



Case No.: UNDT/GVA/2011/006

Judgment No.: UNDT/2011/174

Date: 7 October 2011

English

## Introduction

1. By application registered by the United Nations Dispute Tribunal on 28 January 2011, the Applicant contests the decision of 29 October 2010 whereby the Secretary-General approved the recommendation of 13 October 2010 made to him by the Advisory Board on Compensation Claims to deny the Applicant's request for additional compensation owing to a permanent loss of ear, nose and throat ("ENT") and pulmonary functions.

2. He requests the Tribunal to:

a. Acknowledge that he has sustained ENT impairment representing a 60 per cent permanent loss of function and pulmonary impairment representing a 10 per cent permanent loss of function and order the Respondent to compensate him accordingly;

b. Order the Respondent to pay him the equivalent of two years' salary as compensation for injury sustained as a result of the gross negligence of the Organization in failing to provide the necessary protection and security for its staff.

5. After resuming his duties in Geneva in October 2003, the Applicant received several short-term contracts. On 1 March 2004, he was given a fixed-term appointment as a security officer at the G-3 level. He was promoted to security sergeant (G-4 level) on 1 March 2006. His service was terminated on 28 August 2009 for health reasons, following the exhaustion of his sick leave entitlement and the decision of the United Nations Staff Pension Committee dated 19 November 2008 to award him a disability pension under article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

6. Previously, on 18 November 2003, the Applicant had submitted a claim for compensation under appendix D to the Staff Rules to the officer responsible for compensation claims. From that date onwards, any medical expenses for attack-related injuries were reimbursed in full under article 11.2 of appendix D.

7. At its meeting on 21 August 2008, the Advisory Board on Compensation Claims recommended to the Secretary-General that the Applicant's spine pain syndrome and post-traumatic stress disorder should be recognized as attributable to the performance of official duties. The Secretary-General accepted the recommendation on 2 October 2008.

8. By email dated 5 November 2008, the human resources specialist in charge of the case at the United Nations Office at Geneva ("UNOG") explained to the Applicant the various compensation mechanisms, and, on 14 November 2008, the Applicant was given information about the malicious acts insurance procedure.

9. At its meeting on 14 November 2008, the Advisory Board on Compensation Claims recommended to the Secretary-General that, pursuant to 7.

pension under article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

11. On 6 January 2009, the Secretary-General approved the aforementioned recommendation of the Advisory Board on Compensation Claims (see para. 9).

12. By email dated 5 March 2009, the human resources specialist in charge of the case at UNOG again summarized for the Applicant all the benefits available to him under the current regulations. Besides the disability pension awarded to him by the United Nations Staff Pension Committee, on the one hand, and the compensation mechanisms established by appendix D to the Staff Rules (full reimbursement of medical expenses directly related to his service-incurred injury, request for special leave, and compensation for loss of function), on the other, she also mentioned the malicious acts in service policy and steered the Applicant to the competent person.

13. On 21 August 2009, following its meeting of 7 August 2009, the Advisory Board on Compensation Claims recommended to the Secretary-General that:

- a. Under article 11.3 of appendix D, the Applicant should be awarded compensation in the amount of USD221,483.03, equivalent to a 67 per cent permanent loss of function related to spinal column impairment and post-traumatic stress disorder;
- b. As the permanent loss of function constituted a total disability, the Applicant should be paid annual compensation as provided for in article 11.1 of appendix D;
- c. Pursuant to article 14 of appendix D, the Applicant should undergo an independent medical evaluation to determine whether he had sustained any additional degree of permanent loss of function related to his ENT and pulmonary impairments.

14. On 25 August 2009, the Secretary-General approved the aforementioned recommendations. The Applicant was notified of the Secretary-General's decision on 16 September 2009.



b. Moreover, the wording of article 17 of appendix D to the Staff Rules merely creates a possibility, not an obligation, for a staff member to request a reconsideration by the Secretary-General;

c. Assuming that article 17 of appendix D is mandatory in nature, the Secretary-General's decision of 29 October 2010 could be regarded as resulting from a reconsideration of the degree of disability;

As to the merits

d. The United Nations failed in its duty to protect its staff in Iraq, as is evident from the report of the Independent Panel on the Safety and Security of United Nations Personnel in Iraq and also the report of the Security in Iraq Accountability Panel. There was gross negligence on the part of the Organization, for which it incurs liability. The resulting injuries of the Applicant and their consequences are attributable to the performance of official duties, as was recognized in the Secretary-General's decision of 2 October 2008, and he is entitled to seek compensation from the Organization for the harm sustained;

e. The compensation received pursuant to the decision of 25 August 2009, equivalent to a 67 per cent permanent loss of function of the whole person, does not cover the pulmonary or ENT impairments, as medically evaluated, and the Secretary-General was remiss in declining to take them into account in his decision of 29 October 2010, following the recommendation of the Advisory Board on Compensation Claims;

f. The complexity and slow pace of the compensation process are affecting the health of Applicant and also that of his family;

g. He requests that his ENT impairment be set at 60 per cent loss of function and his pulmonary impairment at 10 percent, in accordance with the scale of military pensions, and that he be compensated accordingly;



d. It will be recalled that, following the decision based on the recommendation of the Advisory Board on Compensation Claims, the Applicant received the amount of USD221,483.03, while the maximum he could claim under article 11.3 of appendix D is USD234,448.

#### Consideration

22. It is clear that the Applicant, by contesting solely the Secretary-General's decision of 29 October 2010, has limited his appeal to the denial of his request for the award of additional compensation for the permanent loss of ENT and pulmonary functions, such compensation being governed by appendix D to the Staff Rules, which provides for the payment of compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.

23. While the Applicant contended in his written application to the Tribunal that, owing to the gross negligence of the Organization in failing to protect its personnel, he is entitled to claim compensation which may be in excess of the amounts provided for in appendix D, he relinquished those claims orally in the hearing. In any event, the Tribunal can only find that this claim is not receivable since there is nothing in the case file to show that a request was submitted to the Secretary-General and denied. That denial—and only that denial—could have been challenged before this Tribunal, after being submitted to management evaluation.

24. The Tribunal must therefore reject as not receivable the Applicant's claim for compensation related to the gross negligence of the Organization.

25. Thus, the Tribunal considers that only the claim contesting the decision of 29 October 2010 is before it.

26. The Respondent maintains that, in so far as this claim is concerned, the application is not receivable as the Applicant failed to exhaust all the internal remedies available to him before filing it.



27. Article 8.1 of the Statute of this Tribunal provides that:

An application shall be receivable if:

- (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;
- (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;
- (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; ...

28. Rule 11.2 of the Staff Rules states with respect to management evaluation:

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request [of the Secretary-General] a management evaluation.

29. Appendix D to the Staff Rules governs the payment of compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Article 17 of appendix D provides that:

(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

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management evaluation requests may ~~take~~ difficulty in assessing the lawfulness of decisions that are more technical than legal.

34. At the same time, as an exception to the above exception, where the determination concerns an injury or illness attributable to the performance of official duties, and the type and degree ~~of~~ resulting disability, and there is an appeal by the staff member, the Secretary-General, in view of the specificity of medical matters, has, in article 17 ~~of~~ the aforementioned appendix D, made provision for the reconsideration by a medical board of the decision he has taken on the recommendation of the Advisory Board on Compensation Claims. This medical board, which is provided for in paragraph (b) of article 17 and is competent only if the appeal is based on medical grounds, consists solely of medical practitioners at least one of whom cannot be a medical officer of the United Nations. It reports to the ~~of~~ aforementioned Advisory Board, and the Secretary-General makes the final determination in the light of the Board's new recommendation and the report of the medical board.

35. The Tribunal considers that only the existence of such a recourse procedure enables the Secretary-General ~~take~~ an informed decision when his first decision is contested on medical grounds, as in this case, thereby safeguarding both the rights of the ~~staff~~ member and those of the Organization.



Conclusion

39. In view of the foregoing, the Tribunal DECIDES:

- a. The claim for compensation submitted by the Applicant in