ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 15 March 2011

JUDGMENT IN CASE No. 68

Ms. H.

v/ Secretary-General

The English version constitutes the authentic text.

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JUDGMENT IN CASE No. 68 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 11 March 2011
at 10:30 a.m. in Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Professor James R. CRAWFORD, Chairman
Professor Luigi CONDORELLI
and Mr. Alfredo MADUREIRA,

with Ms. Anne Carblanc providing Registry services.

On 3 August 2007, Ms H., B4 agent, fell on the marble staircase at the entrance of the OECD in Rue de Franqueville, Paris. On 10 December 2007, the fall was recognised by the OECD as a work accident.

By e-mail of 7 November 2007, Ms H. was informed that her fixed-term contract, expiring on 31 December 2007, would not be extended. On 31 December 2007 the fixed-term contract of Ms H. came to an end, while she was undergoing medical treatment following the fall.

By letter of 29 October 2009, Ms H. requested the Secretary General to recognise her right to extend the fixed-term contract until the date of consolidation, pursuant to article 17/1.13 b), a request which was rejected by the Secretary-General by letter of 19 November 2009.

By letter of 2 March 2010, Ms H. asked the Secretary-General to withdraw this decision. By letter of 8 April 2010, the Secretary-General rejected this request.

On 7 July 2010, Ms H. filed an application (No. 068) requesting the Tribunal to annul the Secretary-General's decision of 8 April 2010, to pay her salary for the period between 1 January 2008 and 14 May 2009, and to award her damages under various headings, as well as legal costs.

On 5 November 2010, the Secretary-General submitted his comments maintaining that the application is inadmissible and, in the alternative, asking for the application to be dismissed in its entirety.

On 7 December 2010, Ms H. submitted a reply.

On 8 December 2010, the Staff Association submitted written comments on the case.

On 17 January 2011, the Secretary-General submitted his comments in rejoinder.

On 22 February 2011, Ms H. submitted 7 additional documents.

The Tribunal heard:

Maître Christine Hillig-Poudevigne, Barrister, Counsel for the applicant;

Mr Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General,

and Mr Jean-Pierre Cusse, on behalf of the Staff Association.

It handed down the following decision:

Outline of the facts

1. On 3 August 2007, at about 11 a.m., Ms H. fell while descending the marble staircase of the OECD building, in rue de Franqueville, on her way to a coffee break with a colleague. She proceeded to the cafe and returned, normally, to her work desk. Only later in the afternoon, after feeling lower back pains, did she attend the Medical Pavilion of the OECD, where she was seen by a nurse and was prescribed paracetamol.

2. On 4 August 2007, Ms H., by now in considerable pain, was seen by SOS Doctors in her home. The doctor attending informed her that he could not make a declaration of work accident. On the morning of 6 August 2007, she returned to the Bureau des Affaires Médicales et Sociales and the Medical Pavilion of the OECD where she was seen by another nurse. On that same day, she tried to see her own doctor, who was on holiday. She was seen by a substitute who filled out the initial work accident form noting injuries in her left shoulder, left thigh (with hematomas) and left buttock (with hematomas). She was placed under treatment until 20 August 2007.

3. In September, Ms H. was visited by her own doctor, who diagnosed a dysenteric syndrome apparently unrelated to the work accident. Subsequently, she was diagnosed with a parasitic illness, for which she was prescribed a course of Flagyl, a strong antibiotic. She presented seriously adverse reactions to the antibiotic, which caused her insomnia. She was granted sick leave between 3 September 2007 and 23 October 2007. Due to her sick leave she was unable to attend a recruitment test, initially scheduled for 18 September 2007; the test was twice rescheduled. After a further request for rescheduling, on 28 September 2007 Ms H. was informed that the tests had been concluded and the interview round of the recruitment process was due to begin the following week. There was no possibility to further reschedule the test.

4. Ms H. returned to work part-time at the OECD from 24 October 2007- 7 November 2007 as part of occupational therapy, as recommended by Dr S. on 24 October 2007. On 9 November 2007, Dr S. extended the part-time work until 30 November 2007.

