



Administrative Tribunal

Distr. Limited
31 January 2007

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1309

Case No. 1464

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, on 28 July 2004, the Applicant again filed an Application, requesting the Tribunal, inter alia, to recognize his illness, post traumatic stress disorder, as attributable to the performance of official duties; to find that the Advisory Board on Compensation Claims (ABCC) erred in not awarding him compensation for temporary total disability under article 11.1 (b) (ii) of Appendix D; and, to order that all directly related medical expenses, including relevant travel costs, be reimbursed. Whereas on 22 November 2006, the Tribunal rendered Judgement No. 1308, rejecting the Application in its entirety.

Whereas, on 18 January 2006, the Applicant filed an Application containing pleas requesting the Tribunal, inter alia:

“2.1.1 With regard to procedure

...

TO RECOGNIZE the findings of the [ABCC] (...) and the [JAB] (...), which have established that the Applicant experienced illness, pain, trauma and suffering as a result of the harassment, obstruction, interference and sabotage to which he was subjected during the performance of his duties;

TO TAKE NOTE of the Respondent’s explicit admissions, in his decisions of 2 April 2004 and 18 October 2005, of the causal link between the Applicant’s illness and the traumatic events that he experienced during the performance of his duties;

2.1.2 With regard to the substance and the merits

TO DECLARE that there has been a violation of the Charter of the United Nations, the Staff Rules and Regulations, the Universal Declaration of Human Rights, the United Nations Global Compact, the International Labour Standards set out by the International Labour Organization (...) and, in particular, the Convention concerning Benefits in the Case of Employment Injury (which entered into force on 28 July 1967);

TO DECLARE NULL AND VOID the Secretary-General’s decision to deny the Applicant’s claim for compensation for permanent partial disability under article 11.2 (d) of Appendix D ...;

TO ORDER the Respondent to pay the Applicant compensation, in accordance with article 11.2 (d) of Appendix D, for the permanent partial disability he has suffered since 2003, with annual interest of 10 per cent on arrears until the date of their payment;

TO ORDER the Respondent, in the event of failure to implement the aforementioned provisions, to pay the Applicant three years’ net base salary, pursuant to article [10] (1) of the Statute of the Tribunal;

TO RESERVE the right to bring a claim for compensation for the permanent partial disability suffered by the Applicant before the competent national court if the Tribunal decides that it is not competent to rule on this matter or that it no longer has competence owing to the Respondent's 'new' policy of severing all legal ties and denying all claims for disability submitted since the Applicant's separation from service.

...

2.3 Requests the Tribunal, by way of provisional measures, to order

(a) *the production of the minutes of the 425th meeting of [the] ABCC*, held on 30 September 2005, including all the reports submitted to it, so that the Applicant can comment on them where appropriate;

(b) *a joinder of cases in order to obtain a ruling on a point of ordinary law*. Since the facts and the parties involved, as well as the issues of substance, are identical in both cases, the Applicant requests a joinder of this case and case No. 1368, so that a ruling can be given on the point of law concerning the Respondent's *liability* for disability following the separation from service of an official who has reached the compulsory age of retirement from the Organization."

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 15 July 2006 and periodically thereafter until 15 August;

Whereas the Respondent filed his Answer on 15 August 2006;

Whereas the Applicant filed Written Observations on 18 September 2006;

Whereas the facts additional to those contained in Judgements No. 1217, No. 1271 and No. 1308 are as follows:

On 10 December 2004, the Applicant submitted a claim to the ABCC requesting compensation under article 11.2 (d) of Appendix D to the Staff Rules, for loss of earnings due to a permanent partial loss of function from 1 October 2003 until 2015. On 30 September 2005, at its 425th meeting, the ABCC considered the claim and, on 18 October, it issued its recommendation. The ABCC recalled that, "by the Secretary-General's decision of 2 April 2004, the claimant's illness was recognized as attributable to the performance of official duties on behalf of the United Nations", and recommended that the Applicant be awarded compensation of US\$ 25,824.48, for a 12% permanent loss of function, but declined to compensate for loss of earnings "as the claimant retired at the age of 62". On 21 October 2005, the recommendation was approved on behalf of the Secretary-General.

On 18 January 2006, the Applicant filed an Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The recommendations of the ABCC were *ultra vires* and were tainted by lack of due process and conflict of interest.

2. The Applicant is deprived of a significant portion of his earnings, as post traumatic stress disorder prevents him from working full-time. As such, he should be compensated for loss of earnings under article 11.2 (d) of Appendix D.

3. Article 11.2 (d) of Appendix D was “secretly repealed” with respect to retirees. This action was unlawful and, in any event, the Applicant has an acquired right to compensation for loss of earnings thereunder.

Whereas the Respondent’s principal contention is:

The decision to deny the Applicant’s request for compensation under article 11.2 (d) of Appendix D was warranted.

The Tribunal, having deliberated from 7 to 22 November 2006, now pronounces the following Judgement:

I. In this Application, the Applicant invokes article 11.2 (d) of Appendix D to the Staff Rules in support of his claim for loss of earning capacity. This Judgement should be read in conjunction with Judgement No. 1308, also issued at this session, in which the Tribunal considered another Application filed by the Applicant for, inter alia, payment of salary and allowances under article 11.1 (b) (ii) of Appendix D.

II. The Applicant retired from service on 31 March 2003. On or about 10 December 2004, five months after having filed his Application in Judgement No. 1308, the Applicant submitted a claim to the ABCC, requesting reimbursement of medical expenses and “[c]ompensation under Art. 11.2 (d) of Appendix D: 12% since 1 October 2003 to 2015”.

The ABCC considered the claim on 30 September 2005, at its 425th meeting, and, on 18 October, adopted the following recommendations:

“(i) based on the current medical information, the [Applicant] should be awarded compensation in the amount of US\$ 25,824.48, which is equivalent to a twelve (12) per cent permanent loss of function of the whole person, under article 11.3 (c) of Appendix D to the Staff Rules; and

(ii) as the claimant retired at the age of 62 and, as the Organization does not have an obligation to compensate for the loss of earnings beyond the normal age of retirement, the claimant’s request for compensation under article 11.2 (d) of Appendix D should be denied.”

On 21 October 2005, the Controller approved the ABCC’s recommendations on behalf of the Secretary-General. On 18 January 2006, the Applicant filed his Application against this decision with the Tribunal and, on 30 June, the Executive Secretary of the Tribunal notified him of the Tribunal’s decision to defer

consideration of the Application in Judgement No. 1308 so that it could be heard in conjunction with the present case.

III. Article 11.2 of Appendix D to the Staff Rules reads:

“In the case of injury or illness resulting in disability which is determined by the Secretary-General to be partial:

...

- (d) Where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner *which adversely affects his earning capacity*, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1 (c) as corresponds with the degree of the staff member’s disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience.” (Emphasis added.)

Article 11.2 (d) is silent as to the age until which such compensation is payable. In Judgement No. 1197, *Merón* (2004), however, the Tribunal obtained clarification from the ABCC, the nature of which is most relevant to this case. In a letter dated 19 July 2004, the ABCC explained:

“[c]ompensation awarded under article 11.2 (d) for loss of earning capacity is sometimes awarded for a short period of time, if the claimant is expected to recover sufficiently to resume working. In cases where the claimant cannot return to work, the Board awards compensation up to the normal age of retirement, i.e. either up to age 60 or 62, depending on the claimant’s entry on duty date. In the past, such compensation awards were paid up to the claimant’s death, or for as long as the disability existed, as in the case of compensation awarded under article 11.1 (c). In recent years, however, the Board has decided that the Organization does not have an obligation to award compensation for the loss of earnings beyond the normal age of retirement and it has applied this interpretation of article 11.2 (d) uniformly. The claimant is advised as to when the benefit will terminate, and this date is included in the Secretary-General’s decision.”

The Tribunal in *Merón* noted that “Appendix D, which dates from 1966, is unclear and ... the competent authorities should delineate the rights of staff members of the Organization in case of total or partial disability suffered as a result of an accident attributable to their service with the Organization”, but concluded that “in view of the different interpretations made over time by the Administration, it does not seem that any one of them is manifestly erroneous, and *it therefore agrees that both the old and the new policy may be regarded as reasonable interpretations of article 11.2 of Appendix D*”. (Emphasis added.)

In *Merón*, it transpired upon further inquiry that the ABCC had changed its policy in 1997, which was predated by the recognition of that Applicant’s partial disability. Accordingly, the Tribunal held that “[t]he policy having changed after the recognition of [her] partial disability, the Tribunal considers that the Applicant [Merón] had an acquired right to the application of the old policy in force at the time that her

permanent partial disability was determined". In the instant case, the recognition of the Applicant's 12% loss of function came well after the ABCC's change in policy and he can claim no such acquired right. The ABCC's policy of interpreting article 11.2 (d) and paying loss of earnings benefits up until the age of retirement is reasonable, per *Meron*, and the Tribunal finds no reason to deviate from its jurisprudence.

IV. Moreover, this claim is for loss of earning capacity allegedly as a result of the 12% loss of function the Applicant has suffered, as assessed by the ABCC. The Applicant is an attorney. He still practices law. There is no evidence that his 12% loss of function translates into loss of earning capacity, 12% or otherwise.

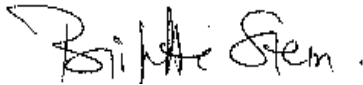
We are constrained to note that the Applicant is a familiar figure in the corridors of this Tribunal, be it as counsel for Applicants; proposed intervener; or, Applicant in his own numerous cases. The pleadings and elaborate arguments he tenders in those proceedings in his crusade against the Organization belie his claim for loss of earning capacity as an attorney.

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

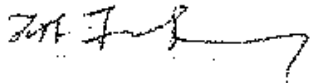
(Signatures)



Spyridon **Flogaitis**
President




Brigitte **Stern**
Member



Goh Joon Seng
Member

New York, 22 November 2006



Maritza **Struyvenberg**
Executive Secretary