



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/006

Judgment No.: UNDT/2011/174

Date: 7 October 2011

English

Original: French

**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

BARON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**INTERIM JUDGMENT**

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**Counsel for Applicant:**

Georges Holleaux

**Counsel for Respondent:**

Myriam Foucher, UNOG

## **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.

## **Facts**

3. The Applicant entered the service of the United Nations in Geneva on 10 September 2002 as a security officer at the G-2 level on a short-term appointment. On 1 June 2003, his appointment was converted into a fixed-term appointment of four months' duration and he was assigned to Baghdad, Iraq, to serve with the security staff of the Special Representative of the Secretary-General to Iraq.

4. On 19 August 2003, the United Nations headquarters in Baghdad was the target of a suicide truck-bomb attack which killed 22 people and injured many others, including the Applicant.

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 article 14 of appendix D, the Applicant should be requested to undergo two independent evaluations, one psychiatric and the other orthopaedic, to determine whether he had sustained a permanent loss of function under article 11.3 of appendix D.

10. The Applicant was informed, by letter dated 26 November 2008, of the decision of the United Nations Staff Pension Committee to award him a disability

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 insurance 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.

15. On 2 August 2010, the Applicant was informed of the Secretary-General's decision to award him monthly compensation of USD2,604.42, under article 11.1 of appendix D, in addition to the disability pension paid by the Joint Staff Pension Fund.

16. On 13 October 2010, following its meeting of 20 August 2010, the Advisory Board on Compensation Claims recommended to the Secretary-General that, on the basis of the medical evaluations obtained, the Applicant's request for additional compensation for permanent loss of ENT and pulmonary functions should be denied. The Secretary-General accepted the Advisory Board's recommendation on 29 October 2010, and the Applicant was informed accordingly by letter dated 8 November 2010.

17. On 28 January 2011, the Applicant filed an application with the Tribunal contesting the decision to deny him additional compensation for permanent loss of ENT and pulmonary functions.

18. The Respondent submitted his reply on 2 March 2011. The Applicant filed a rejoinder on 15 March, and the Respondent presented additional observations on 29 March 2011.

19. On 5 October 2011, a hearing was held, which Counsel for the Applicant and Counsel for the Respondent both attended in person.

**Parties' submissions**

20. The Applicant's contentions are:

*As to receivability*

a. Contrary to what the Respondent maintains, the application is receivable because the rule of prior exhaustion of internal remedies is not provided for in any body of rules applicable to the United Nations;

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;

h. There is no upper limit on the amount of compensation that can be claimed since gross negligence on the part of the Organization has been established;

i. The Tribunal is perfectly competent to interpret the medical reports produced and to determine in particular whether the legal conclusions reached on the basis of the medical evaluations are correct.

21. The Respondent's contentions are:

*As to receivability*

a. The application is not receivable because the Applicant has not exhausted all internal remedies before filing his application with the Tribunal. A remedy in the form of prior recourse to the Secretary-General is provided for in article 17 of appendix D to the Staff Rules;

b. The alleged gross negligence on the part of the Organization owing to failure to protect its personnel in Iraq, which would require the Administration to compensate all harm sustained by the Applicant, even in excess of the limits imposed by the rules, cannot be invoked in this case, which is confined to the contested decision, that is, the decision based on the recommendations of the Advisory Board on Compensation Claims. In the absence of management evaluation, the contention is not receivable inasmuch as it is unrelated to the contested decision and should have been raised in a separate procedure;

*As to the merits*

c. The recommendation of the Advisory Board on Compensation Claims of 13 October 2010 and that of 21 August 2009 are based on the opinions of two independent experts appointed by that Board. They considered that the Applicant had not sustained additional functional loss related to his ENT and pulmonary impairments. It is not for the Tribunal to substitute its own judgment for that of administrative bodies whose duty it is to take medical decisions;

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 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 Advisory Board on Compensation Claims on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (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;

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the

medical board to the Secretary-General who shall make the final determination;

30. The contested decision is that of 29 October 2010, by which the Secretary-General approved the recommendation made to him on 13 October 2010 by the Advisory Board on Compensation Claims to deny the Applicant's request for additional compensation related to the permanent loss of ENT and pulmonary functions. The contested decision is thus a decision of the Secretary-General taken on the recommendation of a technical body and therefore, pursuant to the above-cited article 8.1(c) of the Statute of the Tribunal and rule 11.2(b) of the Staff Rules, the Applicant was not required to request a management evaluation.

