



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1431

Case No. 1503

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 25 September 2006, a staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II: PLEAS

11. The [Applicant] submits that Respondent has unduly and unjustly [refused] to evaluate his medical reports and award him appropriate compensation under the Appendix D.

12. That Respondent’s failure to award compensation to [the Applicant] is based on erroneous interpretation of the law, which Respondent interprets to limit awards of compensation for physical loss of function based on the mathematical formula in Appendix D and under the [Malicious Acts Insurance Policy (MAIP)].

...

16. [The Applicant claims that 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. According to the Applicant, Appendix D and MAIP payments cannot be the basis for recovery of ‘full’ compensation to staff injured as a result of gross negligence.]

...

26. ... [For his injuries] ... resulting from the bomb explosion ... the [Applicant] claims compensation equal to half of the difference between his current age and his expected effective

working age of 75. [The Applicant] thus requests the Tribunal to award him seven and half years' salary at his gross annual remuneration or six and half years', should he be extended to retirement."

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 20 March 2007, and once thereafter until 20 April;

Whereas the Respondent filed his Answer on 17 April 2007;

Whereas the Applicant filed Written Observations on 15 August 2007;

Whereas the Applicant filed additional documents on 28 September 2008;

Whereas the facts of the case are as follows:

The Applicant, a national of Sri Lanka, joined the Organization on 1 March 2000, as a Property Control and Inventory (PCI) Assistant at the IFLD-3/C level, under an appointment of limited duration (ALD), with the United Nations Transitional Administration in East Timor (UNTAET). The Applicant's appointment was successively renewed and, with effect from 12 July 2003, he received a three-month ALD as an Administrative Assistant in the Office of the Special Representative of the Secretary-General for Iraq, in Baghdad, at the IFLD-4/B level. Thereafter, the Applicant's appointment was successively renewed until 14 April 2004 and, with effect from 15 April, he was appointed under a six-month fixed-term appointment as PCI Unit Assistant at the FS-4/8 level, in the United Nations Operations in Cote d'Ivoire (ONUCI), Abidjan. The Applicant's fixed-term appointment with ONUCI has been successively renewed.

On 19 August 2003, the United Nations offices located in the Canal Hotel in Baghdad were attacked and damaged by a car bomb. As a result, the Applicant sustained multiple injuries, in particular, to his hand and nose. The Applicant was hospitalized in Baghdad, where he underwent surgery, and thereafter medically evacuated, first to Amman, Jordan, and then to New York, where he received further treatment.

From 20 August 2003 to 31 March 2004, the Applicant went on sick leave as a result of the injuries sustained from the Baghdad bombing. During that period, the Applicant's appointment was successively renewed to cover the period of his sick leave. The Applicant has remained in full pay status during the period relevant to the present Application.

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

Also on 20 October 2003, the Applicant filed a claim with the Advisory Board for Compensation Claims (ABCC), seeking compensation under Appendix D, for the injuries he sustained from the Baghdad bombing. By letter dated 13 November to the ABCC, the Applicant sought compensation under Appendix D, for the reimbursement of the costs incurred for hospitalization and surgeries.

On 22 January 2004, at the recommendation of the ABCC, the Secretary-General approved that the Applicant's multiple injuries and illness (post-traumatic stress disorder (PTSD)) "be recognized as attributable to the performance of his official duties ... and that, therefore, all medical expenses certified by

the Medical Director as being directly related to the injuries and illness and reasonable for the treatments/services provided may be reimbursed” under Appendix D. In addition, the Secretary-General approved the ABCC recommendation that the Applicant be granted special sick leave credit under article 18 (a) of Appendix D for the period from 20 August 2003 to 13 February 2004, as being directly related to the incident of 19 August 2003, and that he should be credited for any annual leave days that he was charged in order to remain on full pay status. Subsequently, the Applicant’s certified sick leave under special sick leave credit provisions of Appendix D was extended through 31 March 2004

On 12 April 2004, the Applicant submitted another claim to the ABCC, seeking compensation under Appendix D for permanent loss of function in respect of the injury to his finger, as well as compensation for the PTSD.

On 15 April 2004, after receiving medical clearance, the Applicant commenced his appointment with ONUCI.

On 8 August 2006, the Applicant followed up on his request to the ABCC, and also inquired into compensation under the MAIP. On the same day, the ABCC Secretary advised the Applicant that the “issue of permanent loss of function was not considered [by the ABCC]” as he was later medically cleared to go on mission to ONUCI. With regard to claims for permanent injuries and/or psychiatric problems relating to the bombing, he was asked to provide updated medical report(s), including a detailed updated report from a psychiatrist.

With regard to the Applicant’s claim concerning the MAIP, the ABCC Secretary suggested that he contact directly the Insurance and Disbursement Service, as the ABCC only dealt with issues relating to Appendix D. Apparently, the Applicant has not submitted any medical or psychiatric reports as requested by the ABCC.

On 25 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent has unduly and unjustly denied his claim to evaluate his medical reports and award him appropriate compensation under Appendix D and the MAIP.
2. The Respondent’s failure to award him compensation for service-incurred injuries is based on erroneous interpretation of the law.
3. 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.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s claim for additional compensation under Appendix D is not receivable as it was not filed in accordance with the terms of article 7 of the Tribunal’s Statute. If the Applicant wishes to have the ABCC consider his request for additional compensation under Appendix D, he must submit additional and updated medical reports pursuant to articles 13 and 15 of Appendix D.

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 Applicant entered the service of the Organization on 1 March 2000, on an ALD in East Timor. The Applicant's appointment was successively renewed. At the time of the events which gave rise to his Application he was serving on a three-month ALD as an Administrative Assistant in the Office of the Special Representative of the Secretary-General, Baghdad, Iraq.

On 19 August 2003, when the United Nations offices in Baghdad were bombed, the Applicant sustained multiple injuries, in particular, serious damage to his left hand. After hospital treatment in Baghdad, he was medically evacuated first to Amman, Jordan, and then to New York. From 20 August 2003 to 31 March 2004, the Applicant was on sick leave as a result of his injuries; his appointment was successively renewed to cover this period.

On 20 October 2003, the Applicant submitted a claim under Appendix D to the ABCC, seeking compensation for the injuries he sustained in the bombing. In addition, by letter dated 13 November, he sought compensation for the reimbursement of the costs incurred for hospitalization and surgeries. On 12 December, at its 416th meeting, the ABCC recommended that his injuries and PTSD be determined service-incurred and that the related medical expenses be reimbursed by the Organization as well as recommending that he be granted special sick leave credit. On 22 January 2004, the Secretary-General approved these recommendations.

On 12 April 2004, the Applicant submitted another claim to the ABCC, seeking compensation under Appendix D for permanent loss of function in respect of the injury to his finger, as well as compensation for the PTSD. On 15 April, he commenced a new appointment with ONUCI, in Abidjan, for which he was medically cleared. By email of 8 August 2006, the Applicant followed up on his request of 12 April 2004 and inquired into compensation under the MAIP. In response, the Secretary of the ABCC advised the Applicant:

“The issue of permanent loss of function was not considered [by the ABCC] as you were later medically cleared to go on mission to ONUCI. However, if you have permanent injuries and/or psychiatric problems relating to the bombing of the Canal Hotel, then kindly provide *detailed, updated* medical report(s). If you are also claiming for permanent psychiatric problems, then a detailed updated report from a psychiatrist (not a psychologist) is required.”

With respect to the Applicant's claim concerning the MAIP, he was told to contact the Insurance and Disbursement Service.

On 25 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

II. The first issue is whether the Applicant's claim for additional compensation under Appendix D is receivable. The Respondent submits that it is not receivable because it was not filed in accordance with article 7.1 of the Tribunal's Statute. This 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 applicant have agreed to submit the application directly to the Administrative Tribunal".

III. In this case, the Secretary-General approved recommendations by the ABCC as to payment of medical expenses and the granting of special sick leave credit. Subsequent to this, on 12 April 2004, the Applicant requested the ABCC to recommend "adequate compensation for my injuries, pain and suffering and continued medical attention that has disrupted my normal living". In response, he was informed by letter dated 8 August 2006, that

"if you have permanent injuries and/or psychiatric problems relating to the bombing of the Canal Hotel, then kindly provide *detailed, updated* medical report(s). If you are also claiming for permanent psychiatric problems, then a detailed updated report from a *psychiatrist* (not a psychologist) is required."

The ABCC was clearly entitled to request this information. Articles 13 and 15 of Appendix D provide as follows:

"The determination of the injury or illness and of the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners"; and,

"Every person claiming under these rules or in receipt of a compensation under these rules shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules".

IV. The Tribunal notes that as of 3 August 2007, the Applicant had not submitted any additional and updated medical and psychiatric reports to the ABCC, as requested. Unless and until those reports are submitted, his claim for additional compensation under Appendix D cannot be evaluated by the ABCC. With respect to medical claims processed by the ABCC under Appendix D, the relevant appeals procedure is set out in article 17 thereof. The Applicant, having failed to submit the requested information for consideration of his claim, has certainly not complied with the requirements of article 17 and, thus, his case has not been submitted to a joint body. Accordingly, the Tribunal must reject the Applicant's allegation that the Secretary-General "has unduly and unjustly denied to evaluate his medical reports and award him appropriate compensation under Appendix D". Moreover, in the absence of any agreement to direct

submission to this Tribunal, article 7 of the Tribunal's Statute (above) provides that the Application is not receivable by the Tribunal.

V. The Tribunal notes that, on 15 August 2007, the Applicant informed the Tribunal that he is no longer represented by counsel. He attached to his communication for consideration by the Tribunal evaluation reports submitted by Dr. S. T. dated 24 July 2007, Dr. D. K. dated 1 August 2007, and Dr. T. S. dated 23 July 2007. He has also submitted to the Tribunal, by letter dated 28 September 2008, an additional report by Dr. K dated 26 September. In the absence of legal advice, the Applicant may not have appreciated that the Tribunal does not have the competence or capacity to evaluate medical questions. (See Judgements No. 587, *Davidson* (1993); No. 1162, *Dillett* (2003); and, No. 1197, *Meron* (2004).) These reports should have been addressed by the Applicant to the ABCC, as requested by its Secretary. Accordingly, the Tribunal directs its secretariat to seek the Applicant's permission to forward these reports to the ABCC. The Applicant should communicate any further information directly to the ABCC.

VI. The second issue is whether the Applicant's claims alleging negligence and breach of duty on the part of the Organization are receivable by the Tribunal, in the absence of any agreement to direct submission. The Applicant submits that "Appendix D and [the MAIP] payments cannot be the basis for recovery of 'full' compensation to staff injured as a result of gross negligence". The Applicant's argument, based on decisions in cases such as Judgement No. 872, *Hjelmqvist* (1998) and the International Labour Organization Administrative Tribunal (ILOAT) 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. However 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. The MAIP does not take account of psychological injury, such as post-traumatic stress disorder or scarring. The benefits for permanent disability are based on the so-called Continental Scale, as a proportion of the capital sum insured, not exceeding US\$ 500,000.00. It appears that in the present case the Applicant has not been awarded compensation under the MAIP, as the injuries he sustained have not been determined to be permanent total disability or permanent partial disability.

VII. 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 considers these claims as being for alleged non-observance of the Applicant's contract of employment and the terms of his appointment. 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 concluded 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 Judgement No. 872 (*ibid.*) and, generally, ILOAT Judgement No. 402 (*ibid.*.)

With respect to this issue, 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 request for administrative review, or submission to the JAB or agreement to direct submission in this case. 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 (see article 7.1 of the UNAT Statute, quoted above). Unlike the situation in Judgement No. 1426, rendered by the Tribunal at this session, the Applicant did not make a request for administrative review, and the Applicant was not in any way misled or permitted by the Respondent to operate under the impression that the ABCC would consider his claim *in toto*, i.e. including the claim based on alleged negligence and/or breach of duty. 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).) Accordingly, the claim in respect of alleged negligence and/or breach of duty is not receivable by the Tribunal.

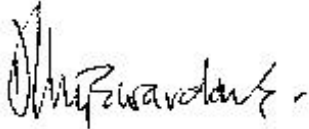
VIII. In view of the foregoing, the Tribunal:

1. Rejects all pleas; and,
2. Directs its secretariat to seek the Applicant’s permission to send all medical reports received by the Tribunal to the Secretary of the ABCC.

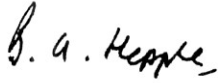
(Signatures)



Spyridon **Flogaitis**
President



Dayendra S. **Wijewardane**
Vice-President



Bob **Hepple**
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary