



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No.1494

Case No. 1577

Against: United Nations Joint Staff
Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Sir Bob Hepple, First Vice-President, presiding; Mr. Goh Joon Seng, Second
Vice-President; Ms. Brigitte Stern.

Whereas, on 9 November 2007, a former participant in the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 January 2008, the Applicant after making the necessary corrections, filed an Application containing pleas requesting the Tribunal, inter alia, to:

“II. PLEAS

1. Rescind the decision of the Standing Committee [of the United Nations Joint Staff Pension Board (UNJSPB)] of 14 August 2007;
2. Find and declare that she is entitled to a disability benefit for the period from 16 July 2004 until 20 April 2005, equivalent to 50 per cent of her annual remuneration, that is US\$ 60,298.35;
3. Find and declare that she is entitled to a disability benefit for the period following 20 April 2005 equivalent to two thirds of her annual remuneration, that is US\$ 60,298.35;
4. Award her US\$ 30,000 in compensation for payment of attorney fees.

...”

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 1 September 2008; and once thereafter until 31 October;

Whereas the Respondent filed his Answer on 29 August 2008;

Whereas the Applicant filed Written Observations on 3 October 2008;

Whereas the Respondent submitted additional documentation on 15 October 2009;

Whereas the Applicant submitted additional documentation on 28 October 2009;

Whereas the facts of the case read as follows:

Upon her acceptance of a two-year contract with the World Intellectual Property Organization (WIPO), the Applicant became a participant in the Pension Fund on 1 June 2001. Following a three-year extension of this contract as from 1 June 2003, the Applicant's participation in the Pension Fund ended upon the expiry of her appointment on 31 May 2006.

The Applicant's case was considered by the WIPO Staff Pension Committee on 28 June 2005. On that occasion the Committee had before it, inter alia:

- A medical report dated 23 February 2005 from the Applicant's attending physician, and
- A medical report dated 21 June 2005 from a physician selected by WIPO to provide a second opinion on the Applicant's medical condition.

By a letter dated 19 July 2005, the Secretary of the WIPO Staff Pension Committee informed the Applicant's counsel that the Committee had:

- Noted that the above-mentioned medical reports "conclude that [the Applicant's] inability to work is not total and permanent and both physicians indicate that [she] could resume her employment in ergonomically sound working conditions", and
- Decided not to award a disability benefit.

On 17 October 2005, the Applicant requested a review of the WIPO Staff Pension Committee's decision on her case. By a letter dated 20 January 2006, the Applicant's counsel transmitted a copy of that request to the secretariat of the WIPO Staff Pension Committee and requested the "appointment of a medical board pursuant to paragraph K.7 of the Administrative Rules of [the Pension Fund]".

In accordance with applicable procedures, the medical board was constituted with the following members: the Applicant's physician, selected by the Applicant; the physician who wrote the second report, selected by WIPO; and a third physician, selected jointly by the two others. The medical board submitted its report in September 2006.

By a letter dated 10 October 2006, the Secretary of the WIPO Staff Pension Committee informed the Applicant's counsel that the Committee, after considering the medical board's report, "decided not to change its decision not to award a disability benefit to [the Applicant], since, according to the medical report, she is able to work part-time and disability must be total in order to be recognized by [the Pension] Fund".

On 8 December 2006, in accordance with paragraph K.8 (a) of the Administrative Rules of the Pension Fund, the Applicant filed an appeal with the Standing Committee of the United Nations Joint Staff Pension Board against the review decision of the WIPO Staff Pension Committee.

By a letter dated 14 August 2007, the Pension Fund's Chief Executive Officer informed the Applicant that her appeal had been considered by the Standing Committee, acting on behalf of the Pension Board, at its 190th meeting. After listing the documents submitted to the Standing Committee in relation to the Applicant's appeal, the Chief Executive Officer informed her that the Standing Committee had considered that she was not incapacitated within the meaning of article 33 of the Pension Fund Regulations at the time of her separation from service on 31 May 2006.

By letters dated 9 November 2007 and 31 January 2008, the Applicant, in accordance with paragraph K.8 (b) of the Administrative Rules of the Pension Fund, filed the present appeal with the Tribunal against the decision of the Standing Committee of the UNJSPB.

Whereas the Applicant's principal contentions are:

1. The Application is receivable.
2. The Applicant should have been awarded a disability benefit pursuant to article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

Whereas the Respondent's principal contentions are:

1. The Applicant does not meet the criteria for the award of a disability benefit pursuant to article 33 of the Regulations of the United Nations Joint Staff Pension Fund.
2. The Applicant was accorded due process.

The Tribunal, having deliberated from 19 November to 25 November 2009, now pronounces the following Judgement:

I. The Applicant entered into service with the United Nations in May 1998, in a temporary position as translator with WIPO. On 1 June 2001, she was given a fixed-term contract, still as translator. She left the Organization on 31 May 2006.

II. In order to perform her task, which was to translate documents from German into English, the Applicant consistently used a computer which was at her workstation and spent her entire day seated. Because of her great height and the fact that the equipment with which she worked was ill-suited to her, she developed relatively significant neurological and cervical problems. Between October 2001 and the date of her separation from service with WIPO the Applicant was placed on sick leave several times. She then requested that WIPO pay her a disability benefit.

III. The Secretary of the WIPO Staff Pension Committee informed the Applicant by an internal memorandum dated 28 April 2004 that the United Nations Joint Medical Service had turned down her request. The counsel for the Applicant contested the memorandum and, on 2 September 2004, the Secretary of the Staff Pension Committee indicated that no formal decision had been taken concerning the Applicant's situation and that she could go for a medical exam, in accordance with article 33 of the UNJSPF Regulations, so that a decision could be taken on her request for a disability benefit.

IV. On 10 March 2005, the counsel for the Applicant sent the Secretary of the Staff Pension Committee a medical report prepared by a doctor specializing in rheumatology. The report concluded that: (1) the Applicant's health problems were probably due to the poor ergonomic conditions at the Applicant's workstation in WIPO; (2) should she return to an activity under the same conditions as before — that is to say, in which she was required to make intensive use of a computer at a workstation that was not suited to her physique — the problems would undoubtedly return and get worse; (3) on the other hand, service not requiring use of a computer and that could be performed in sound ergonomic conditions, could be within the Applicant's abilities.

V. The Applicant subsequently agreed to go for another examination to be performed by an orthopaedic surgeon designated by the Staff Pension Committee. In his report, dated 21 June 2005, the latter reached similar conclusions to that of the first doctor, namely: (1) that the causal link between the Applicant's work and her pathology was clear; (2) that it was quite possible that the Applicant might be able to resume the same type of activity but under different conditions, starting on a part-time basis and at a workstation well suited to her situation.

VI. After reviewing the two reports, the Staff Pension Committee informed the Applicant that the request for a disability benefit had been denied inasmuch as she was not totally or permanently incapacitated. On 17 October 2005, the Applicant requested that the decision be reviewed. In a letter dated

20 January 2006, counsel for the Applicant sent a written copy of the request to the Secretary of the WIPO Staff Pension Committee requesting that steps be taken to set up a medical board within the meaning of provision K.7 of the Administrative Rules of the UNJSPF. A board of experts was then set up (consisting of the doctor who drew up the first medical report, the doctor who drew up the second medical report and a third doctor designated by the other two). The medical board submitted its report on 13 September 2006; its findings were as follows: (1) the Applicant's pathology is due to her former working conditions; (2) she would be unwise to return to such intensive type of computer work; (3) part-time work avoiding computer activities — and carried out in ergonomically sound working conditions — would be within her capabilities. In light of those findings, the Staff Pension Committee decided not to change its initial decision not to award the Applicant a disability benefit.

VII. The Applicant appealed that decision to the Standing Committee of UNJSPB. This appeal was rejected by a letter dated 14 August 2007. Lastly, when her contract ended on 31 May 2006, the Applicant turned to the Secretary of the Pension Board to ask for emergency assistance. The request was rejected on the grounds that, contrary to what the WIPO Administration maintained, the Pension Fund had not been informed that the Applicant had separated from service. On 16 January 2007, the Applicant made a further request for emergency assistance but received no reply.

VIII. Before this Tribunal, the Applicant is appealing the decision of the Standing Committee not to award her a disability benefit. The Applicant requests the Tribunal to:

- Rescind the decision of the Standing Committee of 14 August 2007;
- Find and declare that she is entitled to a disability benefit for the period from 16 July 2004 until 20 April 2005, equivalent to 50 per cent of her annual remuneration;
- Find and declare that she is entitled to a disability benefit for the period following 20 April 2005 equivalent to two thirds of her annual remuneration;
- Award her US\$ 30,000 in compensation for payment of attorney fees.

IX. In support of her requests, the Applicant starts by recalling that the Application is admissible pursuant to the Statute and Rules of the Tribunal. She then points out that the Standing Committee's findings are incorrect insofar as the various medical reports, including that of the board of experts, all concluded that the Applicant was disabled. Contrary to what the Administration maintains, the Applicant believes that article 33 of the UNJSPF Regulations, which states the conditions under which a disability benefit may be granted, does not require that the disability be total and permanent. The Applicant points out that *de facto* it would have been impossible for her to resume work on a part-time basis in a manner consistent with her abilities, that is to say under sound ergonomic conditions and especially without using a computer.

X. For his part, the Respondent states that the various doctors who examined the Applicant did not find that she was disabled. On the contrary, they felt that the Applicant could perform her duties under appropriate conditions. Hence, the Standing Committee had been quite right in concluding that she was not disabled within the meaning of article 33 of the UNJSPF Regulations and in upholding the decision not to award her a disability benefit.

XI. Before looking further into the arguments of the parties, the Tribunal must recall the well established principle that:

“having no medical competence, [it] 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”. (See, *inter alia*, Judgement No. 1233 (2005), para. III; Judgement No. 1197, *Meron* (2004), para. VIII; Judgement No. 587, *Davidson* (1993), para. XII).

Accordingly, the Tribunal is competent, at most, to rule on the propriety of the process of the experts’ examinations and to consider whether the experts’ findings are flawed due to a factual error or contradiction, or whether they ignore an essential fact or draw, from the file, conclusions that are clearly wrong. (See, *inter alia*, in this regard, the jurisprudence of the Administrative Tribunal of the International Labour Organization, which is similar, for example Judgement No. 2580, *Angious* No. 4 (2007), para. 6).

XII. Before proceeding to this limited review, the Tribunal recalls that article 33 (a) of the UNJSPF Regulations states:

“A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration.”

XIII. In this case the Tribunal notes that none of the medical evaluations of the Applicant has any obvious impropriety and the Applicant is not disputing this. Furthermore, contrary to what the Applicant claims, none of the medical reports found the Applicant to be totally or even partially disabled. In three successive reports the physicians all noted that, should the Applicant return to work under conditions similar to those that had caused the onset of the symptoms she now suffers from, this would very likely make her condition worse. On the other hand, they noted that, provided her working conditions were properly adjusted, she could continue to work.

XIV. Thus, the Applicant is incorrect when she claims that the expert reports show that the doctors concluded that she was disabled. It is of little consequence whether the disability is total or partial, since the issue of disability was not mentioned.

XV. Under the circumstances, the Tribunal considers that the Standing Committee made the right decision when it refused to grant a disability benefit to the Applicant, for she was neither disabled nor unable to carry out duties that were suited to her abilities and clearly to her skills.

XVI. However, the Tribunal understands the Applicant's reasoning, for she maintains that due to the working conditions necessary to her duties, she found herself *de facto* disabled. Indeed, she explains that her profession as a translator requires her to use a computer intensively, and no task appropriate to her skills could be assigned to her, not even part-time work under ergonomically sound working conditions. The Tribunal is of the view that unless such considerations are taken into account the usefulness of the provisions providing for the granting of a disability benefit would undoubtedly be wiped out since the UNJSPF Regulations state that the positions envisaged must be "reasonably compatible" with the staff member's abilities.

XVII. Nevertheless, in this case, the Tribunal believes that such positions did exist within WIPO. A translator's work does not consist solely of written intellectual work. Translators are also needed to participate in other translations within the Organization. Such activity could well be considered on its own or in conjunction with the written activity which the Applicant used to do, since it is clear from the expert's report that it is "*intensive* computer work" that could cause a return and worsening of the Applicant's symptoms.

XVIII. The Tribunal will, however, not end its review of the Applicant's situation here. The Applicant draws attention to the fact that she should be regarded as disabled, "*unless WIPO can prove that there is a post available at WIPO or a member organization that is reasonably compatible with the above-described limitations (in particular, no computer activities), taking into account her training as a translator*" (emphasis added). In this connection, the Tribunal must state that the Applicant had an obligation to actively seek posts that were more suited to her state of health. However, the Administration, for its part, could not simply deny her a disability benefit while doing nothing to adapt her working conditions or the type of work she was given. The Tribunal has already seen that, even when dealing with a staff member who is not doing his or her best to find a position compatible with his or her abilities in the framework of the Organization — and it is not suggesting that that is true of the Applicant — the Administration still has an obligation to respect the dignity of its staff members and to treat them with consideration. (Judgement No. 1420 (2008), para. XVII).

XIX. Added to this is the fact that it would seem that, on several occasions, the Administration was less than considerate towards the Applicant. The symptoms she now has are due to her unsound working conditions. Although the Applicant drew the Administration's attention as early as August 2001, to the daily difficulties she was having, the latter did not exercise due diligence. It was not until February 2004, after the doctor at work made a recommendation, that the Applicant's office furniture was replaced with more appropriate equipment. Given the fundamental importance that is now attached to preventing injuries caused by repetitive strain and the need to improve the ergonomic conditions at work, it is most unfortunate that the United Nations does not take these causes of suffering at work more seriously. Although the Applicant goes into detail on these aspects of her situation she does not come to any specific conclusion. As for the Respondent, he makes no comment. However, the Tribunal believes that this should be taken into account in evaluating the Administration's behaviour, particularly since lack of due diligence in the handling of the Applicant's situation is still being seen, though in another form.

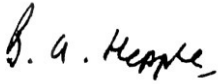
XX. The Tribunal is surprised at the way in which the Secretary of the WIPO Staff Pension Committee handled the first request for a disability benefit. She started by saying that the request had been rejected, then, when counsel for the Applicant asked for an explanation, she said that her first letter, dated 28 April 2004, was just a notification that the Applicant's health condition did not justify the allocation of a disability benefit and, finally, in a letter dated 2 September 2004, that no "formal decision" had yet been taken on the Applicant's situation. All this is quite incomprehensible, as is the way that the request for emergency assistance was handled; the Administration first turned it down for unsatisfactory reasons (the Pension Fund had not been informed that the Applicant had separated from service) and then did not respond. In view of all these circumstances which reveal negligence on the part of the Administration in its handling of the Applicant's situation, the Tribunal takes the view that the Administration did not act with due diligence in its handling of staff members. Accordingly, the Applicant is awarded compensation for the damage suffered, which the Tribunal estimates at US\$5,000.

XXI. Lastly, the Tribunal comes to consider the Applicant's request for compensation for payment of attorney fees. The Applicant gives no reason why the Tribunal should grant this request. The Tribunal has consistently held that only in extremely rare and exceptional cases, when the facts of the matter have made proceedings in the Tribunal far more complicated than is normally the case (see Judgement No. 237, *Powell* (1979), para. XXIX; Judgement No. 1041, *Conde Estua* (2001), para. XIII), or when the Applicant has been encouraged by the Administration to file an application (Judgement No. 665, *Gonzalez de German* (1994), para. XI), will it grant such requests. In this case, the Tribunal sees no exceptional circumstance that would require it to award costs. This request is therefore rejected.

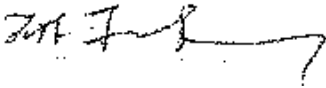
XXII. For the foregoing reasons, the Tribunal:

1. Finds that the Administration failed in its obligation to handle the Applicant's situation with due diligence;
2. Decides to award the Applicant compensation in the amount of US\$5,000 with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
3. Rejects all other pleas.

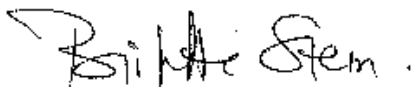
(Signatures)



Bob Hepple
First Vice-President



Goh Joon Seng
Second Vice-President



Brigitte Stern
Member

New York, 25 November 2009



Tamara Shockley
Executive Secretary