31. However, the Respondent contends that, pursuant to article 17 of appendix D to the Staff Rules, if the Applicant wished to contest the Secretary-General's decision, he was required, before filing an application with this Tribunal, to avail himself of the internal remedy provided for in that article, authorizing him to request the Secretary-General to reconsider his decision. For his part, the Applicant contends that the wording of the article is clear, "[r]econsideration of the determination ... may be requested", that it merely provides him with an option, and that he therefore had the choice of availing himself of it or of appealing directly to the Tribunal.

32. The Tribunal has accordingly to determine whether or not the request to the Secretary-General for reconsideration, as provided for by article 17(a) of appendix D, is mandatory, and thus to interpret the intent of the drafter.

33. The Tribunal considers from a reading of the above-cited texts that one of the aims of the Secretary-General in enacting them was to minimize the number of applications to the Tribunal by establishing the principle of mandatory prior recourse to management so as to give the Administration an opportunity to correct its own mistakes. An exception to mandatory recourse to management is provided for, however, when the contested decision is based on advice from a technical body, in order to allow for the fact that the service responsible for reviewing

management evaluation requests may have 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 the 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 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 to 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. Thus, the intention of the Secretary-General was to make this request for reconsideration a prerequisite for filing an application with the Tribunal.

36. However, as drafted, article 17(a) of appendix D has the word "may" where the word "must" should have been used. Therefore, even though this text should be interpreted as requiring the staff member to make such a prior request for reconsideration before filing his application with the Tribunal, the ambiguity of the wording is such that the Tribunal cannot in the present case declare the application not receivable.

37. Thus, the application can only be declared receivable and the Tribunal must rule on the merits.

38. However, as the case stands, since there are no medical certificates that establish independently the type and degree of the Applicant's ENT and pulmonary impairments, the Tribunal must, before ruling on the merits of the Applicant's request and pursuant to articles 9.1 of its Statute and 19.1 of its Rules of Procedure, order that a medical evaluation be performed by a medical board under the following conditions:

- a. Each of the parties shall select a medical practitioner to represent him. The two practitioners shall select by mutual agreement a third medical practitioner who shall be the chair of the said board;
- b. The medical board thus selected shall determine whether the Applicant has sustained a permanent loss of ENT and pulmonary functions, evaluate the degree thereof and state whether the impairment is attributable to the attack of which he was a victim. To this end, it shall examine the Applicant and obtain all the medical documents and certificates it requires;
- c. The medical board shall transmit its report to the Tribunal within four months from the date of the notification of this Judgment to the parties;
- d. The Respondent shall be responsible for facilitating the organization of work of the medical board;
- e. The Respondent shall advance funds to defray the cost of providing the medical evaluation, including the fees of the medical practitioners. Upon conclusion of the present proceedings, the Tribunal shall decide which party is to be finally responsible for bearing the cost of the medical evaluation;
- f. Any difficulties encountered in conducting the medical evaluation shall be submitted to the Tribunal by the parties or by the chair of the medical board.

**Conclusion**

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

- a. The claim for compensation submitted by the Applicant in connection with the alleged gross negligence of the Organization is rejected;
- b. Prior to a ruling on the remaining claims of the Applicant, a board of medical experts shall be established which will operate under the conditions described above;
- c. All the other claims of the parties not ruled on in the present Judgment are to be decided at a later date.

*(Signed)*

Judge Jean-François Cousin

Dated this 7<sup>th</sup> day of October 2011

Entered in the Register on this 7<sup>th</sup> day of October 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry