



Administrative Tribunal

Distr. Limited  
30 January 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1426

Case No. 1492

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Sir Bob Hepple;

Whereas, on 18 August 2006, a staff member of the United Nations, filed an Application requesting the Tribunal, inter alia :

“9. ...

[With regard to the] Appendix D claim:

a. To award [the Applicant] appropriate compensation, on the basis of Article 11 (c) of Appendix D, in an amount equal to twice the pensionable remuneration of staff at P-4 step V, being the maximum provided for under the Rules, for permanent loss of vision in the left eye; partial loss of vision in the right eye; disfigurement of her face and other injuries to her head, shoulders and arms.

**Alternatively:**

[To require] the Respondent to submit [the Applicant]’s case to a medical board for evaluation of her physical injuries, before determining the appropriate compensation;

...

[To award the Applicant] appropriate compensation, [for breach of statutory duty and/or gross negligence] ...

**Alternatively:**

Should the Tribunal determine that it is not competent to decide on cases of negligence, it should require the Secretary-General to establish appropriate machinery to assess the damages due to [the Applicant], by a judicial or other appropriate, fair, impartial and independent machinery.

...

#### CONCLUSION

52. ... [T]o grant an oral hearing in this case. ...

...

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 29 January 2007, and once thereafter until 1 March;

Whereas the Respondent filed his Answer on 28 February 2007;

Whereas the Applicant filed Written Observations on 15 March 2007;

Whereas on 28 March and 29 June 2007, the Applicant filed additional communications;

Whereas the Respondent filed an additional communication on 17 July 2008;

Whereas, on 28 October 2008, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts of the case are as follows:

The Applicant entered the service of the Organization on 16 May 1985, on a fixed-term appointment as a Clerk-Typist at the G-2 level. The Applicant's fixed-term appointment was successively renewed until 1 December 1988, when she was granted a permanent appointment as a Secretary at the G-4 level. At the time of the events which gave rise to her Application, the Applicant was serving at the G-6 level as Personal Assistant to the Special Representative of the Secretary-General in Baghdad, Iraq.

On 19 August 2003, the United Nations offices in the Canal Hotel in Baghdad were attacked and damaged by a car bomb. The Applicant suffered multiple injuries, including loss of vision in her left eye. She received medical care in Baghdad until she returned to New York at the end of August 2003, where she underwent further medical care. As a result of the injuries, the Applicant was placed on extended sick leave. Pursuant to Article 18 (a) of Appendix D, the Applicant was granted special sick leave credit from 20 August 2003 through 30 September 2005, and she was also credited for any days of annual leave that she was charged in order to remain on full pay status during that period. After the Applicant returned to service, she was assigned less physically demanding functions, in accordance with the recommendation of her physician and at her request.

On 19 September 2003, the Applicant filed a claim with the Advisory Board for Compensation Claims (ABCC) under Appendix D. On 17 November, she was informed of the ABCC's recommendation that her multiple injuries were determined by the Secretary-General to be service-incurred, and therefore,

“all medical expenses certified by the Medial Director as being directly related to the injuries and reasonable for the treatments/services provided may be reimbursed under Appendix D to the Staff Rules.”

On 20 October 2003, the Report of the Independent Panel on the Safety and Security of United Nations Personnel in Iraq was issued.

On 9 March 2004, the Applicant underwent surgery on her left eye.

On 23 April 2004, the Applicant wrote to the Secretary-General, requesting compensation for service-incurred injuries and other damages. She also requested settlement of her claim, “even on an Ex Gratia or other basis”. On 28 August 2004, the Applicant wrote to the Under-Secretary-General for Management requesting compensation for her service-incurred injuries in the amount of US\$ 500,000.00.

On 9 February 2005, the Applicant filed a claim with the ABCC and requested compensation totalling US\$ 1,200,000.00, for her numerous injuries and the trauma resulting from the Baghdad bombing and for the Organization’s negligence and breach of duty of care for failing to provide security for the United Nations offices in Baghdad.

On 11 March 2005, the Applicant’s physician informed the Administration that the Applicant re-injured her left eye causing her service-incurred injury to become more severe than initially presented.

On 31 March 2005, the Applicant’s counsel wrote to the Secretary of the ABCC requesting reconsideration of the Applicant’s claim in light of the new injury to the left eye and submitted supplemental documentation.

