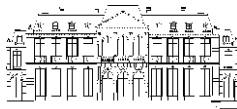


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CO-OPERATION AND DEVELOPMENT

**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 21 June 1999

**JUDGMENT IN CASE No. 38**

Mr. F.

v/ Secretary-General

**Translation**

(The French version constitutes the authentic text)

JUDGMENT IN CASE No. 38 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, Mr. F., a maintenance worker and heating specialist at the OECD since 1979, asked to be recognised as suffering from total permanent invalidity. On 9 February 1998, the Medical and Invalidation Boards met.

On 19 May 1998, the acting Head of Human Resource Management informed the applicant that the Secretary-General had decided to award him an amount corresponding to 4 per cent of the capital sum to which he would have been entitled in the event of total permanent invalidity. On 9 June 1998, the applicant asked the Secretary-General to annul this decision so as to be recognised as suffering from total permanent invalidity, a request which was refused by the Secretary-General on 1 July 1998.

On 28 September 1998, Mr. F. filed an application (No. 38) requesting the Tribunal to annul the Secretary-General's decision of 1 July 1998, with all the legal consequences resulting therefrom, in particular the condemnation of the Organisation for the physical and moral prejudice caused to the applicant, 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 disputing the admissibility of the application and 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 31 May 1999, the Secretary-General informed the Tribunal that, having definitively decided to refuse Mr. F.'s request to be recognised as an invalid, he no longer disputed the admissibility of the application.

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;

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

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

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.

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.

Following this opinion, the acting Head of Human Resource Management wrote to Mr. F. on 19 May 1998 to inform him that:

-- he had not been recognised as suffering from total permanent invalidity under Article 13 of the Pension Scheme Rules, unless he was exposed to asbestos in the context of his duties as defined in the document of 2 February 1995,

--because of his partial permanent incapacity resulting from an occupational disease, the Secretary-General had decided to award him the sum of FF 43 876.80, i.e. 4 percent of 5 years' emoluments under the scale in force on 9 February 1998,

--in view of certain procedural anomalies and ambiguities in the opinions given, he felt that Mr. F. was entitled to ask the Boards to meet again,

--lastly, he asked Mr. F. to let him know his position before 5 June 1998 so as to enable him, should Mr. F. not consider it necessary to call another meeting of the Boards, to pay him the sum of FF 43 876.80.

On 9 June 1998, Mr. F. informed the Secretary-General in a first letter that having that day found asbestos residues in his work premises, he felt obliged, for as long as his health was endangered

by exposure to asbestos in the course of his duties, to stop performing those duties. In a second letter to the Secretary-General of the same date, Mr. F. said that he was appealing against the decision contained in the letter of 19 May 1998 inasmuch as it refused to consider that he was suffering from total permanent invalidity.

On 1 July 1998, the Executive Director replied to the applicant that the Secretary-General was of the opinion that “having regard to the measures taken by the Administration, and notably the precautions with which the technical staff were obliged to comply when performing their duties”, it did not appear that Mr. F. was exposed to asbestos in the context of his duties as the Invalidity Board seemed to define the expression, and that consequently he did not feel authorised to pay the applicant a pension. He added, however, that having regard to the possible doubt about the meaning of the Board’s opinion and to the incident of 9 June 1998, he had ordered an enquiry into the material environment in which the applicant was called upon to work, and that he intended to refer the matter again to the Board in light of the outcome of this enquiry. Lastly, he said Mr. F. would remain on leave until the Board’s new opinion.

On 25 September 1998, Mr. F. told the Secretary-General that he hoped a decision would be taken quickly.

On 28 September 1998, Mr. F. submitted the present application to the Tribunal, contesting the decision of 19 May which refused to recognise him as suffering from total permanent invalidity.

On 15 October 1998, the Executive Director sent Mr. F. three documents which he intended to submit to the Medical and Invalidity Boards, asking for his comments. These documents were a draft request for an additional opinion, a description of a heating specialist’s duties, and an information notice, which the Organisation intended circulating to staff, on upkeep and maintenance in those premises of the OECD with an asbestos or asbestos-based cladding,

On 27 October, Mr. F. replied that in view of the application he had submitted on 28 September 1998, he was no longer able to make comments on the documents sent to him.