5. Between 24 October 2007 and 30 October 2007, Ms H. maintained an exchange of e-mails with Ms W. of HRD in which she requested and obtained information concerning the protection of her rights under OECD Staff Regulations and French law in view of the termination of her contract and the continuation of her medical treatment. In the correspondence, Ms H. informed Ms W. of being under treatment for 'whiplash', 'shock/trauma' from the fall, severe reactions to antibiotic treatment of parasites and a jaw joint misaligned on the right side.

6. On 7 November 2007 Ms H. was informed that her fixed-term contract would not be extended and that her appointment would come to an end, as scheduled, on 31 December 2007.

7. By letter of 9 November 2007, Ms H. was informed by the OECD that Garantie Médicale et Surgicale ('GMC'), the institution in charge of the OECD's medical protection system, would perform some medical tests. On 5 December 2007 she was visited by Dr M. of GMC, on behalf of the OECD. On 10 December 2007, she was informed by Dr M. that her accident had been qualified as a work accident. According to Dr M. her condition was the equivalent of a 'syndrome des traumatises craniens avec son cortège fonctionnel neuro végétatif'. The conclusion of the

examination was that her 'condition had not stabilised'. She was consequently requested to undergo further examinations. Dr M. did not, however, extend her sick leave, and she returned to full-time work for a short time until the OECD's shutdown for the Christmas/New Year break.

8. On 31 December 2007 her fixed-term contract with the OECD came to an end.

9. In the period that followed, Ms H. was seen by numerous physicians, who confirmed her suffering from contractions of her cervical muscles, problems in her temporo-mandibular joint causing severe migraines and eyesight disturbances (also known as 'migraines accompagnées') as well as anxiety disorder.

10. On 8 February 2008, the OECD informed Ms H. of the medical conclusion reached by Dr M., according to which she had apparently recovered, as of that date, albeit with a possibility of subsequent relapse. The OECD informed her that in view of the physician's conclusion she was entitled to benefit from the special provisions of the Staff Manual concerning work accidents (Rule 17/1.12), including the complete reimbursement of all medical care needed as a result of the accident.

11. On 11 March 2008, Ms H.'s Performance Management Form was completed. The form clearly identified a drastic change in performance after the work accident of 3 August 2007, noting that her work had been considerably disrupted by her work leave. Her work prior to 3 August 2007 was assessed as being 'very good'.

12. On 3 June 2009, the OECD notified Ms H. by letter that her relapse of 16 May 2008, for which reimbursement was requested pursuant rule 17/1.12 (work accident), qualified as a consequence of the initial work accident. The medical conclusion was that there was stabilization on 14 May 2009 with after-effects. Treatment should continue until 14 August 2009. In addition, the letter stated that Ms H. was entitled to benefit from the special provisions of the Staff Manual relating to work accidents. Her medical care between 16 May 2008 and 14 August 2009 would be 100% reimbursed.

13. By letter of 29 October 2009, Ms H. officially requested the Secretary-General of the OECD to regularize her situation, claiming payment for medical treatment and compensation for financial, moral and physical damage. She acknowledged having received the conclusion of stabilisation from Dr M., but indicated that she had no information as to the permanent character of the after-effects of the accident. She was still undergoing treatment for those after-effects. For this reason, she challenged the decision of stabilisation. She further complained of the failure of the Medical Board to make a decision in respect of her condition, maintaining that as of that date she did not know when the Medical Board would meet. Ms H. noted that in view of her financial situation she had been forced to move to the USA and was unable to cover advance payments for the medical treatment needed. Finally, Ms H. referred to article 17/1.13 b), pursuant to which employees on a fixed-term contract who suffer work accidents and are, in consequence, obliged to cease work, have the right to the extension of the fixed-term contract until consolidation.

14. By letter of 19 November 2009, the Secretary-General disagreed with the characterisation of Ms H.'s situation as one falling within the scope of article 17/1.13 b) on the basis that her situation had not immediately forced her to cease work. The Secretary-General noted that the medical certificate of 6 August 2007 confirmed that the accident suffered by Ms H. did not require full sick leave. Leave was granted for the period between 3 September 2007 and 23 October 2007, after which period she was declared able to perform her functions again, which she did until the expiry of her contract. Nevertheless, the OECD had recognised that her fall was a work accident and the reimbursements and indemnities due were paid.

15. On 22 December 2009, GMC, acting as the OECD's medical service, notified Ms H. that it accepted her request for medical treatment in the United States, covering the period until 28 February 2010.

16. By letter of 19 February 2010, GMC communicated to Ms H.'s attorney that despite the financial coverage of medical treatment, Ms H. had not followed any treatment since August 2009, either in France or in the USA. In consequence, a third extension of the coverage was not justified.

17. On 26 February 2010, Ms H.'s attorney wrote contesting the statements contained in GMC's letter of 19 February 2010.

18. On 2 March 2010, Ms H. addressed to the Secretary-General a formal request prior to filing an application to the OECD's Administrative Tribunal complaining against the decision adopted by the Secretary-General on 19 November 2009. Ms H. complained of the narrow reading given to article 17/1.13 b). She also requested compensation for the damages suffered as 'a direct result of the denial of continued remuneration'.

19. By letter of 10 April 2010, the OECD informed Ms H. that in view of the fact that her appointment had come to an end on 31 December 2007, the filing of a request claiming the extension of her contract under article 17/1.13 b) in October 2009 was out of time. It should have been addressed to the Secretary-General in accordance 'with the time-limits provided for in article 3 of Annex III to the Staff Regulations'. It also contested the merits of Ms H.'s letter of 2 March 2010.

20. On 7 July 2010 Ms H. filed a complaint before the Administrative Tribunal.

21. By a letter of 28 September 2010, GMC stated that in view of Ms H.'s consolidation with after-effects the OECD was no longer responsible for full payment of medical expenses. Nevertheless, since Dr M. considered that supplementary treatment could take place until 14 August 2009, the OECD had authorised coverage of these treatments. Coverage of medical care had been extended on a number of times in view of Ms H.'s exceptional circumstances until 31 May 2010. In view of the consolidation of her situation, GMC considered that Dr M. should assess the definitive consequences of the accident. A conclusion that partial permanent incapacities exist would require the convening of the Medical Board to obtain a final determination pursuant to Rule 17/1.14 c) ii) and Instruction 122/4.1. The Tribunal understands that a Board is to meet in the near future.

22. On 22 February 2011 Ms H. presented further documents to the Tribunal, including a declaration by Dr S., confirming that he had seen Ms H. on a number of occasions in consequence of her work accident. Dr S. affirmed that all the consultations, up to the last session of 11 September 2009, and the therapeutic part-time work recommendation, were related to this accident. In his view, 'these consultations would not have occurred if not for the work accident'.

23. In addition to her medical ailments, Ms H. was unable to obtain permanent employment after the termination of her fixed-term contract with OECD on 31 December 2007. Since then she has only worked on short assignments for OECD as a consultant. The status of the OECD as an international organization entailed that she was not eligible for unemployment allowance in France, and in view of her accident having occurred in France, she has not been eligible for unemployment benefits in the USA, where she currently resides.

The positions of the parties

24. The application submitted by Ms H. contained two separate requests. First, it called on the OECD to extend her fixed-term contract until the date of the consolidation of her situation pursuant to article 17/1.13.b). On this basis, Ms H. claimed the payment of her salary between the period 1

January 2008 and 14 May 2009, the date when Dr M. considered her situation to have stabilized, despite after-effects. Second, Ms H. requested the Tribunal to award damages on the basis of financial, physical and moral injuries caused. This second request was linked, on the one hand, to the Organisation's responsibility and, on the other, to the consequences that the work accident had on her professional and personal life. She challenged the Secretary-General's rejection of compensation on the basis that her medical care had been covered by the OECD. According to Ms H., coverage of her medical expenses was an obligation for the OECD in view of the fact that the fall had been characterised as a work accident. The fact that medical expenses had been covered was completely independent of any assessments of her injuries. The applicant maintains that the OECD was negligent on several grounds: (1) in view of its failure to install safety systems for users in the marble staircase (it only installed a hand rail after Ms H.'s notification of her fall and suggestion to add safety strips to the marble steps); (2) in view of the absence of a proper medical examination in the OECD's medical pavilion; (3) in view of the extreme slowness in the recognition of her fall as a work accident.

25. The Secretary-General firstly contested the admissibility of the application. In general, the Secretary-General considered that the application had been filed well after expiration of the time limit established in article 3 a) of the Council's Resolution on the Statute and Operation of the Tribunal. For the Secretary-General, Ms H.'s complaint concerned the decision not to renew her fixed-term contract, a decision which was taken on 7 November 2007 and communicated to her via e-mail. Since at the time she was an agent of the Organisation, she had until 8 January 2008 to complain about this decision. An application filed nearly 2 years later was clearly extemporaneous. Further, the Secretary-General maintained that Ms H. could not rely on the 2 year time-limit established in article 17/8, as the latter is only applicable to pecuniary claims arising out of article 17/1.13 b) which the Secretary-General had already considered not to be applicable to Ms H.'s situation.

26. As regards the applicant's request for the payment of compensation, the Secretary-General considered it was time-barred as it has been formulated prematurely. In his view, the recognition of the fall as a work accident and the consolidation with after-effects of the consequences of this accident opened for Ms H. a different regime to that of article 17/1.13 b), viz., the regime for invalidity pensions for permanent partial incapacity, which can only be granted once a decision has been reached on the character of the incapacity by the Medical Board, pursuant to article 122/4.2.

27. In her reply, the applicant specified that her complaint concerned the decision of the Secretary-General of 19 November 2009, rejecting her request to extend her fixed-term contract until 14 May 2009, the date of consolidation. Her application for reconsideration to the Secretary-General, as the request prior to the filing of an application with the Administrative Tribunal, had been filed within 6 months of the decision of 19 November 2009, the delay established under paragraphs a) and c) of article 3 for former OECD agents residing abroad. In the alternative, her application should be admissible on the basis of the existence of exceptional circumstances, pursuant to article 3 d). Specifically in respect of her request for compensation, Ms H. maintained that this claim was based on the damage suffered from the Organisation's refusal to qualify her situation as one coming within the scope of article 17/1.13 b). Her request for compensation was said to be 'disconnected from the request for reparation for injury linked to a work accident'.

28. The Secretary-General, in his reply, submitted that, if the claim for compensation was dependent on the request to annul his refusal to extend Ms H.'s position under article 17/1.13.b, then the request was equally out of time.

Admissibility

29. The Secretary-General contests both the admissibility of the application and its well-foundedness on the merits. As to admissibility, article 3 of the Council's Resolution on the Statute and Operation of the Tribunal provides:

> "a) … applications to the Administrative Tribunal shall not be admissible unless the applicant has given the Secretary-General a prior written request for withdrawal or modification of the contested decision, and the Secretary-General has rejected such request or has not replied within a period of one month. Such prior request shall be given to the Secretary-General within two months from the date of notification of the contested decision in the case of members of staff, the Staff Association or trade unions or professional organisations, or within four months from the date of such notification in the case of former members of staff or duly qualified claimants to the rights of members of staff or former members of staff.
>
> …
>
> c) An additional period of two months for submitting such a prior written request shall be accorded to persons resident outside metropolitan France.
>
> d) In exceptional cases, the Secretary-General may accept a request submitted after expiry of these time limits."

30. According to the Secretary-General, the decision of which the applicant complains was that notified to Ms H. by e-mail on 7 November 2007 stating that her fixed-term appointment would come to an end at the end of the year. The reason given was simply that the fixed term appointment was ending as scheduled. The e-mail was extremely brief, but the Tribunal was informed that the reason for the decision was that financing for the post was no longer available. It is not suggested that the decision was motivated by the applicant's fragile state of health.

31. The applicant did not then, and does not now, contest the decision not to renew her appointment with the OECD. In fact, while the OECD continued to pay 100% of Ms H.'s medical treatment arising from the injury (see Instruction 117/1.13.1), it was neither asked to pay, nor did it independently consider paying, any sums that might be due by virtue of the application of Rule 17/1.13 b).

32. It was not until 29 October 2009 that the applicant formally asked the Secretary-General to give her the benefit of Rule 17/1.13 b); the Secretary-General's letter refusing this request was dated 19 November 2009. That letter took no point relating to the timing of the request, although the point was taken in the subsequent exchange of correspondence (Secretary-General's letter of 8 April 2010).

33. In the Tribunal's view, "the contested decision" in the present case was communicated to the applicant only on 19 November 2009. Her formal request for reconsideration was made on 2 March 2010, within the four-month time limit laid down in Article 3 of the Statute (see paragraph 30 above). The Secretary-General communicated his rejection of that request on 8 April 2010; the applicant then had 3 months to file her case before the Tribunal (Article 4 of the Statute), which she did. Her claim is thus admissible.

34. That being so it is not necessary for the Tribunal to deal with the applicant's alternative arguments based on Article 3 d) of the Tribunal's Statute and on Rule 17/8 of the Staff Regulations. The Tribunal would only observe, as to Article 3 d), that the discretion to allow untimely claims under that Article is vested in the Secretary-General. As to Rule 17/8, this rule is of course without

prejudice to the specific requirements of Article 3 of the Statute, but it arguably provides a limitation upon claims for any "sums resulting from the application of the Staff Regulations…". To that extent Rule 17/8 protects the Organization against stale claims, and there is no reason to give it a restrictive interpretation.

Merits

35. As noted above, Ms H.'s principal complaint concerns the failure to apply Rule 17/1.13 b) of the Staff Regulations in her case. Rule 17/1.13 b) provides:

> "An official who is obliged to cease work as a result of a work accident shall be entitled to maintenance of the entirety of his salary and allowances and, if he has a fixed-term appointment, to the extension of his appointment until his state of health is found to be definitely settled or, at the latest, age 65."

36. The Tribunal would observe that sub-paragraph b) consists of two phrases, joined by the word "and". The first phrase covers all officials who, during their appointment (whether fixed term or otherwise) are obliged to cease work as a result of a work accident. Officials in such circumstances are entitled to be paid in full, salary and allowances, for so long as they cannot work. The second phrase ("and… age 65"), covers the special case of employees on fixed-term appointments who have suffered a work accident and whose health is not yet consolidated. This is a sub-set of the officials covered by the first phrase; what distinguishes them is that their appointment comes to an end while their health is still not consolidated. It should be noted that both phrases have the same subject – "an official who is obliged to cease work as a result of a work accident". In other words, officials on fixed-term appointments must still fall into the category of persons "obliged to cease work"; moreover sub-paragraph b) uses the present tense throughout. Its language is not adapted to cover someone with a fixed-term appointment who has returned to work and who is therefore no longer obliged to cease work because of the accident. Such persons are entitled to have their health care expenses covered (Rule 17/1.13 a)) and, if they are affiliated to the pension scheme or provident fund and their incapacity is permanent, to an invalidity pension or annuity (Rule 17/1.14). But it is not to be thought that Rule 17/1.13 b) gives to fixed-term employees whose incapacity is partial but permanent an entitlement to the extension of their appointment, and to the entirety of their salary and allowances, to age 65, irrespective of whether or not they are affiliated to the pension scheme or provident fund. That would give certain officials on short-term contracts rights which officials generally do not have, and would have significant financial consequences.

37. The second phrase of sub-paragraph b) was added in 1995. A Note by the Secretary-General explained the difficulty as follows:

> "… En effet, des difficultés sont apparues en ce qui concerne le cas particulier des agents titulaires d'engagements de durée déterminée.
>
> 5. Ces agents peuvent se trouver, à la suite d'un accident du travail, en situation d'incapacité temporaire pour une période excédant la durée de leur engagement, auquel cas, du moins dans l'état actuel des règles, l'engagement prend fin, même si ces agents continuent (après la fin de leur engagement) à percevoir la totalité de leur traitement et de la prise en charge des dépenses de santé occasionnées par l'accident jusqu'à la consolidation de leur état de santé.
>
> 6. Afin de clarifier la situation de ces agents et d'éviter les appréhensions compréhensibles qu'ils pourraient avoir en recevant la notification de la fin de leur engagement, il semble à la fois plus simple et plus clair de prévoir que leur engagement sera, le cas échéant, prolongé pendant toute la période d'incapacité. Cette modification de nature juridique est sans conséquences financières. Il est donc

proposé de modifier le paragraphe b) de l'article 17/1.13 du Règlement, comme indiqué en annexe."[1]

In this passage the term "incapacity" means incapacity to work. The passage supports the conclusion that sub-paragraph b) only covers officials whose fixed-term contract expires while they are away from work as a result of a work accident. It was not intended to cover the case of persons still working but suffering some partial incapacity which had at some earlier time obliged them to stop work for a time. Their situation is dealt with, if at all, by Rule 171/1/14.[2]

38. The Tribunal appreciates that this interpretation of paragraph b) potentially leaves unprotected officials on fixed term contracts who – like Ms H. – are injured at work but return to work for some period prior to the termination of their appointment. In such cases any further entitlement depends on whether their incapacity can be classified as permanent, a question not (in the first instance) for the Tribunal but for a medical board under Rule 117/1.14. The Tribunal would nevertheless record that – although the Secretary-General argued that Ms H.'s health problems have not been proved to have been caused by her accident – the evidence before the Tribunal suggests that they were so caused; and certainly the Organisation has proceeded on that basis in reimbursing Ms H.'s medical expenses under Rule 17/1.13 a).

39. Nonetheless, the consequence is that Ms H., having returned to work following the consultation with Dr M. on 5 December 2007 (paragraph 5 above), does not fall within the scope of Rule 17/1.13 b).

40. Turning to the claim for compensation due to the fault of the Organization, the Tribunal recalls its earlier jurisprudence according to which, in a case where "the occupational disease nature of the affliction from which the [applicant] suffers has been recognised, he cannot claim compensation on the basis of negligence on the part of the Organisation unless this negligence was inexcusable … or intentional".[3] The same principle, *mutatis mutandis*, applies to work accidents.

41. As at present advised, the Tribunal does not think that the Organisation has been shown to be at fault to the extent or in the degree required by these authorities. It is true that some aspects of its handling of the case have been sub-optimal. For example, there was major delay in the convening of a Medical Board, although this is at least partly to be explained by the applicant's move back to the United States. On the other hand the Tribunal would recall the following points:

(a) The Organization met all of the medical bills related to Ms H.'s treatment, and showed flexibility in extending the deadline for treatment several times, eventually to 31 May 2010 (see paragraph 21 above);

(b) It was the OECD's doctor, Dr M., who finally made what seems to have been the correct diagnosis of her condition, after she had seen many doctors of her own choosing (see paragraph 7 above);

(c) Ms W. provided helpful and sympathetic responses to her queries about her position in October 2007 (see paragraph 5 above).

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[1] C(95)34, 5 May 1995. The proposed text of new sub-paragraph b), annexed to the Note, was adopted by Council unchanged.

[2] The Secretary-General argued that the work stoppage must follow immediately from the work accident, but no such requirement is contained in Rule 17/1.13. All that is necessary is that the work stoppage should have been a result of the work injury and that it should have occurred during the course of the appointment.

[3] *F v Secretary-General*, Application No 35, OECD Administrative Tribunal, 21 January 1999, http://www.oecd.org/dataoecd/11/22/44546012.pdf,

(d) Although the Tribunal has held the claim admissible notwithstanding the delay, the fact remains that in relation to an accident occurring in August 2007, Ms H. delayed in seeking continuation under Rule 17/1.13 b) until 29 October 2009 (see paragraph 13 above).

42. Before the Tribunal, the Secretary General argued that this aspect of Ms H.'s claim is premature, and should not be decided until the conclusions of the Medical Board become known. The Tribunal agrees, and accordingly will suspend decision on this aspect of the claim pending the determination of the issue of permanent partial incapacity by the Medical Board.

* * *

For these reasons, the Tribunal:

(1) Finds the claim admissible;

(2) Rejects Ms H.'s claim under Rule 17/1.13 b) to the extension of her appointment until 14 May 2009;

(3) Defers the claim to damages until after the decision of the Medical Board, Ms H. having leave to ask the Tribunal to resume its consideration of the case thereafter, if required;

(4) Awards the Claimant €5000 on account of legal costs so far incurred.

Done in Paris on 15 March 2011

(signed) James Crawford

Chairman

(signed) Anne Carblanc

Registrar