ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 28 March 2012

JUDGMENT IN CASE No. 71

X v/ Secretary-General

The English version constitutes the authentic text.

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JUDGMENT IN CASE No. 71 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Monday 12 March 2012
at 10 a.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Judge Jan PAULSSON, Chairman,
Judge Luigi CONDORELLI
and Judge Louise OTIS,

with Mrs. Anne CARBLANC and Mr. Francisco CARDONA providing Registry services.

On 5 July 2010, the Applicant sent a letter to the Secretary-General to claim a replacement income equivalent to half her salary and allowances from the date of her separation from OECD to the last date of consolidation of her two work accidents. On 12 October 2010, the Secretary-General replied that the Organisation was not in a position to follow up on the Applicant's request since the conditions pertaining to the non-renewal of her appointment had been settled by the Administrative Tribunal in its decision of 23 March 2010.

On 22 February 2011, the Applicant requested, pursuant to OECD Regulation 22 a) and Instruction 122/1.3, that the Secretary-General convene the Joint Advisory Board to give its opinion on her situation resulting from the decision of 12 October 2010. On 22 March 2011, the Secretary-General replied that the *Resolution of the Council on the Regulations concerning the Deputy Secretaries-General* (hereinafter the *Resolution*) [C(2006)91/FINAL] does not provide for the possibility that Deputy Secretaries-General refer a matter to the Joint Advisory Board. On 7 April 2011, the Applicant contested this interpretation and requested the withdrawal or modification of the decision of 22 March 2011. On 12 May 2011, the Secretary-General reaffirmed his interpretation of the *Resolution* and noted that the Applicant could have, but had not, submitted a request for withdrawal or modification of the decision of 12 October 2010 within the deadlines, and that any such action was now time-barred.

On 18 July 2011, the Applicant filed an application (No. 071) asking the Tribunal to order that her case be referred to, and examined by, a Joint Advisory Board, and otherwise, to order the OECD to pay an amount corresponding to: i) half her salary and allowances from the date of her separation from OECD to the last date of consolidation of her two work accidents; ii) compensation for the moral tort suffered; and ii) the legal costs before the Tribunal.

On 10 November 2011, the Secretary-General submitted his comments asking the Tribunal to dismiss the Applicant's claim for replacement income on grounds of inadmissibility or, alternatively, on the merits; and to dismiss all other claims, including for costs, in their entirety on the merits.

On 11 January 2012, within the extended time limit granted by the Chairman of the Tribunal, the Applicant submitted her reply.

On 14 February 2012, the Secretary-General submitted his comments in rejoinder.

The Tribunal heard:

Maître Sicault, barrister at the Paris Bar, Counsel for the Applicant;

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

It handed down the following decision:

The facts

The Applicant worked for the Organisation as Deputy Secretary-General for two years from 2 May 2007 to 2 May 2009. After a skiing accident in February 2008, she suffered two falls within the premises of the Organisation, in June 2008 and in April 2009, both recognised as work accidents. In October 2009, she filed an application (N° 67) requesting reinstatement and/or compensation on the grounds that the decision not to renew her contract was tainted by discrimination based on the state of her health. Having first concluded that the Applicant did not provide the minimum evidence required to justify further investigation into whether there was discrimination or not, the Tribunal dismissed her application on the grounds that it had been submitted after expiry of the time limit.

In her application of 18 July 2011, the Applicant requested the Tribunal to order that her case be referred to, and examined by, a Joint Advisory Board, and otherwise, to order the Organisation to pay an amount corresponding to: i) half her salary and allowances from the date of her separation from OECD to the last date of consolidation of her two work accidents; ii) compensation for the moral tort suffered; and ii) the legal costs before the Tribunal.

In the course of the hearing, Me Sicault confirmed that given the sense of his alternative pleading, his primary claim was for a determination that the Applicant was entitled to take her case to the Joint Advisory Board; and that if this request was granted no other relief was being pursued.

The Organisation has expressly confirmed that it takes no issue with the admissibility of this primary claim. The Applicant's letter of 7 April 2011 was a timely challenge to the Secretary-General's determination of 22 March 2011, and the application of 18 July 2011 was timely filed after the rejection of that challenge on 12 May 2011 by the Secretary-General.

On the other hand, the Organisation maintains the substantive correctness of the position taken by the Secretary-General on 22 March 2011.

The question may thus be simply framed as follows. *Was the Applicant entitled to access to the Joint Advisory Board*?

In law

On the substance

Regulation 22 of the Staff Regulations is entitled "Disputes". It comprises five paragraphs, of which (a) and (b) are headed "Advisory Bodies" and (c), (d) and (e) are headed "Administrative Tribunal". 22(a) provides that an Advisory Board shall, unless another body is "responsible for giving its opinion in a particular field", advise the Secretary-General, at the request of any disputant who is an *official*, *former official*, or *duly qualified claimant*, with

respect to any contention that he or she has been treated inequitably or contrary to terms of appointment or Staff Regulations.

It is common ground that this Advisory Board has taken the form of the Joint Advisory Board, which makes *recommendations* as to the disposition of disputes.

It is also common ground that, to the extent such recommendations fail to resolve the dispute, applicants may pursue a binding judgment before the Administrative Tribunal.

The difficulty is that the Applicant was not an *official*; as a Deputy Secretary-General her terms of appointment were defined in the *Resolution*, the terms of which incorporate some but not all of the Staff Regulations.

Article 9 of the Resolution provides as follows:

> "Notwithstanding Regulation 22 c) of Staff Regulations, Rules and Instructions applicable to officials of the Organisation, the Administrative Tribunal shall have jurisdiction to resolve all questions regarding the interpretation and application of these Regulations and of the Deputy and Assistant Secretaries-General's terms of appointment."

The Organisation contends that this provision should be read to mean that the Applicant as a Deputy Secretary-General has access to the Administrative Tribunal but not to the Joint Advisory Board. In effect, the Organisation's position is that the reference to "Regulation 22 c)" should be understood to encompass the Administrative Tribunal alone, and that the word notwithstanding should be understood as derogating from the rule that only officials, former officials, and duly qualified claimants have access to the Administrative Tribunal.

The Applicant points out that Article 9 could have achieved the effect sought by the Organisation by far more straightforward drafting. It is certainly true that it seems odd to provide that "notwithstanding" an article which gives access to the Administrative Tribunal, a particular class of grievants should have … access to the Administrative Tribunal.

The Organisation agrees that the drafting could have been clearer but that such is often the consequence of drafting in committee, and that in any event it was clear that the drafters did not want to give Deputy Secretaries-General access to the Joint Advisory Board because it would be difficult, given the small number of persons at that hierarchical level, to empanel "peers" of such applicants. The Organisation also argues that the Applicant's approach would lead to absurd results, in that it aims to obtain a recommendation from the JAB on the Applicant's entitlement to "replacement income" even though such relief is barred by the *res judicata* of a prior judgment of the Tribunal denying her challenge to the non-renewal of her appointment.

The Tribunal has sympathy for the travails of drafting in groups, and accepts that delegates in international organisations sometimes produce convoluted, if not incomprehensible, texts. Yet ultimately the test must be whether the rules and regulations are consistent with an acceptable form of governance – which above all means that those who are subject to them can be reasonably held to understand what they mean.

Ultimately, the argument that the Joint Advisory Board was unsuitable to peer review at high hierarchical levels is unpersuasive; the Joint Advisory Board's putative

inappropriateness should militate in favour either of a clear rule of avoidance, or else a reform of the Joint Advisory Board – and not a strained interpretation of the text.

An important question is evidently what effort of exegesis and ratiocination can reasonably be demanded of staff. If Article 9 of the Resolution was the only thing available to the Applicant, its opaqueness might reasonably have led her – if it was of interest to her to have clarity on this matter – to ask further questions. And it may ultimately have been conceivable that the Tribunal would accept the Organisation's argument if the only relevant texts were Regulation 22 and the Resolution. The fact is, however, that at the time of her employment, the Applicant received a letter, dated 6 March 2007, from the Head of Human Resource Management attaching a copy of the Resolution, "which establishes the specific rules for your position", and furthermore providing – "in order to assist you in better understanding the existing legal framework" – a single-page "summary of the terms and conditions applicable to your appointment". That single page contained ten numbered paragraphs, including this:

> "10. Staff Regulations 2, 3, 4, 5, 5 bis, 7 c), 14 a) i), b) and c) and 22 are applicable"

One observes that this clear statement of applicability took care to indicate that Regulations 7 and 14 were applicable only in part, while Regulation 22 was not so limited. The Tribunal takes the view that the Applicant was entitled to rely on this straight-forward indication of the applicability of the entirety of Regulation 22, including access to the Joint Advisory Board.

The Tribunal is not impressed by the Organisation's argument that the Joint Advisory Board is not a decision-making instance and that therefore its unavailability to the Applicant would not be a matter of substantive detriment to her. Staff members may have great interest in availing themselves of consultative, deliberative, or simply mediating bodies which hold out the possibility of resolving disputes without the formal confrontation of pleadings before the Tribunal.

Nor is there weight in the Organisation's argument that reference to the Joint Advisory Board "would not serve any purpose for the settlement of the case" since the substance of her complaint had already been dismissed by the Tribunal's judgment in Case No. 67. The premise of this contention, namely that Case No. 67, in dismissing the Applicant's claim of wrongful discrimination in the non-renewal of her appointment, was a *res judicata* barring her present claim for replacement income, is a matter of controversy as to which the Administrative Tribunal has yet to pronounce itself. The least that can be said is that this premise cannot be assumed to be correct for the purposes of assessing the utility of recourse to the Joint Advisory Board.

For these reasons, the Tribunal hereby overrules the Secretary-General's decision of 22 March 2011 inasmuch as it barred the Applicant's access to the Joint Advisory Board.

On the reimbursement of legal costs

Considering that the Applicant has prevailed with respect to the procedural point concerning the JAB, which basically entailed an issue of interpreting short passages in relevant documents, and that nothing can be said at this stage as to the merits of her substantive claim, the Tribunal accordingly grants her the amount of 5000 euros as a contribution to her legal costs, to be paid forthwith by the Organisation.

The Tribunal decides:

1) The decision of 22 March 2011 of the Secretary-General is annulled inasmuch as it barred the Applicant's access to the Joint Advisory Board

2) The Organisation will pay the Applicant a contribution to her cost, in the amount of 5000 euros.

Done in Paris, 28 March 2012

(signed) Jan Paulsson
Chairman

(signed) Anne Carblanc
Registrar