On 18 May 2005, the Director, General Legal Division, Office of Legal Affairs (OLA), informed the Applicant that after review of her claim, on 23 March, the ABCC made its initial determination and that “the decision was taken to award her compensation of US\$ 63,300.00 under Appendix D of the Staff Rules, based on the determination that, as a result of the Baghdad bombing, [the Applicant] suffered a 27 per cent permanent loss of function of the whole person”.

In addition to this Appendix D award, the Applicant was also offered an award of US\$ 45,000.00 under the Malicious Acts Insurance Policy (MAIP). It was clarified to the Applicant that “the MAIP provides additional coverage, over and above that provided under Appendix D, in instances where service-incurred injury of a staff member is due to one of the types of acts listed in the policy”.

On 16 June 2005, the Applicant’s counsel wrote to the Secretary-General requesting reconsideration of the initial award in light of her new injury and her new prognosis. In making this request, the Applicant referred to Article 17 of Appendix D, entitled “Appeals in case of injury or illness”. She also requested that a medical board be constituted by the ABCC to consider her new claim and for reconsideration of the MAIP award, due to her most recent injury and her new prognosis. The Applicant also stated that, “[i]n view of the complexity and importance to staff at large of the issues raised in this case, we request that the parties agree to submit any further appeals in this case to the United Nations Administrative Tribunal without any recourse to the Joint Staff Appeals Body.”

On 24 June 2005, the Applicant was informed that her request for reconsideration of the compensation awarded to her under Appendix D had been forwarded to the ABCC secretariat for necessary

action. Regarding her request for direct submission to the Tribunal, the Applicant was advised that “[a]s the matter is being referred to the ABCC, it would be premature, at this stage, to discuss this request”.

On 10 April 2006, the Applicant followed up on her request for reconsideration dated 16 June 2005, and attached additional documentation.

On 16 May 2006, the Applicant was informed that the ABCC would reconsider her case on 18 May 2006, and that “[u]ntil such reconsideration, ... that it would be premature to discuss your request that the matter be submitted to the Administrative Tribunal”. The Applicant was advised further that, “decisions taken by the Secretary-General on ABCC recommendations are subject to appeal to the Administrative Tribunal. Accordingly, in the event that [the Applicant] contests the final decision of the Secretary-General in her case, she would, at that time, be entitled to submit an appeal to the Administrative Tribunal”.

On 18 May 2006, the ABCC considered the Applicant’s new claim. It increased the percentage of the Applicant’s loss of function from a total of 27 per cent permanent loss of functions of the whole person to a total of 38 per cent; which included 24 per cent for loss of vision to the left eye, 15 per cent for psychiatric impairment, and 5 per cent for disfigurement. The ABCC recommended that the Applicant’s initial award of US\$ 63,300.96 be increased by US\$ 25,789.28. This constituted a total award of US\$ 89,090.24 under Appendix D. On 20 June 2006, the Applicant was informed that the Secretary-General accepted the ABCC’s recommendation. The Applicant did not appeal this new award before the ABCC, nor did she make a request for the constitution of a medical board in connection with her new claim for permanent loss of vision in the left eye.

On 12 July 2006, the Applicant submitted a request for reconsideration of the MAIP award.

On 18 August 2006, the Applicant submitted the present Application to the Tribunal.

With regard to the Applicant’s request for reconsideration of the MAIP award, on 9 November 2006, the Applicant was informed that the underwriters of the MAIP authorized payment to the Applicant of a total of US\$ 120,000.00, based on an assessment of 24 per cent for loss of sight in her left eye.

On 15 June 2007, the Applicant’s counsel submitted to the Tribunal additional documentation from the Applicant’s retina consultant regarding the condition of the Applicant’s left eye.

The Applicant remained on full pay status during the relevant period until 31 December 2007, when she signed an agreement to separate from the Organization with termination indemnity.

Whereas the Applicant’s principal contentions are:

1. Her physical injuries were not fully and adequately evaluated by the ABCC, which acted without hearing her or the medical experts who examined and treated her.
2. A medical board should have been established to properly evaluate her physical injuries before making a final award.

3. In relying solely on the ABCC recommendation, on which the Respondent is represented by the Medical Director with no medical representation for her, the Respondent denied her the possibility to fully present her case.

4. The compensation offered under the MAIP did not provide “full” compensation to her.

5. The Respondent was grossly negligent in providing security in Baghdad and breached its duty of care as regards its staff serving at the United Nations offices in Baghdad.

6. The Respondent failed to accord her due process “by denying her ... the opportunity to present her case for damages for gross negligence and breach of statutory duty, to an independent judicial body”, other than the Tribunal.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s claims for higher compensation under Appendix D and under the MAIP, are not receivable. The Appendix D element of this Application was not filed in accordance with the provisions of Article 17 of Appendix D, or with the terms of article 7 of the Tribunal’s Statute. If the Applicant wishes to have a medical board constituted to consider the medical aspects of her case, she may submit such request to the ABCC with supporting documentation. The MAIP award, which does not come within the terms of Appendix D, may not be challenged through direct submission to the Tribunal. The appeal of the MAIP award must be submitted for administrative review and for consideration by a joint appeals body.

2. The Applicant’s allegations of negligence and breach of duty of care on the part of the Organization, which involve questions of fact, have never been submitted for administrative review and for consideration by a joint appeals body under Chapter XI of the Staff Rules and therefore, they are not receivable.

The Tribunal, having deliberated from 28 October to 26 November 2008, now pronounces the following Judgement:

I. The first issue is whether the Applicant’s claim for higher compensation under Appendix D is receivable. The Respondent argues that the Appendix D element of the Applicant’s claim was not filed in accordance with the provisions of article 17 of Appendix D, and accordingly there was no requirement to convene a medical board. Article 17 provides so far as relevant:

“(a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date.

The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b).

(b) A medical board shall be convened to consider and to report to the [ABCC] on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the [Applicant]; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations.”

The Respondent contends that in her letter of 16 June 2005, the Applicant was not challenging the prior determination of 27 per cent permanent loss of function of the whole person, but was submitting a new claim for her subsequent injury which caused irreparable loss of sight in her left eye. The Respondent claims that this new injury did not relate to the Applicant’s employment. These contentions are inconsistent with the wording of the letter of 16 June and the Applicant’s statement attached thereto. The letter and statement make absolutely no reference to the subsequent injury, and do not request further compensation in respect of this injury. They expressly refer to article 17 as the basis of the request for “reconsideration” of the award recommended on 23 March 2005, request a medical board, and, as required by the first paragraph of article 17 (a), the statement puts forward the name of a medical practitioner chosen by the Applicant to represent her on the medical board. The Respondent’s contention is also inconsistent with the uncontested evidence as to when the Administration was made aware of the subsequent injury. It occurred on 25 February 2005, and her doctor wrote on 11 March informing the Administration of this injury. The determination of 23 March must therefore be presumed, in the absence of evidence to the contrary, to have been made with knowledge of this accident. After the determination of 23 March but before requesting reconsideration, the Applicant’s counsel wrote on 31 March to the ABCC, stating:

“Obviously the extent of the damage to her eye and speed of any possible recovery was grossly underestimated. In this latest episode, for lack of clear vision she fell and again injured her eye which is a clear sign that the vision in her eye is clearly lost permanently ... [The Applicant] is currently undergoing medical treatment and we request that this injury be treated as part of the original injury for which medical expenses, absence from duty and compensation will be borne by the United Nations.”

In other words, the Applicant did not present this as a new claim, but rather as proof that the original injury had caused permanent loss of vision.

II. The Applicant did not receive any response to this request for reconsideration until a year later, on 20 June 2006. The ABCC totally disregarded the Applicant’s request for a medical board, which in any event is mandated by article 17 (b) of Appendix D. This was a flagrant breach of the Applicant’s rights and her legitimate expectation that a medical board would reconsider her case in the light of all the evidence. The Tribunal does not know, from the minutes of the ABCC’s 428<sup>th</sup> meeting, precisely what the evidence was on which the ABCC relied. Nor can it speculate whether a medical board, including the Applicant’s

medical representative, would have reached a different conclusion. The Tribunal has neither the power nor the competence to reassess the type and degree of disability. Only the ABCC can make such an assessment on the basis of a report from the medical board. Accordingly, the proper course for the Tribunal, in view of the clear breach of procedure, and in the light of the Respondent's offer to convene a medical board, if the Applicant submits the necessary documentation, is to remand the matter back to the ABCC for correction of the required procedure, in terms of article 10.2 of the Tribunal's Statute. The Tribunal notes the Applicant's concerns that it is now five years' since the Applicant's injury and three years since the request for a medical board was first made. However, the Tribunal does not agree that it is now "too late" for a medical board to be convened. The latest evidence the Tribunal received concerning the Applicant's condition is a letter dated 15 June 2007 from her retina consultant, which indicates that the vision in her left eye has never improved beyond the level of hand motion vision and, because of the traumatic injury to that eye, she has been suffering from sympathizing right eye with difficulty with bright lights as well as with reading, which has become progressively more difficult for her. There may have been further medical developments since then, so that it cannot be said that it would be futile to convene a medical board to consider whether the type or degree of disability is now more severe than it was at the time of the assessment of 18 May 2006.