On 30 October 1998, the Secretary-General did indeed ask the Medical and Invalidity Boards for an additional opinion, sending them the documents previously communicated to Mr. F.

The Boards have still not, as of today, replied to the Secretary-General’s request.

On 21 May 1999, the Head of Human Resource Management wrote to Mr. F. to inform him that the Secretary-General had decided, in line with the conclusions of the Invalidity Board, that the applicant was not an invalid and that the Organisation no longer contested the admissibility of his application.

#### On the nature of the contested decision

Until 31 May 1999, the Secretary-General and the applicant were in disagreement, the former considering, unlike the latter, that the letters of 19 May and 1 July 1998 did not constitute decisions refusing to grant Mr. F. a pension for total permanent invalidity. Since 31 May 1999, the parties have changed their positions, Mr. F. arguing that the letter of that date contains a new decision which he could subsequently contest, while the Secretary-General apparently contends that his decision of 31 May 1999 is nothing more than confirmation of the position expressed in the letters of 19 May and 1 July 1998.

The Tribunal considers that the letters of 19 May and 1 July 1998 already contained decisions refusing to grant Mr. F. a pension for total permanent invalidity. It notes in this regard that both Instruction 13/2 xi) of the Pension Scheme Rules and Instruction 122/4.5 of the Staff Regulations concerning the specialist medical review procedure provide that the findings of the Invalidity Board, on the one hand, and conclusions of the Medical Board, on the other, shall be final except in the case of obvious factual errors and without prejudice to the jurisdiction of the Administrative Tribunal, and that unless he invoked an obvious factual error, the Secretary-General had no power to convene these Boards again. The decision he took on 31 May 1999 therefore amounts to a simple confirmation of the refusal first expressed on 19 May 1998, and the applicant is entitled, as the Secretary-General admits, to contest this first decision, but is not correct in arguing that the letter of 31 May 1999 contains a new decision against which he could bring a new application.

### The substance

The Tribunal is being asked to rule upon a question of a medical nature, namely, whether the ailment afflicting Mr. F. amounts to a “permanent invalidity which totally prevents him from performing the duties attached to his employment in the Organisation” within the meaning of Rule 17/1.10 a) of the Staff Regulations. Normally, findings of such permanent invalidity are, according to Instruction 117/1.11.2 a), “made by the Medical Board referred to in Instruction 122/4.2 i), in accordance with Instructions 122/4.1 and following”.

The Tribunal notes that the opinion of the Board, the terms of which are referred to above, is not such as to make it possible to recognise that Mr. F. is suffering from permanent invalidity. It recognises, however, that there is some doubt since the opinion of the Board is accompanied by a condition relating to the functions performed by Mr. F. despite the fact that the task of the Board was precisely to say whether Mr. F. was suffering from permanent invalidity preventing him from performing the duties attached to his employment in the Organisation, and that the Board was in possession of a detailed description of Mr. F.’s duties.

In these circumstances and wishing to ensure that Mr. F. does not suffer as a result of this shortcoming on the part of the Medical Board, the Tribunal decides that a new expert appraisal should be organised to address the question of whether Mr. F. is entitled to the benefit of Rule 17/1.10 a) of the Staff Regulations. This appraisal will be carried out by three experts, the first designated by the Chairman of the Tribunal from a Paris Court of Appeal list of medical experts, and one each of the two others by each party, provided that none of the three took part in the previous expert appraisal. This Board, which must be in possession of Mr. F.’s entire medical file and a description, agreed by the two parties, of his duties, will give its opinion within three months of the last expert’s being designated. The Board’s conclusions will be communicated to the parties who shall have one month to make known to the Tribunal any comments thereon. The Chairman of the Tribunal shall be competent to rule on any difficulty relating to the carrying out of the expert appraisal.

Having regard to the circumstances which make this new expert appraisal necessary, the Tribunal considers that the Organisation should pay all the costs relating to it. It also decides that Mr. F. will remain on sick leave until the Tribunal rules on the substance of his application.

The Tribunal:

1) decides to delay ruling on Mr. F.’s submissions until completion of the expert appraisal as described above,

- 2) decides that Mr. F. shall remain on sick leave until the Tribunal has ruled on the substance of his application,
- 3) reserves other costs until its decision on the substance.