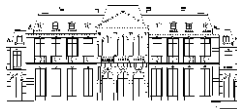


OCDE

ORGANISATION DE COOPÉRATION ET
DE DÉVELOPPEMENT ÉCONOMIQUES



OECD

ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 21 June 1999

JUDGMENT IN CASE No. 35

Mr. F.

v/ Secretary-General

Translation

(The French version constitutes the authentic text)

JUDGMENT IN CASE No. 35 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Wednesday 9 June 1999
at 9.30 a.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Professor Luigi CONDORELLI,

with Mr. Colin McINTOSH and Mrs. Christiane GIROUX providing Registry services.

On 28 August 1997, the applicant, a maintenance worker and heating specialist at the OECD since 1979, sent a letter to the Secretary-General informing him that he had been exposed to asbestos in the course of his duties since 20 August 1979 and requesting compensation for the physical and moral prejudice he claimed the Organisation had caused him.

By letter of 12 November 1997, the Executive Director refused this request. On 12 January 1998, the applicant sent a letter to the Secretary-General, appealing against this decision. On 21 April 1998, the Secretary-General notified the applicant that he confirmed the Executive Director's decision of 12 November 1997.

On 21 July 1998, Mr. F. filed an application (No. 35) requesting the Tribunal to annul the Secretary-General's decision of 21 April 1998, with all the legal consequences resulting therefrom, and to order reimbursement by the defendant to the applicant of costs of an amount to be determined at the end of the procedure.

On 30 November 1998, the Secretary-General submitted his comments rejecting all the applicant's submissions.

On 28 January 1999, the Staff Association filed an intervention document in support of the applicant's submissions.

On 2 February 1999, the applicant submitted a reply.

On 6 April 1999, the Secretary-General submitted his comments in rejoinder in which he maintained his submissions rejecting Mr. F.'s application.

On 10 May 1999, Mr. A. F., an official of the Organisation, submitted an intervention document (received by the Registry on 28 May 1999) under Article 5 a) of the Resolution of the Council of the Organisation on the Statute and Operation of the Administrative Tribunal, claiming that the Organisation had failed in its duty of care towards him, causing him certain injury. He asked the Tribunal to award him compensation for physical and moral prejudice of an amount not less than seven years' salary.

On 4 June 1999, Mr. L., a former official of the Organisation, submitted an intervention document (received by the Registry on 7 June 1999) under Article 5 a) of the Resolution of the Council of the Organisation on the Statute and Operation of the Administrative Tribunal, claiming that the Organisation had failed in its duty of care towards him, causing him certain injury. He asked the

Tribunal to award him compensation for physical and moral prejudice of an amount not less than seven years' salary.

The Tribunal heard:

Maître Jean-Didier Sicault, Lecturer in International Civil Service Law at the Paris I and Paris II Universities, Barrister at the Court of Appeal of Paris, Counsel for the applicant and the intervening parties;

Mr. David Small, Head of the Legal Directorate of the Organisation, on behalf of the Secretary-General;

Mrs. Marie-Christine Delcamp, on behalf of the Staff Association;

and Messrs. G., P., L.D. and F., witnesses called by the applicant.

It handed down the following decision:

The facts

After having worked from 1961 to 1979 for various heating installation companies, notably from 1961 to 1968 for the firm which installed the heating in the OECD's New Building, rue de Franqueville, and the boiler room in rue André-Pascal, Mr. F. was recruited by the OECD on 20 August 1979 as a heating fitter, a function he has exercised constantly since.

On 28 August 1997, he asked for his case to be submitted to the Medical and Invalidation Boards with a view to having recognised:

- i) the occupational nature of the disease from which he was suffering due to his exposure to asbestos,
- ii) the permanent invalidity from which he claimed to be suffering.

At the same time, he asked the Secretary-General to award him, as compensation for the physical and moral prejudice he claimed resulted from the breach, by the Organisation, of its duty of care towards him, a sum corresponding to 7 years' salary, calculated on the basis of his last gross salary.

In a letter of 12 November 1997, the Executive Director refused this request on the grounds that the OECD's special compensation regime for occupational diseases excluded any additional compensation for prejudice resulting from exposure to asbestos at work, and that the alleged prejudice had not been proved. On 12 January 1998, Mr. F. asked the Secretary-General to review this decision.

On 9 February 1998, the Medical and Invalidation Boards issued the following opinion:

- i) "Mr. F. is not suffering from permanent invalidity which totally prevents him from performing the duties attached to his employment in the Organisation, provided he is not exposed to asbestos in the course of the duties defined in the document of 2 February 1995 in which case he would be so prevented,"
- ii) Mr. F. is suffering from partial permanent incapacity of 4 per cent resulting from an occupational disease.

On 21 April 1998, the Secretary-General informed Mr. F. that he refused his request for compensation, stating that he considered the Organization had not breached any duty of care towards him, that he would shortly be informed of the decision taken after the opinion of the Medical and Invalidity Boards and that the very existence of a flat-rate compensation regime excluded any additional compensation of prejudice resulting from exposure to asbestos and that, lastly, the alleged prejudice had not been proved.

On 19 May 1998, the acting Head of Human Resource Management informed Mr. F. that having regard to the opinions of the Boards, the Secretary-General considered that he was entitled to the sum of FF 43 876,80, namely five years' emoluments under the scale in force at the date of the opinion of the Boards.

On 21 July 1998, Mr. F. submitted an application to the Tribunal in which he continued to ask for the Organisation to be ordered to pay him, in addition to the above-mentioned sum, compensation of an amount equal to 7 years of his last gross salary.

RULES APPLICABLE TO THE PRESENT DISPUTE

The Tribunal noted that with regard to work accidents and occupational diseases, the provisions of the Staff Regulations and their implementing Instructions refer on many occasions, in order to fill any gaps, to the French law on social security, and even to French case law on this topic. It notes, further, that until recently, the regime applicable at the OECD was purely and simply that in force in France.

In these circumstances, the Tribunal considers that it is possible to transpose to the present dispute the principles underlying Article L 451.1 of the French Social Security Code which provides that "subject to the provisions of Articles L 452.1 to L 452.5, L 454.1, L 455.1, L 455.1.1 and L 455.2, no action for compensation for accidents and diseases mentioned in the present chapter (i.e. work accidents and occupational diseases) can be brought under the ordinary law by the victim or his heirs."

In other words, since the occupational disease nature of the affliction from which Mr. F. is suffering has been recognised, he cannot claim compensation on the basis of negligence on the part of the Organisation unless such negligence was inexcusable (Art. L 452.1 to L 452.4) or intentional (Art. L 452.5), none of the other exceptions referred to in Article L 451.1 being relevant.

Since intentional negligence requires the existence of a desire to cause bodily injury, it cannot seriously be argued that the Organisation's approach to the protection of its staff from asbestos amounted to negligence of this type, and Mr. F.'s counsel did not so contend. It remains, therefore, to consider whether the Organisation's behaviour may be treated as inexcusable negligence.

Application to the case of the OECD

Without examining here all the problems posed by the presence of asbestos in the materials used to construct certain OECD buildings, the Tribunal feels it is necessary, in order to solve this dispute, to note the measures taken by the Organisation as regards the conditions of work of an official who, like Mr. F., is called upon to intervene in his capacity as a heating specialist. In this context, the only elements which seem to it relevant are as follows:

Checks carried out in June 1981 by the *Association parisienne de propriétaires d'appareils à vapeur et électriques (APPAVE)* led to the conclusion that the concentrations of asbestos in the air were significantly lower than the maximum concentrations allowed, but that the asbestos-based

cladding on the walls and ceilings of the boiler room had in some places deteriorated significantly, making it desirable to cover this cladding. This was done in 1982, and the Sub-Committee on Health and Safety was informed of the fact at its 19 April 1982 meeting. In the years that followed, the air measurements carried out always showed levels of asbestos lower than the norms in force. In 1994, following incidents which showed that cabling work could lead to the dissemination of asbestos particles, the Organisation decided to allow staff to absent themselves during this work, to carry out new tests, to remove the cladding in certain premises, including the boiler room, and lastly to take preventive measures for staff who might be called upon to work or find themselves in premises or ducts coated with material containing asbestos fibres.

The Tribunal is well aware of the Organisation's obligations towards its staff in matters of health and safety at work. The consequences of the existence of asbestos in the premises of the Organisation have therefore to be handled with a degree of attention which will need to be increased as knowledge about these consequences and how to deal with them advances. It considers, nevertheless, that having regard to current knowledge and the regulations in force, both in the host country and in other Member countries of the OECD, the Organisation's behaviour with regard to Mr. F., while giving rise to a recognition of the occupational nature of the disease from which he is suffering, does not constitute inexcusable negligence and that the application must be dismissed.

On the interventions by Mr. A. F. and Mr. L.

The submissions of these interventions, requesting compensation, do not comply with Rule 4 of the Rules of Procedure of the Tribunal which provides that "submissions contained in the intervention document shall not have any other purpose than to support the submissions of either the applicant or the defendant". They are therefore inadmissible, but this in no way prejudices any rights that Mr. A. F. and Mr. L. may invoke by way of individual applications.

On the intervention of the Staff Association

The Tribunal notes the Staff Association's intervention which emphasises the obligations resulting from various international instruments on the safety of workers exposed to asbestos.

On the reimbursement of costs

The Tribunal considers that in the circumstances of the case, Mr. F. is entitled to reimbursement of his costs up to an amount of FF 10 000.

For these reasons,

The Tribunal decides:

- 1) Mr. F.'s application is dismissed;
- 2) The interventions of Mr. A. F. and Mr. L. are dismissed;
- 3) The Organisation shall pay the sum of FF 10 000 to Mr. F. towards reimbursement of his costs.