



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1432

Case No. 1504

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

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

15. [The] Respondent’s failure to award compensation to [the Applicant] is based on erroneous interpretation of the law, which [the] 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)].

...

19. [The Applicant claims that his appointment in UNOHCI was wrongfully terminated when he was still in pain and under medical treatment in the Republic of Korea, for the injuries he sustained from the Baghdad bombing and, as a result, he was unemployed for seven months until he received an appointment to serve in ONUCI. In respect of this element of his claims, the Applicant requests the Tribunal to award compensation equivalent to seven months of lost salary at the P-4 level. The Applicant requests further that the Tribunal should order the Respondent to restore him to his previous level, at P-4, with adjustment for lost steps and back payments from 22 June 2004.]

...

30. [The Applicant] submits that for the pain and suffering and the future impairment of full enjoyment of good health which will reduce his employment prospects after his current employment ends, he is entitled to compensation. ... [The Applicant] requests compensation at the P-4 equivalent to 18 years of working life which has been impaired. This amount could be reduced to [seven] years' pay should he be given a permanent contract until he reaches 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 submitted additional documentation on 24 July 2008;

Whereas the Respondent submitted additional documentation on 30 October 2008;

Whereas the facts of the case are as follows:

The Applicant, a national of the Republic of Korea, entered the service of the Organization on 16 April 2001, under an appointment of limited duration (ALD), as a Geographical Officer at the P-4 level in the United Nations Office of the Humanitarian Coordinator for Iraq (UNOHCI), in Baghdad. His appointment was extended successively until 15 November 2003, when he separated from service. The Applicant was reappointed on successive ALDs until 15 June 2007 and, following another break in service, he was re-appointed on 7 August 2008 under a fixed-term appointment in the Department of Field Support (DFS).

On 19 August 2003, the United Nations offices in the Canal Hotel in Baghdad were attacked and damaged by a car bomb. The Applicant sustained multiple injuries, in particular, damage to his back. Following the bombing, the Applicant was admitted to a hospital in Baghdad, and on 23 August, evacuated to Amman, Jordan. On 5 September, the Applicant, at his request, returned to his home country, to continue medical treatment.

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

On 21 October 2003, the Applicant, who was still in the Republic of Korea at the time, advised UNOCHI that he was "ready to resume [his] work". On 31 October, the Applicant was informed that, following the decision of the UNOHCI Senior Management and with a notice of two weeks, his appointment, which had been extended to 31 December 2003, would be "shortened" to 15 November, due to staff reduction in the mission. The Applicant, who remained in full pay status until his separation from service, was paid a termination indemnity equivalent to 1.5 weeks of his salary.

On 15 November 2003, the Applicant submitted a claim to the Advisory Board for Compensation Claims (ABCC), requesting reimbursement of medical expenses under Appendix D, for the back injury he

sustained from the Baghdad bombing. On 5 June 2004, the Applicant submitted another claim to the ABCC, requesting compensation under Appendix D for “partial permanent damage” to his back.

On 22 June 2004, the Applicant, having obtained medical clearance, commenced his appointment with the United Nations Operations in Cote d’Ivoire (ONUCI).

By memorandum dated 9 August 2004, the Applicant was advised by the ABCC that he needed to “submit an updated neurosurgical evaluation, and the description of present condition” in order for the United Nations Medical Director to be able to determine whether he had experienced any loss of function from the injuries he sustained from the Baghdad bombing. A new orthopedic report was also needed to determine whether he had sustained any degree of permanent loss of function. On 8 October, the Applicant transmitted an updated neurosurgical evaluation report to the ABCC.

On 9 May 2005, the Secretary-General approved the recommendations of the ABCC made at its 422nd meeting on 4 March, that: (i) the Applicant’s multiple injuries sustained from the Baghdad bombing should be recognized as attributable to the performance of his official duties, and, therefore, all medical expenses that are certified by the Medical Director as being directly related to the injuries and reasonable for the treatments/services provided may be reimbursed; and (ii) the issue whether any additional compensation should be awarded under Appendix D be deferred, “pending the receipt of additional medical documentation from the [Applicant] and further evaluation of the case by the Medical Director”.

On 27 July 2005, the ABCC received two requests from the Applicant for approval of sick leave for the duration of the injuries he sustained from the bombing. On 26 September, the ABCC requested additional information in this regard and reminded the Applicant to send updated medical reports.

Having received the requested information regarding the approval of sick leave, on 16 December 2005, the ABCC advised the Applicant that, as he did not exhausted his sick leave entitlements, and was not charged annual leave in order to remain on full pay status, “no action will be taken regarding this matter [i.e. the request for sick leave credit under Appendix D]”. The ABCC stated further that, as the medical reports submitted by the Applicant were not sufficient “for the purpose of review as to whether or not any additional compensation should be awarded ... no further action will be taken on his claim”.

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

On 14 September 2007, the ABCC considered the Applicant’s claims for compensation under Appendix D. The ABCC concluded that the 19 August 2003 incident “likely aggravated this pre-existing condition and that it contributed to the [Applicant’s] present condition of chronic lower back pain syndrome with sciatic nerve injury” and determined that his permanent loss of function was 13 per cent of the whole person, of which 6.5 per cent could be attributed to the Applicant’s pre-existing condition. On 28 September, the ABCC recommended US\$ 15,239.12 in compensation for “6.5 per cent permanent loss of function of the whole person, under article 11.3 (c) of Appendix D”, which amount was approved by the Secretary-General on 10 October 2007.

