related to the illness and reasonable for the treatments/services provided may be reimbursed; and

(ii) the [Applicant’s] request for the reimbursement of airfare between New York and Quebec where he went for treatment [should] be denied as not being medically necessary, as the claimant could have received equivalent treatment in New York”.

The ABCC made no mention of the Applicant’s claim for payment of salary and allowances under article 11.1 (b) of Appendix D to the Staff Rules. On 2 April, the Controller approved the recommendation on behalf of the Secretary-General and, on 28 July 2004, the Applicant filed this Application.

III. In applications challenging the decision of the Secretary-General pursuant to recommendations of the ABCC, the Tribunal should bear in mind its jurisprudence in Judgement No. 1162, *Dillett* (2004):

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

The Tribunal, having no medical competence, will not seek to substitute its subjective judgement for the judgement of the administrative bodies charged with making medical decisions. The Tribunal, however, can determine whether sufficient evidence exists to support the conclusions reached by those administrative bodies. If sufficient evidence does not exist, the Tribunal is obligated to set aside any decision made by such decision makers.”

IV. On the claim for reimbursement of round-trip airfare between New York and Quebec, the ABCC, acting on the advice of the Medical Director, recommended that this item “be denied as not being medically necessary as the [Applicant] could have received equivalent treatment in New York”. The Applicant contends that this conclusion of the ABCC

“is incorrect from a financial standpoint. The treatments for post-traumatic stress disorder if received in New York would have cost the United Nations \$15,000 or more, well above the \$4,000 paid in Canada (where the Applicant benefited from the savings resulting from a complete hospital file and a medical record going back 50 years). The choice between treatment in New York or treatment in Canada was discussed many times in 2001 with the Medical Service. Apart from the fact that there was no pool of francophone psychiatrists to be found in New York, the Medical Officer was convinced that it was far more advantageous for the United Nations and for the Applicant to receive medical treatment from a specialist in Canada at the rate of \$150 per hour than in New York at the rate of \$500 per hour.”

There is no evidence in the record before the Tribunal of the relative advantage of treatment in Canada, in medical or financial terms, or of the alleged sanction of the Medical Officer for the treatment to be in Canada. The Tribunal therefore makes no order on the Applicant’s claim for \$2,300 being reimbursement of his travel expenses for medical treatment.

V. The Tribunal will next consider the Applicant's claim for salary and allowances for a period of total disability between April and September 2003. This claim is made under staff regulation 6.2 and article 11.1 (b) (ii) of Appendix D to the Staff Rules.

Staff regulation 6.2 reads: "[t]he Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations". No issue arises under staff regulation 6.2 as there *is* a scheme of social security, as illustrated by the afore-mentioned article 11.1 of Appendix D:

"In case of injury or illness resulting in disability *which is determined by the Secretary-General to be total*, and whether or not the staff member is continued in the employment of the Organization or is separated:

- (a) The United Nations shall pay all reasonable medical, hospital and directly related costs;
- (b) Without prejudice to the staff member's entitlements under other provisions of the Staff Regulations and Rules, the salary and allowances which the staff member was receiving at the date on which he last attended at duty (but not including special allowance under staff rule 103.11) shall continue to be paid to the staff member until either:
 - (i) He returns to duty; or
 - (ii) If, *by reason of his disability*, he does not return to duty, then until the date of the termination of his appointment or the expiry of one calendar year from the first day of absence resulting from the injury or illness, whichever is the later, provided, however, that if the staff member dies before the expiry of such period, the payments shall cease on the date of death." (Emphases added.)

Thus, for article 11.1 (b) (ii) to apply, the Secretary-General must first determine that the Applicant's disability is total. The ABCC's recommendation of 24 March 2004 made no reference to this because the Applicant had not substantiated his claim before the ABCC, as subsequently confirmed by the following extracted communication from the Secretary of the ABCC to the Office of Legal Affairs:

"When the [ABCC] reconsidered the case at its 417th meeting, the Applicant's letter dated 23 July 2003 and his claim form dated 21 July 2003 ... were included in the presentation to the Board. However, the Applicant had not substantiated his claim for compensation under article 11.1 (b) and, as the Board had proceeded on the basis that he had already retired as of 31 March 2003 ..., there was no discussion of compensation under article 11.1 (b), as it did not appear to be applicable. It should be noted that article 11.1 deals with cases of injury or illness, which have resulted in total disability and that claimants who receive compensation under article 11.1 (c) would, most likely, also be receiving a disability benefit under the [United Nations Joint Staff Pension Fund]. A claim for the loss of earnings should be submitted under the provisions of article 11.2 (d) of Appendix D and, in previous such cases, the Board has been of the opinion that

the Organization does not have an obligation to compensate claimants for the loss of earnings beyond the normal age of retirement, i.e. 60 or 62.

It should be noted that, although the Applicant contacted the Secretary of the [ABCC] on several occasions before and after the Board's consideration of his claim for various reasons, ... he never raised the issue with the Secretary of why the Board had not considered the issue of compensation under article 11.1."

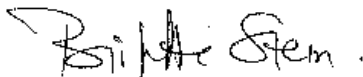
There is no determination by the Secretary-General that the Applicant's disability is total. Moreover, the Applicant did not separate from service by reason of his disability as stipulated by article 11.1 (b) (ii) but, rather, separated by reason of his retirement. Accordingly, his claim does not fall within article 11.1 (b) (ii) of Appendix D, the statutory provision under which it was made.

VI. In view of the foregoing, the Application is rejected in its entirety.

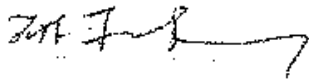
(Signatures)



Spyridon Flogaitis
President



Brigitte Stern
Member



Goh Joon Seng
Member

New York, 22 November 2006



Maritza Struyvenberg
Executive Secretary