III. The mistake of procedure by the ABCC has obviously caused a substantial delay in the settlement of the Applicant's claim, and her counsel contends that it has compounded her suffering. The Tribunal is limited by article 10.2 of its Statute as to the amount of compensation it can award in this respect, to three month's net base salary. In view of the delay, the nature of the breach of procedure, and the Applicant's suffering, the Tribunal awards the maximum amount.

IV. The Tribunal shall consider the second and third issues together. The second is whether the Applicant's claim in respect of the MAIP is receivable. In her Application, the Applicant complains that "the compensation offered under the MAIP does not provide 'full' compensation". On 12 July, the Applicant's counsel highlighted the "discrepancy" between the revised Appendix D award based on 38 per cent permanent loss of function, and the MAIP award. On 9 November, the MAIP award was raised from US\$ 45,000 to US\$ 120,000. This was said to be based on an assessment by the underwriters that the Applicant suffered a 24 per cent permanent loss of function. The Applicant's argument, based on decisions in cases such as Judgement No. 872, *Hjelmqvist* (1998) and the International Labour Organization Administrative Tribunal Judgement No. 402, *In re Grasshoff* (1980), is that if a staff member is assigned to a dangerous area or otherwise obliged to take abnormal risks, then the staff member should be provided with adequate insurance coverage that would indemnify the staff member in full. She further contends that the MAIP, like Appendix D, does not provide full compensation to staff injured while deployed to work in a place which the Organization knows or ought to know is unsafe. It is not disputed that the MAIP does not take account of psychological injury, such as post-traumatic stress disorder or scarring. The benefits

for permanent disablement are based on the so-called Continental Scale, as a proportion of the capital sum insured not exceeding US\$ 500,000. It was on the basis of this scale that a 24 per cent assessment of permanent disability was made in the present case.

V. The third issue is whether the Applicant's claims based on breach of statutory duty and/or gross negligence are receivable by the Tribunal. The Applicant relies on staff regulation 1.2 which requires the Secretary-General to "seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them". The Applicant also alleges breach of "common law". The Tribunal views these claims as being for alleged non-observance of the Applicant's contract of employment and the terms of her appointment, receivable under article 2.1 of the Tribunal's Statute. The main evidence produced in support of these allegations is the Report of the Independent Panel on the Safety and Security of United Nations Personnel in Iraq, which reported on 20 October 2003, after investigating the bombing, that the "[United Nations] security management system failed in its mission to provide adequate security to [United Nations] staff in Iraq". The Tribunal has recognized that in certain situations staff members may be entitled to compensation additional to awards under Appendix D. (See Judgements No. 872 (*ibid.*); No. 1273 (2005); and, generally, ILOAT Judgment No. 402 (*ibid.*)) There do not appear to have been any cases decided by the Tribunal in which there had been an additional payment under the MAIP.

VI. With respect to both these issues above, it is an essential prerequisite for bringing any such claim that the Applicant must submit the matter for administrative review and for consideration by a JAB before the matter can come before the Tribunal, unless there is agreement to direct submission of the claim to the Tribunal. The Tribunal notes that there was no such agreement in this case.

Unfortunately, the Applicant's case has not followed the prescribed procedure to bring the matter before the Tribunal. Staff rule 111.2 (a) provides that:

"A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

Following administrative review, the matter may be submitted to a JAB. Article 7.1 of the UNAT Statute provides that:

"An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the [A]pplicant have agreed to submit the application directly to the Administrative Tribunal".



In this case, there has been a mistake of procedure because the Applicant did not appeal to the JAB. Instead, the Applicant requested the Secretary-General to agree to direct submission to the Tribunal, but on 24 June 2005 was informed that any such request was “premature”, and no agreement was ever reached for direct submission. The Tribunal notes that, unlike Appendix D claims, there is no mechanism for an appeal in connection with an MAIP award. This means that the only way that the Applicant could challenge the MAIP procedure and claim compensation based on alleged breach of duty or negligence was by seeking administrative review, and by submission to a JAB. The Tribunal has repeatedly stressed that “the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence”. (See Judgements No. 571, *Noble* (1992); No. 1235 (2005); No. 1313 (2006); and, No. 1388 (2008).) The Tribunal has also emphasized, on many occasions, “the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well-functioning of the Organization”. (See Judgement No. 1106, *Iqbal* (2003).)

VII. Nonetheless, the Tribunal notes that, on 16 June 2005, the Applicant’s counsel requested that the ABCC reconsider her claim in light of the “emotional suffering and mental anguish and injury” in view of being “exposed to unusual and grave danger to her life by the assignment to a war zone without adequate security arrangement” and that, on 24 June, the Deputy Director, General Legal Division, OLA, notified the Applicant’s counsel that “several legal arguments in support of [her] request for a higher amount of compensation than that awarded ... on the grounds that [the Applicant’s] injuries were a result of the [United Nations’] negligence ... would be premature, at this stage” as the matter had been referred to the ABCC.

Under the circumstances of this case, the Tribunal construes the Applicant’s request as a claim for administrative review. It finds then that the Respondent’s position that such claim was premature, given the case pending before the ABCC, permitted the Applicant to operate under the impression that the ABCC would consider her case *in toto*, i.e., both medical and administrative claims. The Tribunal also takes note of OLA’s letter of 20 June 2006, which informed the Applicant’s counsel that the ABCC had reconsidered her case on 18 May, and decided to award her compensation equivalent to an additional 11 per cent permanent loss of function of the whole person under article 11.3 (c) of Appendix D. The Tribunal is puzzled as to why this communication was devoid of any reference to the Applicant’s breach of duty and negligence claim, among others.

In Judgement No. 1348 (2007), the Tribunal found that “[t]he Applicant was either induced to operate under misguided or mistaken beliefs or, at the very least, permitted to continue to operate thereunder despite the knowledge of the Director that she was so doing. This failure of communication constituted a violation of her right to due process”.

In the instant case, while the Tribunal does not consider the Applicant's rights of due process to have been violated, such that she is entitled to compensation, it does find that the Respondent cannot now rely upon his own actions or omissions in preventing the Applicant from exercising her claims before the JAB. Accordingly, the Tribunal remands the administrative pleas raised in this Application to the JAB for consideration upon the merits. The Tribunal directs its secretariat to forward the written pleadings in this case to the JAB, which can also request parties to submit their arguments on the merits of these claims. In this connection, the Tribunal takes note of the fact that the Secretary-General did request an opportunity to submit his arguments upon the merits of the case in the event that the administrative pleas be deemed receivable. In view of the time already elapsed in this case and the importance of the issues raised, the Tribunal requests the JAB to expedite the case. In view of the increase in United Nations' operations in extreme circumstances and the sovereign immunity which the Organization enjoys, it is essential that the issues raised in the pleas in paragraphs IV and V above be resolved.

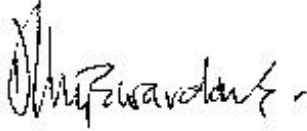
VIII. In light of the foregoing, the Tribunal:

1. Remands the case back to the ABCC for correction of procedure by convening, as soon as practicable and no later than 180 days from the date of distribution of this Judgement, a medical board to report on the medical aspects of the appeal, in the light of the Applicant's present condition, and for the ABCC to consider whether to recommend to the Secretary-General that additional compensation should be paid to the Applicant in accordance with the provisions of Appendix D to the Staff Rules;
2. Orders the Respondent to pay to the Applicant compensation of three months' net base salary, at the rate in effect on the date of Judgement with interest payable at 8 per cent per annum as from 90 days from the date of distribution of this judgment;
3. Remands the outstanding administrative claims raised by the Applicant in this case, relating to the MAIP and alleged breach of statutory duty and gross negligence, to the JAB and directs the secretariat to forward one set of pleadings in this case to the JAB; and,
4. Rejects all other pleas.

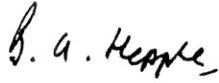
*(Signatures)*



Spyridon **Flogaitis**  
President



Dayendra Sena **Wijewardane**  
Vice-President



Bob **Hepple**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary