ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 7 August 2015

JUDGEMENT IN CASE N° 79

XXX

v/ Secretary General

Translation (the French version constitutes the authentic text).

JUDGEMENT IN CASE No 79 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on 22 June 2015
at 10 a.m. in Château de la Muette,
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of:

Mrs. Louise OTIS, Chairman,
Mr. Luigi CONDORELLI,
and Mr. Pierre-François RACINE,

with Mr. Nicolas FERRE and M. Jean LE COCGUIC providing Registry services.

The Tribunal heard:

Mr. XXX, Counsel for the applicant

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

Mr. Jean-Pierre Cusse, President of the Staff Association

It handed down the following decision:

INTRODUCTION

[1] In its application for annulment and compensation, the Applicant requests that the decision of the Secretary-General of the Organisation for Economic Cooperation and Development (hereinafter referred to as the "Organisation") of 4 August 2014 refusing its application for recognition of occupational disease be annulled, that her reintegration be declared with the financial awards pertaining thereunto including payment of compensation for moral prejudice.

[2] The Secretary-General of the Organisation submitted his comments on 4 February 2015.

[3] The Applicant submitted a reply on 3 March 2015.

[4] The Staff Association at the Organisation submitted written comments in support of the application of the applicant on 4 March 2015.

[5] Finally, the Secretary-General of the Organisation submitted his comments in rejoinder on 3 April 2015.

[6] The parties presented documentary evidence and did not call any witnesses.

THE FACTS IN THE CONTENTIOUS SITUATION

[7] The Applicant has requested that the occupational nature of the illness by which she is affected be recognised by the Tribunal as an "occupational disease" as defined by the Regulations, Rules and Instructions applicable to Officials of the Organisation (hereinafter referred to as the "Regulations"). Regulation 17/1.12 of the Statutes makes provision that the origin of the disease should be "attributable to the performance of duties within the Organisation".

[8] This is a brief overview of the facts.

Reassignment of the Applicant in 2011

[9] The Applicant took up her duties at the Organisation on 1 November 1982. She occupied a number of different posts within the Translation Division, as an approved translator, and then in Human Resources Management until 1 January 2007, the date when she was appointed Head of the Joint Pensions Administrative Section.

[10] Finally, following a decision handed down by the Secretary-General on 17 October 2011, she was reassigned to the post of Head of Translation Division from 1 December 2011. This decision was appealed before the Organisation Tribunal on the ground that the Secretary-General could not reassign her pursuant to article 10/3 of the Regulation included in the Statutes since the post of Head of the Joint Pensions Administrative Section no longer existed and the termination procedure should be initiated.

[11] On 6 May 2013, the Tribunal rejected the application submitted by the applicant on the ground that the Secretary-General was vested with discretionary power in choosing whether or not to terminate an employment under those circumstances for which provision is made under article 11 of the Regulations. Moreover, it was highlighted that reassignment of the Applicant was undertaken in the exceptional framework of reorganisation of the responsibilities allocated by 6 Co-ordinated Organisations and not in the usual framework of activities of the Organisation.

[12] The final paragraph of the decision does however indicate as follows:

> 36. That said, the Organisation ought to have paid special attention to the repeated requests made by the applicant who has given the Organisation the benefit of her competence and devotion to duty for almost 30 years[1]. The administrative prevarication surrounding the applicant's reassignment, the slowness of the process, the administration's sustained ambiguity and the unfortunate rumours occasioned by this tedious process were prejudicial to the applicant. There is documentary evidence to the effect that these years of uncertainty caused the applicant stress and anxiety. She is awarded €5 000 in compensation.

[13] In addition to this symbolic amount of 5,000 euros granted for stress and anxiety caused by the fastidious process of reassignment, the Tribunal was never referred the matter nor made any declaration as to the occupational illness of the Applicant. This specific point was never the object of any allegation or discussion before the Tribunal.

[1] Appendix 13

[14] During the hearing for the present Application, the Applicant admitted to have issued to members of the medical board a document solely including paragraph 36 of the decision without having provided the full decision.

Illness of the Applicant

[15] After a first period of non-active status from 14 to 22 June 2011, the Applicant was placed on non-active status, on 3 May 2012, for reasons of sickness and never resumed work. The medical letters indicated exhaustion, severe depression, Hashimoto thyroiditis and severe sleep apnoea.

[16] On 13 February 2013, the doctor appointed by the Secretary-General, X, drafted a report in which he concluded that no element in the matter allowed it to be determined that the health condition of the Applicant resulted from the performance of her duties within the Organisation[2]. Dr X did not appear to have examined the Applicant.

[17] On 5 March 2013, the Organisation sent a letter to the Applicant in order to notify her of the decision not to recognise her condition as being an occupational disease as defined by the Statutes[3].

[18] Pursuant to Instruction 122/4 and the following instructions, the Applicant requested on 19 March 2013, that the expert procedure be initiated[4], to which the Organisation agreed[5].

[19] It is taken for granted that on 19 June 2013, during the expert appraisal procedure, the Organisation terminated the appointment of the Applicant pursuant to article 11 a) vii of the Statutes which governs the case of the official in the event of incapacity to work following period of inactivity. Consequently, she recovered compensation for loss of employment amounting to 172,000 euros and claimed pension rights from 1 July 2013.

[20] On 13 July 2013, there was no agreement between the doctor appointed by the Organisation, X, and the doctor of the Applicant, X[6]. Consequently, a third doctor [7] will be

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2 R-061.
3 R-081.
4 R-083.
5 R-089.
6 This dispute occurred as indicated under R-092.
7 The "medical specialist" called in Instruction 122/4.1

appointed by the first two doctors so as to hand down his own medical opinion, or a medical opinion reached by the three doctors collectively, meeting in the framework of a "medical board" pursuant to Instruction 122/4.2

[21] In the case at hand, the medical specialist appointed on 18 December 2013 is doctor X[8]. Although the latter is the only doctor to have signed the medical opinion, he expresses his opinion on behalf of all three doctors[9]. Out of concern for uniformity, we hereby have reference to this opinion as well as that of the " medical board ".

[22] On 18 April 2014, the medical board determined, in its medical opinion, that the Applicant was suffering from an occupational disease attributable to her working conditions. The medical opinion primarily included its findings which read as follows:

> Psychological external troubles which fall outside of the scope (of occupational diseases) presented by Mrs X and which are reactive and non-definitive, are attributable to the working conditions (as were also available to the Administrative Tribunal on 6 May 2013).
>
> Dr X considers that the problems suffered by the party concerned admittedly relate directly and without doubt, but are not [*sic*] exclusive, to the working conditions, but the Tribunal of Cassation dismissed this condition of exclusivity based on established case law.[10]

[23] After reading these conclusions, the Organisation informs the Applicant, on 4 August 2014, that it refuses to confirm the occupational nature of the disease:

> After careful and thorough examination of these conclusions and other information available, the Secretary-General is sorry to not be able to recognise the occupational nature of the illness from which you suffer. He indeed considers that neither the expert medical appraisal, nor the information made available, show that this illness is the result of the work you performed within the Organisation[11].

[24] Referring to French law, the Organisation claims that the illness suffered by the Applicant could only be recognised as occupational in nature by the medical board if the two following conditions are met: (1) the illness is directly and fundamentally caused by the usual work

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8 R-094.

9 This is also the position of the Tribunal in the draft judgement, para. 47.

10 R-098.

11 R-104.

undertaken and (2) the incapacity caused is permanent and in excess of 25 %[12]. The Organisation believes that the first criterion is not considered by the medical board and that the notice shows that the second is not fulfilled, with the psychological problems of the Applicant being expressly defined as "non-definitive"[13].

[25] The Applicant challenges the decision of the Secretary-General refusing the application for recognition of occupational disease, all pursuant to Instruction 122/4.6.

ANALYSIS

[26] The issue to be resolved is as follows: can the Secretary-General rule out the findings of the medical board as to the occupational nature of the disease of the Applicant?

1. The definitive nature of the findings of the medical board

[27] Instruction 122/4.5 of the Regulations makes provision that the findings of the medical board are "final, except where there is an obvious material error"[14]. Instruction 122/4.6 of the Statutes makes provision that the Secretary-General should take a "new decision in accordance with the conclusions" of the medical specialist or the medical board[15].

[28] In the case at hand, the Organisation has expressly recognised the definitive nature of the findings to be handed down by the medical board. Firstly, in the letter sent on 4 September 2013 to the Applicant notifying the latter of the appointment of a medical specialist, it indicated that "the findings of the medical specialist are final"[16]. Secondly, on 18 December 2013, the Organisation handed Dr X a letter so as to confer the mandate for medical appraisal indicating

12 R-105.
13 R-105.
14 The English version makes provision that the findings "shall be final, except where there is an obvious material error".
15 The English version makes provision that the Secretary-General "take a new decision in accordance with [...] the conclusions of the medical specialist or medical board".
16 R-092.

the definitive nature of the medical opinion expressed. It is indicated as follows: "Please note that your findings will be final". [17]

[29] We are of the opinion that regulatory texts and mandates conferred by the Organisation have enabled it to observe that there was no manifest material error, and the Organisation cannot rule out the findings issued by the medical board.

2. Remit of the medical board

[30] However, only the findings which fall within the remit of the medical board may benefit from the definitive nature conferred by Instruction 122/4.5.

[31] Regulation 17/1.12 makes provision for work accident and occupational disease. Any occupational disease which is attributable to the performance of duties within the Organisation shall be deemed to be a work accident.[18] The Secretary-General takes the decision to recognise the accident as a work accident and a disease as an occupational disease[19]. If this is based on a medical opinion, the specialist medical review procedure under Instruction 122/4 may be implemented, as agreed by the Secretary-General. [20]

[32] It so happens that the determinations leading to an "occupational disease" do not necessarily result from medical observations alone, but may in certain cases, also refer to subjective criteria for appreciation which fall within the decision-making power of the Secretary-General. This is since the disease of the official should originate in the work undertaken so as to be recognised as an "occupational disease". This may also be the case for any pre-existing disease not attributable to the performance of duties or any pathology resulting substantially from external factors. This is why the terms of the mandate granted to the expert by the Secretary-General are key.

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17 R-096.

18 Regulation 17/1.12 c)

19 Instruction 117/1.12.2. b) : “The Secretary-General shall, following investigation and where necessary medical examination, inform the official whether or not the accident is recognised as a work accident, and if it is not, shall give the reasons for such decision”.

20 In all instances where the Secretary-General takes a decision based on a medical opinion and where the employee concerned contests the medical ground, the latter may request, within a deadline of fifteen days following receipt of written notice of the decision, that the medical opinion on the base of which the decision was taken be submitted to an specialist medical review procedure.

[33] However, the present matter does not leave any doubt over the remit of the medical board to definitively determine the occupational nature of the disease of the Applicant. This remit was granted directly by the Secretary-General.

[34] Firstly, the specialist medical review procedure for which provision is made under Instruction 122/4 and led by the medical board concerned the medical opinion handed down by the Organisation's doctor. The latter had expressly concluded on the absence of any occupational disease pursuant to the mandate conferred thereunto by the Organisation.

[35] The medical opinion which amends the medical board pursuant to Instruction 122/4 was that of Dr X[21]. On analysis of medical documentation provided by the Applicant, Dr X had concluded that no doctors were consulted by the Applicant who were able to determine that there was a "real, certain and exclusive" link between the disease and the performance of duties or, at the very least, failed to objectively support this conclusion[22].

[36] In addition to the fact that the medical board was referred the revised medical opinion expressly concerning the "occupational" nature of the disease of the Applicant, the Organisation, moreover, expressly requested that the medical board expresses an opinion on this issue. Indeed, the mandate conferred by the Organisation to Doctor X, selected by experts of the Parties, is unequivocal. It was asked to decide whether or not the Applicant is affected by an occupational disease:

> It is incumbent upon you to now undertake, where applicable, the examinations, analyses and expert appraisals which appear necessary, assisted by doctors appointed by the Secretary-General and by Mrs X concerning the recognition, or otherwise, of an occupational illness as defined by article 17/1.12 c) of the Regulation applicable to officials of the Organisation. This article makes provision that "*an occupational disease which is attributable to the performance of functions within the Organisation shall be deemed to be a work accident ".*
>
> Paragraph d) of the same article makes provision that "*in the event of difficulty in interpreting principles set out in paragraphs (…) c) hereinabove, analogous reference shall be made to the French legislation applicable to (…) occupational diseases, and to relevant decisions of the French courts (…)"*

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21 Cf. R-061.

22 Cf. R-065.

In this framework, your opinion should concern the following issue:

-are the criteria set forth under article 17/1.12 c) and d) of the Regulation fulfilled in the present case so as the occupational nature of the disease declared by Mrs X be recognised?

[...]

For due and proper information, please find annexed herewith a copy of the provisions set forth hereinabove and the instructions pertaining to the definition of an occupational disease, as well as those pertaining to a specialist medical review procedure (Instruction 122/4 and following).[23]

[Italics and highlights in the text]

[37] However, the criteria set forth under article 17/1.12 c) and d) not only include the characterisation of the disease, but also the determination of the origin of the disease as an accountable factor related to the performance of duties within the Organisation. This latter condition is essential in recognition of an occupational illness.

[38] Since Dr X has not criticised the "diagnosis of nervous anxiety"[24] of the Applicant, but only its occupational nature, the medical board could not revise this medical opinion other than by itself reflecting on the occupational nature of the disease of the Applicant.

[39] Since the Organisation expressly conferred the task to the medical board of ruling on this question, could it then replace its own appreciation for that of the medical board? We are of the opinion that once the remit of the medical board has been acknowledged, the text of the Regulation is clear: the findings are "final, except where there is an obvious material error" (Instruction 122/4.5). The Secretary-General should then take a decision in light of the official concerned "in accordance" with this opinion (Instruction 122/4.6). The purpose of the redress in the specialist medical review procedure of Instruction 122/4 and the following instructions is clearly to rule on two irreconcilable opinions. It would run contrary to the sought objective to allow the Organisation to rule out conclusions.

[40] Consequently, in light of the clear terms outlined in the mandate and the pertinent articles in the Statutes, the medical board was competent to present definitive findings as to the occupational nature of the disease of the Applicant.

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23 R-095 and R-096.

24 Cf. R-065.

3. Obvious material error

[41] Instruction 122/4.5 makes provision that the findings of the medical board "are final, except where there is an obvious material error".

[42] We are well aware that the medical board handed down its findings in four lines, namely:

> Psychological issues outside of the table (occupational illnesses) presented by Mrs X which are responsive and not definitive, are attributable to working conditions (such as was outlined by the Administrative Tribunal of 6 May 2013).

[43] The medical board was referred the full medical file and also undertook an expert appraisal on the Applicant, officially summonsed for 16 April 2014. However, on the basis of all information presented, it concludes that the psychological issues are related to the employment conditions linking its findings to a direct and immediate fact which the Administrative Tribunal of the Organisation had previously concluded on the existence of the occupational disease of the Applicant. The only fact retained by the medical board, on the basis of all documentation received, was the ruling handed down by the Administrative Tribunal. It thereby consolidated its position by having reference to a preponderant, but completely false decision.

[44] There is no need here to review appreciation of the facts nor the unreasonable nature of factual determinations. It is not an appeal or legal review.

[45] The medical board based its conclusion on the observation of an inaccurate fact. The judgement indicated by the medical board does not exist.

[46] Decision No. 72 of which the Applicant only indicated paragraph 36 did however reject the claim made by the Applicant. The matter solely concerned reintegration to the post. It was never a question of an occupational disease. Observing that the Secretary-General had not committed an administrative error, the Administrative Tribunal did however believe that a minimum amount of 5,000 euros should be allocated to the Applicant in light of the anxiety and stress caused by the fastidious procedure having preceded the reintegration.

[47] Essentially, the medical board based its opinion on an inaccurate legal fact when it observed that the Administrative Tribunal had decided on the occupational nature of the disease of the Applicant. It would have been wise to ask for the full decision.

[48] It is highly plausible that this observation of an inaccurate fact largely influenced the medical board. Otherwise, why would it have opted to only include this fact in its submissions whilst it had access to abundant documentation? It results that a board responsible for responding to an issue on which a decision-making body has already made a declaration, will clearly be influenced. This is a fundamental error.

[49] The fundamental nature of this error explicitly results from the testimony of Dr X (exhibit 0-034): "I indicate that during the meeting of the medical board on 16/04/2014, Mrs X, in the middle of discussions concerning recognition of the pathology as an occupational disease, filed and served a document, annexed herewith, absent from the initial bundle provided to the medical board, which had a fundamental role in the notice handed down by Dr X, Chair of the board". It matters little insofar as the reference in the notice of the board to judgement No. 72 be accompanied by the expression "moreover" which would lead it to be believed that the board did not have reference to this judgement solely in support of its opinion.

[50] It is important to insist on the fact that the abridged document presented by the Applicant to the medical board essentially included paragraph 36, with the header of the Administrative Tribunal and the symbolic amount of 5,000 euros was erased.

[51] We are faced with an error of fact which does not imply any appreciation. We believe that this error may be classed as an obvious material error justifying intervention of the Administrative Tribunal.

[52] In the English version of the Statutes, the term "obvious material error" is used. If we had wished to refer to the material error as a simple error in wording or the calculation, we would have translated material error as "clerical error" or "administrative error". In considering the two versions of the Statutes, and the spirit governing its drafting, it should be concluded that the material error should include the notion of a typographical error or error in calculation in the material accuracy of facts which do not require any appreciation.

[53] By attributing the definition of material error to a factual error, the Administrative Tribunal is no exception.

[54] The ILO Administrative Tribunal indicated through case law those situations which lead to an entitlement to review its own decisions. Amongst these is the notion of "material error" which is expressly defined as an error of fact, compared to an error in appreciation of the facts:

> Other pleas in favour of review may be allowed if they are such as to affect the Administrative Tribunal's decision. They include an omission to take account of particular facts; a material error, i.e. a mistaken finding of fact which, unlike a mistake in appraisal of the facts, involves no exercise of judgment; an omission to pass judgment on a claim; and the discovery of a so-called "new" fact, i.e. a fact which the complainant discovered too late to cite in the original proceedings.[25]
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> [our underline]

[55] Several judgements handed down by the ILO Administrative Tribunal reiterated this rule by adding that the application for review should be presented within a reasonable deadline and that the error claimed should be fundamental, namely having an influence on the outcome of the challenged ruling[26].

[56] Consequently, judgement No. 1178 handed down by the ILO Administrative Tribunal analyses the material errors claimed by the Applicant in reviewing a previous judgement. The Tribunal concluded that the three claimed material errors are not errors since the Applicant contests the appreciation of the facts by the Tribunal rather than the truthfulness of facts forming the basis of this appreciation:

> 5. As to material errors he objects, first, to the finding that the only pressure applied was the setting of a time limit for signing the agreement on termination. What he is saying is not that there was any mistake over the length of time he had been given but that it was unreasonable. That is a matter of appraisal and so his plea does not afford admissible grounds for review.
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> [...]
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> Another material error he alleges was the statement that the Organisation's offer which led to the signing of the agreement was "gratuitous". But here again what he is alleging is misappraisal of the evidence, a plea that will not be entertained.

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[25] Judgement n°442 of the ILO Administrative Tribunal, para. 3.

[26] Cf. the judgements by the ILO Administrative Tribunal as follows: judgement n°1952, para. 3; judgement n°2586, para. 6; judgement n°2937, para. 3; judgement n°3197, para. 2; judgement n°3305, para. 3; judgement n°3385, para. 1; judgement n°3391, para. 2; judgement n°3392, para. 8.

> He takes issue with the view that his refusing the ILO's offer would not have made his position any worse. But even supposing the view was incorrect there would have been no material error about that. Again he is advancing the inadmissible plea of misreading of the evidence, and so it fails.[27]
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> [our underline]

[57] In judgement No. 3385, the ILO Administrative Tribunal recognised that it had committed a material error, but believed that it was not fundamental and did not therefore justify its intervention. The material error was to have concluded that the Applicant lived in the Netherlands whilst the proof revealed that this was not the case[28]. It is a clear example of a factual error.

[58] Without having specific reference to the Statutes of an Organisation, the ILO Administrative Tribunal rectified the findings of the medical board when it identified irregularities in the procedure followed or that the report "included an obvious material error or contradiction, neglected an essential fact in the matter or any obviously incorrect findings"[29]. This power of review is admittedly wider than "material error". However, material error is that which is an error of fact and not any "material omission", as described hereinabove. Consequently, judgement no. 1284 of the Administrative Tribunal annuls a medical report, annuls the decision of the Organisation based on this report and orders a further medical examination due to an error in the procedure followed combined with the following error in fact:

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[27] Judgement n°1178 of the ILO Administrative Tribunal, para. 5. For other examples of claimed material errors which are rather errors in interpretation of proof, see judgements of the ILO Administrative Tribunal as follows: judgement n°2059, para. 4 et 5; judgement n°2158, para. 5; judgement n°3391, para. 5 and 6.

[28] Cf para. 3.

[29] Judgement n°1284 of the ILO Administrative Tribunal, para. 4 : “The impugned decision cites the Advisory Board's recommendation, which purportedly rests on the Medical Board's findings as appended to the defendant's reply. The main issue the complainant raises is whether UNIDO was right to refuse him compensation on the grounds that his condition was not attributable to his work. On that score the Organization argues that the Tribunal may not review the Medical Board's findings. Precedent has it indeed that the Tribunal may not replace the Board's assessment of medical questions with its own. But it goes further than that: the Tribunal does have full competence to say whether there was due process and whether the medical findings show any material mistake or inconsistency, or overlook some essential fact, or plainly misread the evidence”. [our underline]

These criteria are also outlined in the following judgements of the ILO Administrative Tribunal: judgement n° 1752, para. 9; judgement n°2361, para. 9; judgement n°2537, para. 7; judgement n°2567, para. 4; judgement n°2578, para. 6; judgement n°2957, para. 16; judgement n°3045, para. 5.

> Worse still, some of the findings rest on allegations of fact that look highly dubious, even though evidence is lacking to declare them wrong. One is that the complainant's heart disease is endogenous. The doctors base it on his family history and in particular on his father's death by myocardial infarction and a sister's diabetes and high blood pressure. As the defendant does not deny, he revealed as early as 1970 that his father had been killed "in a battle" at the age of about 60 and that he had three brothers and two sisters in good health.[30].

[59] It seems to comply with established case law in international administration law to interpret the notion of a material error as including factual errors is a material inaccuracy in terms of the facts which do not imply any appreciation.

[60] In the circumstances in the case at hand, we can conclude that the material error of the medical board was fundamental and the findings should be ruled out.

[61] Consequently, the Secretary-General was correct to ratify the findings of the medical board of 18 April 2014 and not to conclude on the occupational disease on the faith of this notice.

[62] However, the entitlement of the Applicant to have redress to the specialist medical review procedure and to obtain a definitive medical opinion (provided that it does not include any obvious error) was recognised by the Secretary-General, who accepted the application.

[63] It is, therefore, necessary to establish a medical board presided by a new neutral expert so as to rule on the issue referred by the Secretary-General on 18 December 2013. The wording of the present decision should be issued to the new medical board.

[30] Judgement n°1284 of the ILO Administrative Tribunal, para. 5.

CONCLUSION

[64] **Hereby declares** that the Secretary-General did not need to comply with the findings of the medical board since they included an obvious material error.

[65] **Hereby orders** that the issue referred to the Secretary-General on 18 December 2013 be once more ruled upon by a medical board formed of doctors appointed by the parties and a neutral expert selected by mutual consent of the latters or, failing agreement, in line with the procedure set forth under Instruction 122/4.1.

Louise Otis
Chairman

Nicolas Ferré
Registrar