UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/090
Judgment No.: UNDT/2015/066
Date: 24 July 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LACA DIAZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, an Information Management Assistant at the GS-5 level in the Department of Public Information (DPI), on a continuing appointment, contests the Secretary-General's decision dated 19 February 2013 accepting the recommendation of the Advisory Board on Compensation Claims ("ABCC") awarding the Applicant the sum of USD28,748.00 for permanent loss of function as a result of a work place injury he suffered in October 1991. In particular, the Applicant is contesting the computation of the ABCC in determining the amount of compensation for permanent loss of function of the whole person in accordance with Appendix D (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) to the Staff Rules.

2. Essentially, the Respondent contends that in computing an award for compensation based on an injury, the salary scale ("pensionable remuneration") in effect at the date of injury is to be used, whilst the Applicant states that it is the one in "effect at the claim or judgment date, and no later than the [maximum medical improvement] date".

Relevant background

3. The Applicant filed his application on 5 June 2013 and, following a suspension of the proceedings for the purpose of exploring whether this matter could be resolved informally, the Respondent's reply was filed on 31 July 2013.

4. On 20 September 2013, the parties, in response to Order No. 192 (NY/2013), dated 12 August 2013, submitted a joint statement of facts and issues. That same day, the Applicant filed a motion for summary judgment contending that there was no dispute regarding any material facts in the present case. By Order No. 121 (NY/2014), dated 20 May 2014, the Tribunal found the case not susceptible to summary judgment and denied the motion, for reasons to be stated in the final

judgment. The parties thereafter confirmed that the matter could be decided on the papers, the Respondent alone filing closing submissions.

5. For ease of reference, the facts, agreed upon by the parties in the joint statement, are reproduced below, with footnotes italicized and in parenthesis:

> 2. On 2 October 1991, the Applicant was injured while performing duties on behalf of the United Nations. He injured his lower back while moving boxes that weighed between 30-50 pounds. The Applicant has received intensive rehabilitation treatment at the expense of the Organization.
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> 3. In 2007, the Medical Services Division (MSD) considered that the Applicant had reached his maximum medical improvement (MMI). *(Although the Applicant asserts that he has just learned of this determination.)* A permanent impairment is defined as one that has reached MMI and is well stabilized and unlikely to change substantially in the next year with or without medical treatment. This definition is consistent with the American Medical Association (AMA) Guidelines to the Evaluation of Permanent Impairment, sixth edition (Guidelines). The MSD uses the AMA Guidelines in its determination of MMI and permanent loss of function of the whole person. A determination of MMI is required prior to determining whether there is a permanent loss of function, and the assessment of the loss of function.
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> 4. MSD referred the Applicant's case for an independent medical evaluation. The independent medical examiner advised that the Applicant had not reached MMI, and recommended a multi-disciplinary treatment program, and other options in order to avoid further deterioration of his condition.
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> 5. In 2008, the Applicant's physician found him fit to return to work. The Applicant, however, continued to submit medical documents from his treating physicians stating that the symptoms caused by the back injury were on-going, and required continuous and intensive rehabilitation. Between the years 2008 and 2012, the Applicant continued receiving intensive rehabilitation treatments, which the Organization approved and paid for.
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> 6. On 13 July 2012, the Applicant requested compensation for permanent loss of function of the whole person under Appendix D.

7. On 23 July 2012, the Secretary of the ABCC referred the Applicant's claim to the MSD for consideration of permanent loss of function and other matters related to sick leave and disability considerations.

8. On 14 November 2012, the MSD determined that the Applicant reached MMI on 23 July 2012. *(Although the Applicant asserts that he has just learned of this determination.)* The MSD also determined that the Applicant's loss of function was permanent and assessed the loss at percent of the whole person as of 23 July 2012. MSD based its assessment on the AMA Guidelines. *(The AMA Guidelines are considered the industry standard for calculating permanent loss of function.)*

9. On 18 December 2012, the Applicant's claim was presented to the ABCC at its 461st meeting. *(The ABCC considered the Applicant's claim for compensation under Appendix D at its 367th, 431st, 433rd, 439th, and 445th meetings, wherein the ABCC recommended that the Applicant be granted special sick leave credits for lower back injury sustained on 2 October 1991. Special sick leave is not an issue or consideration in assessing permanent loss of function.)* The ABCC recalled that on 3 August 1995, the Secretary-General determined that the Applicant's injury was found to be service-incurred and that the Applicant was granted special sick leave credits by decisions dated 17 May 2008 and 6 July 2009. The ABCC considered the MSD's reports and advice, based on the AMA Guidelines, that the Applicant sustained a permanent loss of function of 20 percent of the whole person due to his injury and recommended that the Applicant be awarded compensation in the amount of USD28,748.00, which it calculated to be equivalent to 20 percent permanent loss of function of the whole person as provided for in Article 11.3 of Appendix D. The ABCC based its calculation of the award using the pensionable remuneration scale in effect on the date of the injury.

10. On 19 February 2013, the Controller, on behalf of the Secretary-General, accepted the ABCC's recommendation. On 7 March 2013, the Secretary of the ABCC informed the Applicant of the Secretary-General's decision to award him compensation in the amount of USD28,748.00, and subsequently paid the award. On 6 June 2013, the Applicant filed an appeal with the Dispute Tribunal.

Agreed Matters

11. The parties are agreed that the basic calculation for compensation under Appendix D, Art. 11.3, involves multiplication of two numbers:

> (a) The percentage of permanent loss of function of the whole person; and
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> (b) "Twice the annual amount of the pensionable remuneration at grade P-4, step V" (see "Schedule" under Appendix D, Art. 11.3(c)).
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> 12. The parties are agreed that the percentage in this case is 20%. The disputed amount for the basic calculation is the pensionable remuneration number.
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> 13. The pensionable remuneration number(s) are found in Appendix A to the Staff Rules.

Issues

6. There is no dispute in this case regarding the Applicant's eligibility for compensation for permanent loss of function, or the degree of his permanent impairment. Indeed USD28,748.00 has already been paid to the Applicant as compensation, and the Respondent has tendered a further sum of USD1,494.80 (see the Respondent's Additional Submission dated 22 June 2015). The issue in the present case concerns the applicable salary scale that the Organization should use in calculating the award for compensation under Appendix D to the Staff Rules for the work place injury suffered by the Applicant in 1991, from which injury he reached maximum medical improvement ("MMI") in July 2012.

7. The Respondent contends that the compensation should be based on the P-4, step V salary scale at the time of the date of injury, i.e. 1991, whilst the Applicant contends that the applicable scale should be that at the date of payment. Alternatively, the Applicant contends that if the date of injury is used, he was in any event paid the wrong amount, and no interest or actuarial value was taken into consideration to compensate for the time value of the money that he has lost. He contends that it would be iniquitous if another staff member suffered the same injury in 2013, but would receive a substantially larger sum despite having suffered no delay in payment. In his reply, the Respondent contends that the Dispute Tribunal's review of compensation is limited and that, absent prejudice, material mistakes of fact or other

extraneous factors, the Tribunal will not overturn a factual determination or substitute its judgement for that of the ABCC (citing UN Administrative Tribunal Judgment Nos. 1133, *West* (2003) and 570, *Roth* (1992); and *Shanks* UNDT/2011/209).

8. The core question is succinctly addressed by the parties as part of the issues in dispute in their 20 September 2013 joint statement:

> 14. The Applicant asserts that no policy has been published stating that the Appendix D, Art. 11.3 should use the injury date.
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> 15. The Respondent asserts that Appendix D is the published policy. Appendix D to the Staff Rules requires the use of the salary scale in effect on the date of injury to calculate the compensation payable under Article 11. This was the intent of the drafters, as confirmed by the legislative history of Appendix D, including the report of the [Consultative Committee on Administrative Questions ("CCAQ")] dated 14 May 1952 and report of the ABCC dated 24 June 1968. The ABCC has consistently applied the policy of using the date of injury for its calculations since the adoption of Appendix D.
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> 16. The Respondent asserts that there is no policy instrument that would permit the Organization to use any other date for calculation of awards, or would permit the payment of interest.
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> 17. The Applicant agrees that Appendix D was published. He asserts that Appendix D requires the use of a different date (the scale in effect at the claim or judgment date, and no later than the MMI date). With respect to authority to pay interest, the Applicant relies upon the cases cited in the Application and the policies cited therein.

9. The Respondent argues that the determination that the amount of the award is based on the date of accident or date of disability has historically been applied consistently and uniformly by the ABCC. The Respondent avers that, at its 151st meeting in 24 June 1968 in reviewing the policy rationale, the ABCC's report stated that "compensation payments based on such a bodily rating are paid for a specified period, proportional to the rating and normally are a percentage … of the usual wage at the time of injury" (Annex R/8 to the Respondent's reply at page 3).

10. The Applicant argues that it is instructive that art. 11.3 of Appendix D to the Staff Rules now has a built-in adjustment mechanism, whilst previously Appendix D

provided a fixed schedule of lump-sum benefits expressed in dollars. The fixed lump-sum in 1963 was adjusted upwards by about fifty percent, and then by 1976, when it was evidently recognized that constant adjustments would be required, the P-4, step V pensionable remuneration scale was introduced without debate. Therefore, any deflating compensatory award would militate against this clear intention, contending also that it is for this reason the United Nations Appeals Tribunal ("UNAT") has set non-pecuniary damages based upon salary scale at the time of judgment rather than at the earlier time of the breach of a staff member's rights.

11. In the closing submissions, the Respondent further contends that there is no legal basis for the Applicant's claim for interest, or for the delay in considering his ABCC claim. The Respondent contends that "the applicant continued to receive his salary, benefits and entitlements during the 21 years since his injury …" (para. 3 of Respondent's closing statement). Further, the Respondent claims that the Organization does not award interest on ABCC claims, and that "since the date of injury, the Applicant has been paid his salary, has been granted sick leave credits, and the Organization has paid for his medical expenses" (para. 8). Also that "the ABCC could only consider the Applicant's request once he reached MMI and filed his claim, which he did 21 years after the date of injury".

Summary judgment

12. The Tribunal will firstly address the reasons for denying the motion for summary judgment. The Applicant contended that he was entitled to summary judgment under art. 9 of the Tribunal's Rules of Procedure, which provides that a party may move for summary judgment when there is no dispute as to the material facts of the case and a party is entitled to judgment as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgment is appropriate.

13. The appropriateness of an application for summary judgment was discussed in *Cooke* UNDT/2011/216, and also in the summary judgment in the case of *Prisacariu* UNDT/2014/045. The contextualization of an application for summary judgment,

whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in multiple jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims, on the merits, and is not a procedure normally used for disposal of matters on receivability or admissibility. In other jurisdictions it may be otherwise. Whatever nomenclature is given to the process is, to my mind, not material, as the Tribunal has dealt with matters summarily by striking out, or dismissal, on the grounds of vexatiousness, frivolity, abuse of process, manifest inadmissibility, failure to disclose a cause of action, and so on. In the instant case, the Tribunal found that, whilst the facts appeared to be common cause, the issues of law are complex and diametrically opposed. The legal issues are not straightforward nor clearly in favour of the moving party, the Applicant. This is illustrated by the fact that the Respondent requested leave to file further submissions following the Applicant's motion for summary judgment. In this regard, the legal positions of both parties were not substantially supported by appropriate legal authorities. Moreover, the legal issues appear to be new ground not previously traversed, and required a considered and reasoned analysis.

14. The Tribunal also found it necessary to seek clarification from the parties as to the exact details of the documents they relied upon to support their submissions regarding the correct quantum to be awarded to the Applicant, as there appeared to be some discrepancies. The parties were ordered to attend a case management discussion ("CMD") on 18 June 2015 particularly for this purpose. At the CMD, Counsel for the Applicant clarified that the Applicant's submission is that the relevant pensionable remuneration scale is that set out in ST/IC/2011/22 (Pensionable remuneration for staff in the Professional and higher categories and for staff in the Field Service category), effective 1 August 2011. Following the CMD, in a submission filed on 22 June 2015, the Respondent retracted a submission made in his reply to the application, which stated that the applicable pensionable remuneration scales were set

out in ST/IC/1990/45, effective 1 July 1990. The Respondent submitted that the applicable pensionable remuneration scale is set out in ST/IC/1990/76 (Pensionable remuneration for staff in the professional and higher categories and for staff in the field service category), effective 1 November 1990. Given the need to resolve the matters discussed above, the Tribunal denied the motion for summary judgement.

Applicable and relevant law

15. It is the professional and ethical duty of Counsel to assist the Tribunal by filing precise pleadings and annexes. As some of the annexes or documents filed by the parties were incomplete (in particular the Respondent had not explicitly identified the applicable instruments relied upon in the submissions, nor identified the name of, or the subject matter covered by, the instruments annexed to the reply), the Tribunal directed the parties to attend the CMD on 18 June 2015 with full and complete copies of all documents referred to or relied upon in their submissions—see para. 5 of Order No. 110 (NY/2015), dated 9 June 2014. At the CMD, a composite bundle of approximately 1,000 pages, including legal authorities, was submitted by Applicant's Counsel. Counsel for the Respondent was still awaiting confirmation from the United Nations Chief Executives Board in Geneva as to whether the documents submitted as annexes to the reply were complete copies, and confirmed subsequently via email dated 19 June 2015 that "the copies of the CCAQ documents attached as annexes R/5 and R/6 to the Respondent's Reply are complete copies …". The Respondent having confirmed that the documentation filed was complete, the Tribunal proceeded to render its decision, the parties having agreed that the matter can be disposed of on the papers before it.

16. The Tribunal will now deal with the consideration of the legal arguments. ST/SGB/Staff Rules/Appendix D/Rev.1/Amend.1 (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) of 8 January 1976 states as follows (emphasis added):

Section II. Principles of award and general provisions

Article 2. Principles of award

The following principles and definitions shall govern the operation of these rules:

…

(e) "Pensionable remuneration" shall have the meaning assigned thereto under article 1.3 of the Regulations of the United Nations Joint Staff Pension Fund.

…

Section III. Compensation payments

…

Article 11. Injury or illness

…

Article 11.3

(a) In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member of function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule set out in paragraph *(c)* below, and in accordance with the principles of assessment set out in paragraph *(d)* below, and applying, where necessary, proportionate and corresponding amounts in those cases of permanent disfigurement or loss of member or function not specifically referred to in the schedule;

(b) The payment of lump-sum compensation under paragraph *(a) shall be made in addition to any other compensation payable under article 11*, whether or not the staff member remains in the employment of the United Nations, and *whether or not the permanent disfigurement or loss of member or function affects the staff member's earning capacity*;

(c) SCHEDULE (PERMANENT DISFIGUREMENT OR PERMANENT LOSS OF MEMBER OR FUNCTION)

Loss or total loss of use	Amount
(i) Both arms or both hands, or both legs or both feet, or sight in both eyes…….....	Twice the annual amount of the pensionable remuneration at

			grade P-4, step V
(ii)	Arm	(at shoulder)	60% of (i)
		(at or below elbow)	57% of (i)

…

The total compensation may not in any case exceed that under (i) above. In the case of General Service personnel, manual workers and locally recruited mission personnel whose salaries or wages are fixed in accordance with staff rules 103.2, 103.3 or 103.4, appropriate adjustments in the amount of compensation provided for in this schedule may be made by the Secretary-General, taking into account the proportion which the staff member's salary or wage bears to Headquarters rates.

…

Article 11.5

In any case where annual compensation has been awarded under article 11.2, the Secretary-General may, if the staff member agrees, commute all or part of the annual compensation award to a lump-sum payment which is the actuarial equivalent of such award, using conversion tables established by the Secretary-General for this purpose.

Section IV. Administration and procedures

Article 12. Time limit for entering claims

Claims for compensation under these rules shall be submitted within four months of the death of the staff member or the injury or onset of the illness; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a claim made at a later date.

…

Article 17. Appeals in case of injury or illness

(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);
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> (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;
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> …

Consideration

Receivability and scope of the case

17. Pursuant to arts. 12 and 17 of Appendix D to the Staff Rules, a claim for compensation shall be submitted within four months of the injury, and any appeal or reconsideration of the determination by the Secretary-General of the type and degree of disability, may be requested within 30 days of notice of the decision provided that the Secretary-General may, in exceptional circumstances, accept a claim or a request for reconsideration at a later date. The Respondent raised no issue in this case as to the receivability of the Applicant's claim under art. 12 of Appendix D. The parties agree that the date of the Applicant's injury was 2 October 1991 and that the date of the Applicant's claim for compensation was 13 July 2012. The ABCC considered the Applicant's claim and recommended payment of compensation, which was approved by the Controller on behalf of the Secretary-General. The Respondent has admitted liability, but not quantum, the main issue in dispute being the methodology used to calculate the amount of compensation. The Tribunal finds, therefore, that the Secretary-General considered that there were exceptional circumstances in this case that justified consideration of the Applicant's claim at a later date. Indeed, the passage of more than two decades between the date of the injury and the date of the claim for compensation gives rise to the central issue to be decided in this case: on what date should the level of pensionable remuneration referred to at art. 11.3(c) of Appendix D be assessed?

How should the phrase "the pensionable remuneration at grade P-4, step V" in Appendix D of the staff rules be interpreted?

18. The Respondent submitted in his closing statement that "[t]his is not a case where the policy is silent as to which salary scale to use for computation of an award for permanent loss of function under Appendix D." This averment is clearly erroneous. Article 11.3(c) is ambiguous. Pensionable remuneration scales are adjusted regularly and there is no explicit statement or guidance in Appendix D to indicate the relevant or operative date for assessing the pensionable remuneration at grade P-4, step V in any given case.

Legislative history

19. The Respondent submits that the "legislative history of the Organization's social security plan" demonstrates the intent of the drafters of Appendix D to the staff rules, i.e., that compensation is to be awarded based on the pensionable remuneration scale in effect at the date of the injury or accident. Reference is made to three documents—Annexes R/5, R/6 and R/8 to the Respondent's reply—to support this interpretation of art. 11.3(c) of Appendix D to the Staff Rules. Before examining the submissions of the Respondent on this issue, the Tribunal will briefly outline the evolution of Appendix D and, in particular, the provisions dealing with permanent loss of function, also referred to in earlier documents as permanent partial disability.

A. The evolution of Appendix D to the Staff Rules

20. Provisional rules governing compensation to staff members in case of death, injury or other disability attributable to service ("May 1952 provisional rules") were attached to the report of the twelfth session of the CCAQ dated 14 May 1952 ("May 1952 CCAQ report") along with a report of the CCAQ's Working Group on Social Security Provisions ("WGSSP") ("WGSSP report"). The relevant provision on permanent loss of function from the May 1952 provisional rules (art. 10.2) stated (emphasis added):

> When the injury results in permanent disfigurement or impairment, *regardless of whether it affects earning capacity*, the staff member will be compensated by a lump-sum payment which will be determined by the Secretary-General in *accordance with the type and degree of such disfigurement or impairment.*

21. It is clear from this provision that from the earliest days of the Organization's policy on compensation for service-incurred injury, the *purpose* of lump-sum payments was not to compensate the staff member for loss of earnings. A staff member was and is eligible to receive compensation regardless of whether the disfigurement or impairment resulting from an injury or accident affects their earning capacity. Loss of earning capacity and income is a different head of compensation and was and is dealt with under different provisions. The amount of a lump-sum award has also never been connected to the staff member's salary, either at the time of the injury or later. The May 1952 provisional rules left the question of the amount of the award to be determined by the Secretary-General "in accordance with the type and degree" of the impairment. A footnote to art. 10.2 of the May 1952 provisional rules stated: "Schedule governing lump-sum payments to be annexed later".

22. A year later, in May 1953, the Organization issued new provisional rules as Appendix D to the Staff Rules set out in ST/AFS/SGB/94/Add.1 ("May 1953 provisional rules"). The May 1953 provisional rules set out a schedule of fixed lump-sum dollar amounts which were to be awarded depending on the permanent loss of function suffered (arm, hand, leg, foot, sight, hearing, etc.). The relevant provision from the May 1953 provisional rules was art. 11.2, which stated:

> If the injury or illness results in permanent disfigurement, or permanent loss of function, irrespective of whether it affects earning capacity, a lump-sum the amount of which shall be determined by the Secretary-General based on the schedule immediately hereunder.

23. A decade later, the Organization revised the fixed lump-sum dollar amounts upwards when Appendix D of the Staff Rules was amended by ST/SGB/Staff Rules/Appendix D dated 1 February 1963 ("1963 provisional rules"). The provision on lump-sum payments for permanent loss of function was the same as that in effect

today (see para. 16 above) except for art. 11.3(c), which was identical to the schedule set out in art. 11.2 of the May 1953 provisional rules, except with higher fixed lump-sum dollar amounts. For example, the compensation award for loss or total loss of use of an arm at or above the elbow was increased from USD10,500 under the May 1953 provisional rules to USD15,750 under the 1963 provisional rules. Article 11.3 on permanent loss of function remained unchanged when Appendix D to the Staff Rules was next amended by ST/SGB/Staff Rules/Appendix D/Rev.1 dated 1 January 1966 ("1966 rules").

24. According to a Review of Compensation Benefits by the ABCC dated 24 June 1968 ("1968 ABCC report"), at "an earlier meeting" of the ABCC "[i]t was suggested by the Chairman [of the ABCC] that [the existing schedule], which is based on an assessment of the 'whole man' at USD30,000, was no longer adequate in terms of present day level of salaries, costs, etc.". It is clear, therefore, that at this time the ABCC itself was already cognizant of the issue of adjusting lump sum awards to reflect the economic realities of the time at which they were awarded, and instructive that the "present day level of salaries, costs etc." was a consideration . It is likely that this was the reason for revising the awards upwards in 1963. However, five years later, the new awards were already considered inadequate by the Chairman of the ABCC.

25. In 1976, the Organization amended art. 11.3(c) of Appendix D to the Staff Rules through ST/SGB/Staff Rules/Appendix D/Rev.1/Amend.1. The amendment to art. 11.3(c) indexed lump sum payments for permanent loss of function to pensionable remuneration at grade P-4, step V. As pensionable remuneration rates are regularly adjusted, this amendment eliminated the need for continued revision of lump sum dollar amounts. As the Applicant put it in the application, the indexing of awards to pensionable remuneration amounts to a "built-in adjustment mechanism".

B. Documents referred to by the Respondent

26. The Respondent states in the reply that "[t]he CCAQ extensively discussed the policy behind Appendix D". The first document referred to by the Respondent in support of his interpretation of art. 11.3(c) of Appendix D to the Staff Rules is the WGSSP report annexed to the May 1952 CCAQ report (Annex R/5 to the reply). The Respondent notes that the WGSSP report states: "[u]nder the provisional rules, compensation is to be awarded on the net base pay at the time of the accident or disability". However, this quotation has been taken out of context. The Tribunal has already referred to the section of the WGSSP report that covered lump-sum payments for permanent partial disabilities. The quotation cited by the Respondent in support of his position comes from a different section of the WGSSP report, titled "Relationship of other benefits under the staff rules to compensation payments" and a subsection titled "salary and wage increments".

27. The Tribunal recalls that under both the May 1952 provisional rules and the current rules, compensation can be awarded under a number of different heads. The purpose of each head of compensation is different as is the methodology for calculating the amount of compensation to be awarded. It is clear from art. 10.2 of the May 1952 provisional rules that lump sum payments for permanent partial disability are to be determined "in accordance with the type and degree of such disfigurement or impairment" and not in accordance with "the net base pay at the time of the accident or disability". This reference to net base pay appears to relate to compensation awarded under arts. 6 and 10.2 of the May 1952 provisional rules, which compensates staff members for loss of salary and allowances. The evolution of Appendix D—in particular, the fact that fixed lump-sum dollar amounts preceded indexing to pensionable remuneration, which did not occur until 1976—supports this interpretation.

28. The second document referred to by the Respondent is the report of the thirteenth session of the CCAQ in October 1952 (Annex R/6 to the reply). The Respondent submits that page 25 of the report confirmed "the determination that the

amount of the award is to be based on the date of the accident". There is no such statement on page 25 of the October 1952 report. Although the report contained revised provisional rules which "cancelled and superseded" the provisional rules attached to the report of the twelfth session, art. 10.2 on lump sum payments for permanent partial disability remained exactly the same as in the May 1952 provisional rules. The Respondent has not identified any section or passage of the October 1952 report that supports his argument.

29. The third document relied upon by the Respondent is the 1968 ABCC report referred to above. The Respondent submits that the 1968 ABCC report explains the policy rationale for assessing pensionable remuneration at the date of injury through the following statement (emphasis added): "Compensation payments based on such a bodily rating are paid for a specified period, proportional to the rating and normally are a percentage (66-2/3%) of the usual wage *at the time of injury*" (Annex R/8 to the reply at page 3).

30. Again, this quotation has been taken out of context. Earlier in the report, it is suggested that

> a complete re-assessment of the United Nations system would be useful. It is further suggested that the recent proposals of the International Association of Industrial Accident Boards and Commissions (IAIABC), made in connection with a comprehensive study of the problems of permanent partial disability, would be a useful basis for discussion.

The report then sets out a four phase system of compensation as a potential alternative to the Organization's rules on compensation for workplace injury, set out, at that time, in the 1966 rules. The report lists one of the advantages of the proposed alternative scheme as the avoidance of lump sum payments. Instead, the disability as a percentage of the whole body would be assessed and then "adjusted to take into account both the age and occupation of the injured employee". Compensation payments would then be paid for a specific period based, partly, on the "usual wage at the time of injury". The quotation cited by the Respondent does not help the

Tribunal to determine the issues in this case because it relates to an alternative compensation scheme that was never adopted. Lump sum payments remain part of the compensation scheme under art. 11.3(c) of Appendix D and considerations such as the age, occupation, and wage of the injured staff member prior to injury have never been part of the formula for calculating such awards.

C. Conclusion

31. The Respondent's reliance upon the legislative history of Appendix D to support the submitted interpretation of art. 11.3(c) is misguided. When read in context, and taking into account the evolution of Appendix D over time, none of the three documents referred to by the Respondent supports the interpretation that pensionable remuneration is to be assessed at the date of injury.

Past practice

32. The Respondent submits that the ABCC's "consistent practices since the adoption of Appendix D has been to use the pensionable remuneration salary scale in effect on the date of the injury or the date of the accident" without adjustment. In support of this contention, the Respondent included in evidence (Annex R/7 to the reply) an email from the Secretary of the ABCC dated 21 June 2013, which stated as follows:

> The practices and procedures which I describe below have been applied consistently and uniformly, without exception, during my two-year tenure as secretary of the ABCC and during the approximately seventeen-year tenure of my immediate predecessor in my position. They are consistent with the provisions of Appendix D.
>
> …
>
> - The compensation calculation is based on the compensation in effect at the time of the onset of the injury or illness or incident causing the same. It is my understanding that this is consistent with the standard workers' compensation practice in the private sector.
>
> …

33. The Applicant submits that the continuous practice of the Organization does not assist the Respondent, citing for support *Valimaki-Erk* 2012-UNAT-276. In that case, UNAT held that a policy that required individuals to renounce permanent residency status acquired in a country other than that of their nationality prior to recruitment had no legal basis despite the Organization enforcing the policy for 59 years. The policy stemmed from a recommendation contained in a Report of the Fifth Committee of the General Assembly dated 7 December 1953. UNAT noted that the Fifth Committee had required that its decisions from the relevant session were to "be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved *through appropriate amendments to the Staff Rules* (emphasis in original)" and that the policy had not been reflected in any administrative issuance. It therefore had no legal basis.

34. The situation in the current case is somewhat different to that in *Valimaki-Erk* in that there is an administrative issuance in effect, but it is silent as to the precise legal interpretation of "pensionable remuneration at grade P-4 step V" for the purposes of art. 11.3(c) of Appendix D. Neither the Applicant nor the Respondent have referred the Tribunal to documents that explicitly reveal the intention of the drafters of Appendix D. Nor has the Respondent convincingly explained the basis for its own interpretation. However, it is instructive that Appendix D provides for "appropriate adjustments" to the amount of compensation in cases where salaries or wages are fixed (art. 11.3 (c)), the only proviso being that compensation may not in any case exceed twice the annual amount of pensionable remuneration at grade P-4 step V. Also, under art. 11.5, in cases where annual compensation is commuted to a lump sum payment, an *actuarial* equivalent is assessed using conversion tables.

35. In any event, it is clear from the afore-stated email that the ABCC Secretary's personal experience of the consistent practice as at 21 June 2013 spanned a mere period of two years, and that in his experience, this practice has been used without exception. The statement does not differentiate between new and stale cases or exceptions, and begs the question as to what would happen in an exceptional case

which the Secretary-General has accepted for consideration, if the claim was filed more than four months after the injury, as in the Applicant's case. The previous practice of the ABCC therefore, cannot in itself be a constraint to the correct interpretation of art. 11.3(c).

Policy considerations

A. The issue of delay

36. There are obvious policy and practical reasons for requiring claims for injury compensation to be submitted promptly after the injury of a staff member. Expedient submission of a claim allows the Organization to assess, while the events are fresh, the circumstances surrounding an accident to determine whether any resulting injury qualifies as service-incurred. The Organization can also approve support for the staff member through payments for medical treatment and rehabilitation in a timely manner, and potentially avoid any worsening of the injury. It is likely that the drafters of art. 12 of Appendix D to the Staff Rules had such considerations in mind when establishing a time limit of four months after the date of the injury for submitting an injury compensation claim.

37. However, the compensation provided for under art. 11.3 of Appendix D to the Staff Rules differs in its purpose and means of assessment to the other heads of compensation provided for under Appendix D, such that it will not always be possible to submit a claim under this head within four months of the date of the injury. Article 11.3 provides for the payment of a lump-sum compensation award in the case of injuries resulting in *permanent* loss of function, as the parties agree occurred in this case. Article 11.3 requires an assessment as to the permanent loss of function assessed as a percentage of the whole person. The parties are agreed that these determinations—i.e. whether the loss of function is permanent and, if so, what percentage of the whole person is affected—can only be carried out when the staff member has reached MMI. MMI is the point at which an injured worker's medical

condition has stabilized and further improvement is unlikely, even with continued medical treatment or rehabilitation.

38. The assessment of the date of MMI is a medical determination and the length of time taken to reach such a status will depend on the nature of the injury and response to medical treatment and rehabilitation. It is not reasonable to assume that MMI will always be reached within four months of an injury. One obvious reason for requiring a determination of MMI before awarding compensation under art. 11.3(c) is that, through treatment and rehabilitation, a staff member may fully recover from an injury and suffer no permanent impairment or loss of function at all, or, if there is a permanent impairment it may, after treatment and rehabilitation, be substantially reduced so as to reduce the eventual liability of the Organization.

39. The parties agree that the Applicant received intensive rehabilitation treatment at the expense of the Organization. They also agree that it was not until 2007, more than 15 years after the date of the injury, that the Organization's Medical Services Division considered that the Applicant had reached MMI. In the reply, the Respondent stated that the Applicant did not concur with the Medical Services Division's assessment and, after a number of further assessments, and the reporting of continued symptoms from the Applicant, a determination that the Applicant had reached MMI was not reached and agreed until 2012.

40. In his closing statement, the Respondent stated:

> Importantly, at the Applicant's request, there was a delay in determining his MMI. Postponing consideration and determination of MMI enabled the Applicant to receive extensive treatments and surgeries, which the Organization approved and paid for. The Applicant and the Medical Officer assigned to his case met on nine occasions, between 14 September 2007 and 23 July 2012, to discuss MMI. The delay in considering the Applicant's permanent loss of function was due the Applicant contesting that he had reached MMI before July 2012. The ABCC could only consider the Applicant's request once he reached MMI and filed his claim, which he did 21 years after the date of the injury.

The Respondent submits that using the date of injury or date of the accident to assess the amount of compensation, "does not improperly reward applicants who delay in reaching MMI".

41. The assessment of MMI is a medical determination. No evidence has been presented to suggest that the Medical Services Division considered that the Applicant had reached MMI prior to 2007, that the Applicant disputed such an assessment, or that the Applicant purposely delayed his recovery. In the Joint Statement of Facts and Issues dated 20 September 2013, the parties agree that: "[a] determination of MMI is required prior to determining whether there is a permanent loss of function and the assessment of the loss of function". By logical extension, the parties agree that no assessment could be made of the amount, if any, of compensation due to the Applicant under art. 11.3(c) until 2007 at the earliest, 15 years after the date of injury. Thus the issue to be decided in this case would have arisen nevertheless and regardless of whether the Applicant disputed the MMI determination of the Medical Services Division in 2007 because pensionable remuneration scales were revised a number of times between 1991 and 2007. Based on the agreed facts, the facts set out by the Respondent in the reply to the application, and the acknowledgement of liability by the Respondent, the characterization of events in the closing statement is misleading and unfair to the Applicant.

42. The Tribunal also accepts that the Respondent did not delay in considering the Applicant's claim once it was submitted nearly 21 years later, since it could only be assessed by the ABCC once the Applicant had reached MMI. What we have in this case is a no-fault delay.

43. Looking at the application of Appendix D more generally, the Tribunal is not convinced that assessing pensionable remuneration under art. 11.3(c) at the date of the award would result in "improperly reward[ing] applicants who delay in reaching MMI". Firstly, despite the observations of the Tribunal set out in paras. 36-38 of this sub-section, the Secretary-General retains discretion under art. 12 of Appendix D to the Staff Rules as to whether to accept a claim for compensation that is submitted

outside the four month deadline. It is only in "exceptional circumstances" that the Secretary-General may consider such a claim. Secondly, as noted above, the date that MMI is reached is a medical determination. If by referring to staff members who "delay in reaching MMI", the Respondent is suggesting that staff members would have an incentive to "fake" ongoing symptoms from an injury in order to receive higher lump sum payments, the Tribunal can only assume that qualified medical practitioners are competent to assess whether medical symptoms are genuine. In any event, there is no evidence to suggest that such issues were considered when drafting art. 11.3(c).

B. Other compensation received by the Applicant

44. The Respondent submits that it must be taken into account that the Applicant "suffered no loss of income from his service-incurred injury and that the Applicant continued to receive his salary, benefits, and entitlements, including sick leave and special sick leave, during the approximately 21 years between the date of the injury and the date he was awarded remuneration for permanent loss of function of the whole person". This submission is wholly specious and irrelevant to the question to be decided. Article 11.3(b) explicitly states that payment of lump-sum compensation under art. 11.3 "shall be in addition to any other compensation payable under article 11". Articles 11.1 and 11.2 of Appendix D deal with the payment of salary and allowances to compensate a staff member for loss of income, which compensation is explicitly based on salary and allowances "at the date on which he last attended at duty". In contrast, the payment of lump-sum compensation under art. 11.3 shall be made "whether or not the permanent disfigurement or loss of member or function affects the staff member's earning capacity." A similar statement has been included in the relevant provision on permanent loss of function since the May 1952 provisional rules as noted at para. 20 above.

Conclusion

45. The Tribunal finds that the legislative history of Appendix D does not support the Respondent's contention that the applicable salary scale in computing this head of compensation is that at the date of injury, regardless of the passage of time. Nor is the Tribunal satisfied that the previous practice of the ABCC in consistently applying the salary scale as at the date of injury, more so in the absence of evidence of any other cases where there may have been exceptional circumstances, is the appropriate method of assessment in this particular case.

46. In his reply, the Respondent contends that the Dispute Tribunal's review of compensation is limited and that, absent prejudice, material mistakes of fact or other extraneous factors, the Tribunal cannot overturn a factual determination or substitute its judgement for that of the ABCC. The Tribunal of course is not making any factual determination or judgment regarding the findings of the ABCC, there being no dispute regarding the Applicant's eligibility for permanent loss of function or the degree of impairment. The only matter to be decided, a matter of construction, is the applicable salary scale in assessing compensation that may still be due to the Applicant.

47. The literal theory of interpretation holds that, where the language is plain, courts should not invoke external aids to construction. In *Scott* 2012-UNAT-225, UNAT stated at para. 28:

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

48. A plain reading of Appendix D to the Staff Rules is that compensation shall be calculated based on pensionable remuneration at salary scale P-4 step V, without any further clarification. This case cannot be resolved by the literal or plain meaning rule of construction; there is nothing in the text that expressly dictates that pensionable remuneration shall be that prevailing at the date of injury. Indeed, art. 11.3(c) is ambiguous, there is no explicit statement or guidance in Appendix D to indicate the relevant or operative date for assessing the pensionable remuneration at grade P-4, step V in any given case. The Applicant has alluded to the absurdity that is created if the Respondent's construction is allowed, where a different and much higher award of compensation would be due to a claimant with the exact same percentage loss of function, but who may have been injured only recently.

49. Where a provision cannot be read in its ordinary and literal manner, "[m]odifications are only allowed in certain instances, typically to avoid cruel or absurd results or to cure ambiguities" (*Warren* UNDT/2010/015). The Organization may develop reasonable criteria, procedures and guidelines "regulating various aspects of human resource management, provided that they are consistent with properly promulgated issuances, are not manifestly unreasonable, do not require formal promulgation under the Organization's existing rules and, above all, are not unlawful" (*Basanta Rodriguez* UNDT/2014/50). However, this Tribunal has also declared that it is unreasonable for the Organization to effectively add new provisions to the overarching issuance, as "[t]his would amount to a usurpation of the legislative powers of the General Assembly … What is to be considered reasonable will be a matter of fact to be determined in each case based on the wording of the issuance and the spirit of the law" (*Ronved* UNDT/2015/011).

50. There is no doubt that the Applicant's case is one of such exceptional circumstances so as to be considered by the ABCC, and accepted by the Secretary-General, more than two decades later. Presumably, in the ordinary course of events, Appendix D requires that a claim be filed within four months of injury, and one assumes that the ABCC then makes a final determination in the year or two that

follows. Consequently, absent exceptional circumstances, the date of injury, date of MMI, date of claim and date of decision would all occur during the application of the same salary scale. By accepting the Applicant's claim 21 years later under what are exceptional circumstances, considering the applicable time limits, the Organization cannot then apply the requirements of a normal claim. Due to the extreme passage of time and in fairness to justice and to prevent any iniquity, the Applicant's case calls for exceptional treatment.

51. In light of the legislative history, the provisions of Appendix D regarding adjustments to wages and salaries and actuarial lump-sum payments, the fact that "pensionable remuneration" is by definition adjusted from time to time, and the particular facts of this case, the Tribunal finds that the computation of compensation based on the salary scale at the time of injury in the Applicant's case was unreasonable. The only logical and reasonable conclusion is that the compensation should be calculated on the salary scale as at the date of MMI, particularly more so based on the Respondent's admission that no assessment could be made until such time as the Applicant had reached full MMI, at which point his claim would have crystallized and he would have been entitled to payment.

Remedy

52. The parties agree that the Applicant has already been paid the amount of USD28,748.00 as a result of his claim. In a submission dated 22 June 2015, the Respondent acknowledged that the Organization erred in calculating the award to which the Applicant was entitled based on the pensionable remuneration scale in effect at the time of the Applicant's injury. The pensionable remuneration scale in effect on the date of the Applicant's injury was that set out in ST/IC/1990/76, effective 1 November 1990 rather than that set out in ST/IC/1990/45 effective 1 July 1990 as originally claimed by the Respondent. The Respondent stated that the Applicant will "receive payment of the difference between the 1 July 1990 and 1 November 1990, P-4 step 5 salary scales, i.e. USD1,494.80, within 30 days". The

Respondent has therefore acknowledged liability in the total amount of USD30,242.80, which should have been paid by 22 July 2015 at the latest.

53. By Order No. 123 (NY/2015) dated 23 June 2015, the Applicant was granted leave to file comments, if any, on the Respondent's submission dated 22 June 2015 regarding this error. By email to the New York Registry of the Dispute Tribunal dated 23 June 2015, the Applicant informed the Tribunal that he had "no comments" in response to the Respondent's submission.

54. The Respondent asserted that there is no policy instrument that would permit the Organization to use any other date for calculation of awards, or that would permit the payment of interest. In UN Administrative Tribunal Judgment No. 1197, *Meron* (2004), compensation for loss of function had been erroneously calculated as it was premised upon the Cambodia salary scale where the applicant had been on mission rather than on the applicable scale at the applicant's duty station in Geneva. As the applicant had received substantially less compensation than that to which she was entitled, the ABCC issued a revised recommendation awarding the applicant additional compensation for loss of function of USD73,988.42, which amount was paid with four percent interest. It is therefore incorrect to state that the Organization is not permitted to exercise its discretion for the payment of interest, or indeed by logical extension, to use any other date for calculation of award, particularly in exceptional cases.

Judgment

55. In view of the following, the Tribunal DECIDES:

a. The application succeeds.

b. The Respondent was liable to pay the Applicant the amount of pensionable remuneration at P-4, step 5 under the version of Appendix D to the Staff Rules applicable on the date of MMI—23 July 2012.

c. The Respondent is ordered to pay the Applicant the difference between the amount already paid—USD30,242.80—and the amount applicable under Appendix D to the Staff Rules at the date of MMI.

d. The Respondent is ordered to pay to the Applicant interest on the amount identified at para. 55(c) at the United States prime rate from 23 July 2012 until payment of the said amount.

e. The Respondent is ordered to pay to the Applicant interest on the amount of USD1,494.80 from the date of MMI until the date the amount was paid.

f. The amounts in para. 58(d) and (e) above shall be paid with interest at the United States prime rate with effect from the date that this Judgment becomes executable until payment of the said amount. An additional five per cent shall be added to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of July 2015

Entered in the Register on this 24th day of July 2015

(Signed)

Hafida Lahiouel, Registrar, New York