

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 9 August 2022

JUDGEMENT IN CASE No. 104

AA

v.

Secretary-General

JUDGMENT IN CASE No. 104 OF THE ADMINISTRATIVE TRIBUNAL

The Administrative Tribunal consisted of :

Louise OTIS, Chair

Pierre-François RACINE

And Chris DE COOKER

with Nicolas FERRE and Angélique VALLIN providing Registry services.

INTRODUCTION

1. AA (hereinafter the “Applicant”) has filed an Appeal for Rectification, for Revision or for Interpretation of the Judgment issued by the OECD Administrative Tribunal on 8 November 2021 in Case No. 99 (hereinafter the “Judgment”). In this Judgment, the Tribunal dismissed the Applicant’s claim to receive additional compensation for a work-related injury, concluding that there was “*no proof that the Organisation committed a fault or breach justifying the award of compensation in addition to that granted to the Applicant*”.¹ The Tribunal, nonetheless, ruled that the Organisation had not entirely fulfilled its duty of care towards the Applicant and awarded her 15,000 euros as moral damages.
2. In her appeal the Applicant requests an award of 180,000 euros in damages for an act of negligence on the part of the Organisation and an award of 150,000 euros in damages for moral prejudice.

¹ Judgment no. 99, para. 44.

3. Both parties have confirmed that the pre-hearing procedure will comprise only the Application and the Observations of the Organisation. Moreover, subsequent exchanges confirmed the will of both parties that the appeal would proceed without oral hearing. The President of the Tribunal had confirmed that the appeal was taken under advisement without further written procedure and hearing.

THE NATURE OF THE APPLICATION

4. The Appeal for Rectification, Revision or Interpretation obeys the rules set out by the Resolution of the Council on the Statute and Operation of the Administrative Tribunal² and the Tribunal's Rules of Procedure.
5. Article 12 of the Resolution of the Council on the Statute and Operation of the Administrative Tribunal states that: "*judgments [of the Tribunal] shall not be subject to appeal except for purposes of rectification of error ("erreur matérielle"), revision or interpretation.*"
6. Articles 10, 11a) and 12 of the Tribunal's Rules of Procedure set out the grounds for rectification, revision and interpretation within the meaning of Article 12 of the Resolution of the Council:

Article 10: Appeal for rectification

When a judgment is vitiated owing to a mistake ("erreur matérielle") or an error relating to the submissions in the application, and this error or mistake may have decisively influenced the decision of the case, one of the parties may file an appeal for rectification with the Tribunal, within three months from the date of notification of the judgment."

² Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, Annex III.

Article 11: Appeal for revision

a) One of the parties may request the Tribunal to revise a judgment in the event of the discovery of a fact or evidence of decisive importance which, at the time of the judgment, was unknown to the Tribunal and to the party requesting revision."

Article 12: Appeal for interpretation

Where the operative provisions of a judgment are ambiguous or incomplete or where they are inconsistent either with each other or with the ratio decidendi (reasons in point of law), one of the parties may, within three months from notification of the judgment, request the Tribunal to interpret it.

7. It is clear from the wording of the application that it seeks neither the rectification of a clerical error which had a decisive impact on the Judgment in Case No. 99, nor an interpretation of the judgment.
8. This is therefore an appeal for revision within the meaning of Article 11a) of the Rules of Procedure.
9. Such an appeal can only be admitted because of the discovery of a fact or of proof likely to exert a decisive influence on Judgment No. 99 and which was unknown to the Tribunal and to the party requesting the revision.

THE PARTIES' ARGUMENTS

10. The application is based on 8 grounds set forth below.
11. The first ground calls into question the Tribunal's assessment of the proof of faulty negligence on the part of the Organisation which was reportedly warned on 14 March 2013 by BB of an anomaly in an elevator before the Applicant's accident but would not have taken the necessary measures to prohibit the use of this elevator. The Applicant alleges that, despite the requests of her counsel, she could not have access to the "logs" of the Operation Units in which BB's incident report should have been recorded.

12. The purpose of the second ground is to distinguish what falls under the Organization's statutory liability towards its agents in the event of an accident at work from what falls under its liability for negligence.
13. The third ground argues that the Organisation or its insurer should have sued the medical establishments responsible for the complications that followed the accident, but that this did not exonerate the Organisation from its liability which was directly incurred towards her, in view of French law.
14. The fourth ground blames the departments of the Organisation who could not have been unaware that the question of its responsibility. Moreover, the Applicant formulates severe criticisms against her own lawyer, who did not allow her to address the Tribunal.
15. The fifth ground deals with the conflicts of interest concerning Doctor DD, then doctor of the Organisation and CC and the additional testimonies produced on 24 May 2021 by the Organisation. The Applicant deplores that the Organisation did not provide a register of entry badges to its premises on 14 March 2013 which would have made it possible to know whether Dr. DD was absent as he asserts in his testimony or, on the contrary, present that day, as the Applicants asserts. As for CC, of whom Dr. DD was the direct superior, her second testimony changed slightly from the first.
16. The sixth ground of appeal alleges that the Delta building is equipped with cameras located near the elevators. The Organisation should have checked the footage on the day of the accident in order to know who was present in the building.
17. The seventh ground of appeal concerns the attitude of the Legal Directorate with regard to conflicts of interest between the Organisation and its agents prioritizing the sole interests of the Organisation.
18. The eighth ground summarizes the difficulties of all kinds for the Applicant resulting from the accident: loneliness, heavy handicaps and huge financial constraints making it

difficult to stay in Paris while supporting her mother who lives alone in the United States.

19. Finally, the Applicant requests that she be awarded 180,000 euros for material damage and 150,000 euros for non-pecuniary damage.

20. In the Secretary General's view, the Applicant sets out six discernible pleas against the Judgment.

21. First, the Applicant criticizes the Tribunal for having considered that there was sufficient evidence to establish that, on 14 March 2013, the day of her accident, a security officer had examined the elevators and had not identified any anomaly (Appeal, pp. 2-4). This argument is not new. The Applicant had already raised it in her Rejoinder in which she claimed that there was no evidence that the elevators had been checked on 14 March 2013 (Tribunal's paginated record for Case No. 99, p. 0050).

22. In raising this argument, the Applicant puts into question the Tribunal's exercise of judgment in assessing the evidence. This does not constitute a valid ground for rectification or revision.

23. Second, referring to a judgment of the French *Cour de cassation* of 23 May 2012, the Applicant claims that the Organisation should have placed an "out of order" sign on the doors of the elevators and was therefore at fault (Appeal, p. 4). In other words, the Applicant contests the Tribunal's finding that "[i]n these circumstances, the Tribunal considers that there is no proof that the Organisation committed a fault or breach justifying the award of compensation in addition to that granted to the Applicant." (The Judgment, para. 44).

24. The fact that the Applicant disagrees with the Tribunal's conclusion is not a valid ground for rectification or revision.

25. Third, the Applicant argues that an employer may not refuse compensation in cases of nosocomial infections. As already mentioned, when assessing the Organisation's alleged liability, the Tribunal was to examine whether the Organisation had committed "*a fault or breach justifying the award of additional compensation*", in light of the fact that the Applicant already received compensation in accordance with the Organisation's applicable provisions (The Judgment, para. 44, emphasis added). The Tribunal concluded, based on the evidence, that the Organisation had not committed such breach or fault. Therefore, the Applicant does not demonstrate any material error on the Tribunal's part or present any new fact or evidence on which she was unable to rely in the original proceedings.
26. Fourth, the Applicant regrets her decision to retain the services of her counsel, who she considers did not have the required knowledge to represent her adequately before the OECD Administrative Tribunal. This fact, which concerns the Applicant's own choices and is unrelated to the legal matters at stake, also does not constitute a valid ground for rectification or revision under any of the relevant jurisprudence.
27. Fifth, the Applicant questions the reliability of the witness statements of Dr. DD and CC that were provided by the Organisation during the proceedings in Case No. 99.
28. In this regard, the Organisation first notes, as the Tribunal also noted in its Judgment, that the Applicant was offered the opportunity to cross-examine these witnesses during the original proceedings, but that she chose not to do so. In her present challenge, the Applicant merely questions the integrity and probity of her former colleagues in an unsubstantiated manner, seeking on this basis a reversal of the Tribunal's earlier assessment of the evidence before it. Once again, her disagreement with the Tribunal's original assessment does not constitute an admissible ground for revision or rectification of the Judgment.

29. Last, the Applicant requests that the Tribunal change its assessment of the damages to be awarded to her. While the Tribunal awarded the Applicant 15,000 euros as moral damages, the Applicant now requests 150,000 euros as moral damages and another 180,000 euros for material damages. Once again, this request fails to align with the strictly limited areas of possible review permitted under the Tribunal's Resolution and Rules of Procedure, in that it asks the Tribunal to change its assessment of the Applicant's original plea for damages, without any demonstration of error "*in the material accuracy of facts which do not require any appreciation*". As such, the Applicant's request does not constitute an admissible ground for revision or rectification of the judgment.

30. Finally, the Secretary General requests the Tribunal to dismiss the Applicant's claims.

THE TRIBUNAL'S ANALYSIS

31. Firstly, it must be underlined that the Applicant had received proper compensation for the work-related injury she incurred in 2013. However, she did not receive an additional compensation which is allowed when an organisation has not taken reasonable measures to avoid harm, the risk of which was foreseeable.

32. As set out by the Tribunal in the judgment subject to the application for review:

33. Il incombe à la personne qui réclame des dommages-intérêts complémentaires de l'Organisation de présenter la preuve prépondérante d'une négligence constitutive de faute. Cette preuve sera administrée par témoignage écrit ou oral ou par preuve documentaire.

34. Le Tribunal examinera en premier lieu si l'Organisation a commis par négligence une faute de nature à justifier une indemnisation complémentaire s'ajoutant à celle qui lui a été attribuée en application des règles statutaires. En d'autres termes, l'Organisation a-t-elle eu connaissance du danger présenté par la différence de niveau entre le palier du 6^{ème} étage du bâtiment Delta et la cabine de l'ascenseur et dans l'affirmative, a-t-elle pris des mesures raisonnables pour éviter un accident ?

...

42. En résumé, il est acquis que le 14 mars 2013 vers 16h, un incident concernant Mme BB a eu lieu à l'entrée d'un ascenseur au 6^{ème} étage du bâtiment Delta et qu'il a été signalé à un agent d'accueil de l'OCDE. Cela étant, les affirmations de l'Organisation selon lesquelles le PC de sécurité de l'immeuble a été informé de cet incident et qu'un agent de ce PC s'est rendu sur les lieux sans constater d'anomalie ne sont pas remises en cause par une preuve prépondérante.

43. Enfin, il n'est pas contesté que sitôt l'accident de la requérante connu, l'Organisation a pris les mesures nécessaires auprès du bailleur pour prévenir tout autre accident.

44. Dans ces circonstances, le Tribunal estime que la preuve n'est pas apportée que l'Organisation a commis une faute de nature à justifier l'octroi d'une indemnisation complémentaire à celle accordée à la requérante.

33. The Tribunal's judgments are final and have *res judicata* authority. They may be reviewed on strictly limited grounds. Therefore, an appeal for revision is a remedy based on exceptional circumstances justified by the discovery of a fact or evidence of decisive importance unknown by the Tribunal or the party at the time of the judgment. In this regard, the ILOAT held in its judgment 4365 that:

*“the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review.”*³

34. To establish whether her appeal for revision is well-founded the Applicant must submit new facts or fresh evidence of decisive importance which was unknown to the Tribunal and to her and her counsel at the time of the judgment.

³ ILOAT, judgement no 4365, 07 July 2020. See also ILOAT judgement no 4327, 24 July 2020, ILOAT judgement no 4436, 7 July 2021, ILOAT judgement no 4474, 27 January 2022.

35. It must be reminded that at the very heart of Case no. 99 lays the sole following question : on 14 March 2013, before 20h30 when the applicant fell from exiting a lift, had any prior notice of malfunction of such lift been given by someone to somebody and, if so, by who to whom and which actions did this elicit from OECD ? The Applicant's first ground is the only one that addresses this question.
36. It must be emphasized that the Applicant and her lawyer were provided in advance of the hearing by the Chair with the right to cross-examine the four witnesses submitted by the OECD and to challenge their written testimonies. The Applicant might also have submitted names of witnesses of her own or requested the OECD to disclose possible relevant evidence such as footage from cameras with which the Delta building might have been covered.
37. But, as mentioned in the Judgment, her lawyer decided not to cross-examine the OECD's witnesses. The Applicant did not request testimonies of her own and reference to possible additional evidence appears only in the present Appeal.⁴
38. Thus, the Applicant provides neither relevant facts nor evidence the discovery of which was not possible before the judgment, whereas the outcome of an appeal for revision depends on such material.
39. Finally, it must be underlined that the additional compensation sought by the Applicant in her appeal for revision includes substantial damages resulting from the alleged poor quality of the care received at the hospital and the infection contracted during the first surgery. These matters are not within the remit of the Tribunal.

⁴Judgement no 99, paragraph 19.

40. The other pleas raised by the Applicant boil down to challenging the Tribunal's assessment of facts and reasoning and provide no ground for revision under the scope of rule 11 a).

THE TRIBUNAL DECIDES

41. The appeal is dismissed without costs.