On 2 January 2008, the Applicant’s counsel notified the Director, General Legal Division, Office of Legal Affairs (OLA), that he had previously informed the ABCC that its recommendation of

compensation in the amount of 6.5 per cent was vitiated by legal errors and should be revised based on the “cardinal principle of tort law ... that the tortfeasor takes his victim as he finds him” and that the Applicant should be paid the full award based on the 13 per cent permanent loss of function. On 1 February, the ABCC decided to postpone review of the Applicant’s appeal pending receipt of the advice of OLA.

At its 441st meeting on 21 August 2008, the ABCC reconsidered the Applicant’s case in light of all available documentation, including OLA’s advise that “pre-existing medical conditions may be considered by the ABCC in making recommendations for compensation under Appendix D so long as determinations based on pre-existing medical conditions are properly documented” and that “principles of tort liability (including the ‘egg-shell skull’ doctrine) are not applicable to the interpretation and implementation of Appendix D, as these rules are not intended to provide compensation for tort liability”. The ABCC noted that the Applicant’s recent medical examination before returning to work indicated that his spine exam was normal. Accordingly, as no additional medical documentation was submitted by the Applicant, it recommended that the decision of the Secretary-General dated 10 October 2007 be upheld and the Applicant’s request for the convening of a medical board under article 17 of Appendix D denied. On 2 October 2008, the Secretary-General approved the ABCC’s recommendations.

On 29 October 2008, OLA notified the Applicant’s counsel that the MAIP insurers had authorized a payment in the amount of US\$ 32,500.00 in respect of the injuries sustained by the Applicant. This amount was based on the medical assessment by the United Nations Medical Services of 6.5 per cent permanent loss of function of the whole person.

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 the 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.

3. The Applicant's allegations concerning the termination of his appointment in UNOHCI, and the level of his subsequent appointment in ONUCI, 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 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."

II. In this case, on 4 March 2005, the ABCC recommended that the Applicant's injuries be determined to be service-incurred and that the related medical expenses be reimbursed by the Organization, but that the issue of whether any additional compensation should be awarded under Appendix D be deferred, "pending the receipt of additional medical documentation from the [Applicant] and further evaluation of the case by the Medical Director." On 9 May, the Secretary-General approved these recommendations. The ABCC was clearly entitled to require this additional medical documentation, since 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."

The Applicant concedes that the medical documentation was in fact submitted to the ABCC more than three months after submitting his Application to the Tribunal and states that this was because of delays from the doctors treating him. Medical reports dated 13 and 16 July 2007 were submitted to the Tribunal on 15 August.

III. By letter dated 30 October 2008, the Respondent informed the Tribunal that by the Secretary-General's decision of 10 October 2007, pursuant to a recommendation of the ABCC, the Applicant was awarded compensation in the amount of US\$ 15,239.12, which is equivalent to a 6.5 per cent loss of function of the whole person under article 11.3 (c) of Appendix D. In this respect, the ABCC noted that the

Applicant's permanent loss of function can be determined to be 13 per cent of the whole person, of which 50 per cent (i.e., 6.5 per cent of the whole person) can be attributed to a pre-existing condition. The Applicant then requested the ABCC to reconsider its decision, under article 17 of Appendix D, on the basis that "the ABCC had no valid grounds to take account of the previous injury". On 21 August 2008, the ABCC, having taken advice from OLA, recommended that the award in the amount equivalent to a 6.5 per cent of permanent loss of function should not be changed. On 2 October, the Secretary-General approved this decision. The Respondent also informed the Tribunal that, by letter dated 29 October, the Applicant had been informed that the insurers for the MAIP had approved the payment of compensation to the Applicant in the sum of US\$ 32,500.00, based on the medical assessment that the Applicant suffered a 6.5 per cent permanent loss of function.

IV. It is clear that, at the time this Application was submitted to the Tribunal, it was not receivable as the Applicant had not complied with the relevant appeals procedure as set out in article 17 of Appendix D. However, the Applicant has subsequently sought reconsideration of the Appendix D claim by the ABCC, and the Secretary-General has accepted the ABCC's recommendation. It is, accordingly, open to the Applicant to submit a new application to this Tribunal within the time limits prescribed by article 7.4 of the Tribunal's Statute. In regard to the MAIP claim, the Tribunal notes that this has not yet been the subject of administrative review and has not been submitted to the Joint Appeals Board. It will be necessary for the Applicant to follow this procedure, within the prescribed time limits, before submitting an application to the Tribunal, in the absence of any agreement with the Respondent to direct submission of the matter to the Tribunal.

V. 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. The Tribunal has noted above that, subsequent to his Application to this Tribunal, the Applicant had been awarded compensation under the MAIP on the basis of a 6.5 per cent assessment of permanent disability.

VI. 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 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 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.

VII. The third issue is whether the Applicant’s allegations regarding the termination of his employment in UNOHCI and the level of his subsequent appointment in ONUCI are receivable by the Tribunal. The Applicant has submitted these allegations directly to the Tribunal, without first having sought

administrative review or consideration by a joint appeals body as required by article 7.1 of the UNAT Statute. Nor has the Respondent agreed to direct submission to the Tribunal. Accordingly, and for the same reasons as set out in paragraph VI, above, these issues are not receivable by the Tribunal.

VIII. In view of the foregoing, the Tribunal rejects all pleas.

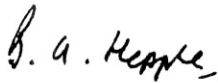
(Signatures)



Spyridon **Flogaitis**
President



Mr. Dayendra Sena **Wijewardane**
Vice-President



Bob **Hepple**
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary