ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 21 May 2017

JUDGEMENT IN CASE No. 82

Mrs. AA
Applicant

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 82 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on 02 May 2017
At 2.30 p.m. in Château de la Muette,
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of :

Mrs. Louise OTIS, Chair

Mr. Luigi CONDORELLI

And Mr. Pierre-François RACINE

with Mr. Nicolas FERRE and Mr. David DRYSDALE providing Registry services.

The Tribunal heard:

Mr. Christophe COURAGE, counsel of the Applicant;

Mr. Remi CEBE, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General; He was assisted by Mr. Auguste NGANGA-MALONGA and Mr. Peik MAKELA, Legal Advisors,

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

It handed down the following decision:

Introduction

1. In its application for annulment and compensation lodged with the Registry on 9 September 2016, the Applicant requests that the decision of the Secretary-General of the Organisation for Economic Co-operation and Development (hereinafter referred to as the 'Organisation') of 10 June 2016 dismissing her application for recognition of occupational disease be annulled, that the occupational nature of her disease be recognised from 4 December 2012 onwards, and that her reinstatement be declared with effect from 19 June 2013 together with the associated financial awards, including the reinstatement of her pension entitlement and the payment of compensation for non-material damage and costs.

2. The Secretary-General of the Organisation submitted his comments on 14 November 2016.

3. The Applicant submitted a reply on 9 December 2016.

4. The Organisation's Staff Association submitted written comments in support of the Applicant's application on 15 December 2016.

5. At the request of the Secretary-General's representative, the Chair of the Tribunal granted an extension to 15 February 2017 of the deadline set for the Secretary-General to submit a rejoinder.

6. The Secretary-General of the Organisation submitted his comments in rejoinder on 14 February 2017.

7. The parties presented documentary evidence and did not call any witnesses. At the hearing, the Applicant produced a new exhibit, reference R-51.

8. It should be emphasised that this is the Applicant's third application concerning a sequence of events originally relating to her reassignment. The first application challenged the reassignment of 17 October 2011, the second sought the annulment of the refusal of recognition of the occupational disease issued by the Secretary-General on 4 August 2014 and, finally, the third application, which is the subject of this legal examination, relates to the second refusal of recognition of the occupational disease issued on 10 June 2016.

9. In the circumstances it is necessary to refer to the two judgments already given by the Tribunal in order to define the facts in the contentious situation and facilitate the contextual analysis.

10. The exhibits produced by the Applicant are identified under reference R and those produced by the Secretary-General under reference SG. Each exhibit is followed by a number indicating the order in which it was produced.

The facts

The reassignment of 17 October 2011

11. The Applicant took up her duties at the OECD on 1 November 1982. She held a number of different positions there[1] until 1 June 2007, when she was appointed Head of the Joint Pensions Administrative Section (hereinafter JPAS), a grade A5 post.

12. Following a decision of the Secretary-General issued on 17 October 2011, the Applicant was reassigned to the post of Head of the Translation Division (EXD/CSL/TRA), a post of the same category and grade as the previous one. The length of the confirmation period in this new position, as set out in Instruction 110/3.1, was set at three months from 1 December 2011.

13. On 13 December 2011, the Applicant filed a prior request seeking to obtain the withdrawal or modification of the Secretary-General's decision; in it, she alleged that as her previous post had been discontinued, the Secretary-General was unable to reassign her without following the established procedure, i.e. notice of termination and the discretionary exercise by the Applicant of the right to retire with notice instead of being reassigned. This prior request was rejected by the Executive Director on 16 January 2012, giving rise to the first application challenging the reassignment.

14. Ruling on this application, the Tribunal concluded that the Secretary-General had carried out the reassignment in accordance with the principle of lawfulness by exercising his power under Article 10/3 of the Regulations, since an equivalent post required a holder. The reassignment was carried out without any effect on the salary, allowances and benefits received by the Applicant.[2]

15. The Tribunal also emphasised that the Applicant's reassignment had not arisen in the normal course of the Organisation's activities; it occurred in the exceptional circumstances of the restructuring of the services provided by six (6) Co-ordinated Organisations. This reorganisation was the subject of agreement among the Organisations. The Applicant's

[1] Translation services as an accredited translator and human resources management
[2] OECDAT, Judgment 72, 6 May 2013.

reassignment to an equivalent post resulted from the specific needs of the Organisation in the context of structural changes.

16. In light of the foregoing, the first application was dismissed, although it was noted that administrative prevarication and the slowness of the process had caused the Applicant anxiety. She was awarded 5,000 euros in compensation.

The first refusal of 4 August 2014 to recognise the occupational disease

17. 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 returned to work. The medical certificates indicated exhaustion, severe depression, Hashimoto thyroiditis and severe sleep apnoea.

18. On 13 February 2013, the Organisation's doctor, LM, concluded that no element in the matter justified the conclusion that the Applicant's health condition resulted from the performance of her duties within the Organisation.

19. 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 an occupational disease as defined by the Regulations.

20. On 19 March 2013, the Applicant requested that the specialist medical review procedure be initiated before the medical board.

21. It was found on 19 June 2013, during the specialist medical review procedure, that the Organisation had terminated the appointment of the Applicant pursuant to Article 11 a) vii of the Regulations, which governs the case of the official who is incapacitated for service at the end of a period of non-activity. The Applicant, who had 30 years of employment, received an indemnity for loss of employment amounting to 172,000 euros and had her pension rights from 1 July 2013 confirmed.

22. Following the specialist medical review, the medical board concluded that the Applicant was suffering from an occupational disease attributable to her working conditions, on the following grounds:

> The psychological disorders presented by Mrs X, which are not included in the classification (of occupational diseases), and which represent a reaction and are not

definitive, are attributable to working conditions (as also ruled by the Administrative Tribunal on 6 May 2013).

Dr LM considers that the disorders suffered by the party concerned are certainly directly related, though not exclusively so, to working conditions, but the Court of Cassation has invalidated any requirement of exclusivity on the basis of established case law.

23. The Organisation refused to recognise the occupational nature of the disease, giving rise to the second application.

24. Ruling on the second application, the Tribunal held that the medical board had based its conclusion on an erroneous finding of fact, namely that the Tribunal had previously found that the Applicant had an occupational disease. In fact, it was the Applicant herself who, inadvertently and without acting in bad faith, had submitted an abridged document to the members of the medical board, as appears from Judgment 79[3]:

> '45. The medical board based its conclusion on a false understanding of the facts. The judgment referred to by the medical board does not exist.
>
> 46. On the contrary, Judgment 72, of which the Applicant quoted paragraph 36 only, dismissed the claim made by the Applicant. The point at issue in the case in question was solely a reassignment to a new post. It did not relate to an occupational disease in any way. While finding that the Secretary-General had not committed an administrative error, the Administrative Tribunal decided that a minimum amount of 5,000 euros should be allocated to the Applicant in light of the anxiety and stress caused by the laborious procedure that preceded the reassignment.
>
> 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 Applicant's illness. It would have been wise to ask to see the full decision.
> …
> 50. It should be stressed that the abridged document presented by the Applicant to the medical board essentially contained paragraph 36 together with the header of the Administrative Tribunal, and the symbolic award of 5,000 euros had been deleted.'

25. In its second judgment, the Tribunal held that an error of fact had been committed that did not involve any element of appraisal. It concluded that this error represented an obvious and decisive material error.

[3] OECDAT, Judgment 79, 7 August 2015.

26. Consequently, the Tribunal found that the Secretary-General was correct to refuse to ratify the findings of the medical board of 18 April 2014 and not to conclude that the Applicant's illness was occupational on the strength of this opinion.

27. However, the Tribunal held that the Applicant had the right to obtain a definitive medical opinion and ordered that the question of the Applicant's occupational disease, as submitted by the Secretary-General on 18 December 2013, be ruled on again by a medical board.

28. This brings us to the legal examination of the Applicant's third application.

The second refusal of 10 June 2016 to recognise the occupational disease

29. The documentary evidence presented by the parties reveals the following:

30. In accordance with Judgment 79, a new medical board was constituted by the parties. This board was composed of Dr AM, who had previously been designated by the Applicant for the first board, Dr FB, designated by the Organisation, and finally the medical specialist chosen by the parties' doctors to chair the board, namely Dr ND, head of the psychiatry department of the Hôtel-Dieu de Paris hospital.

31. In November 2015, the Applicant attended an individual medical consultation with Dr FB and then, on 27 January 2016, with the chair of the medical board, Dr ND.

32. According to Judgment No. 79, the medical board's report was supposed to rule again on the question submitted by the Secretary-General on 18 December 2013 in accordance with the procedure set out in Instruction 122/4.1. This question was worded as follows:

> 'It is now your task to undertake whatever examinations, analyses and expert appraisals you consider necessary, assisted by the doctors designated by the Secretary-General and by Mrs X, with regard to the recognition, or otherwise, of an occupational illness as defined by Article 17/1.12 c) of the Rules applicable to officials of the Organisation. This article makes provision that "*an occupational disease which is attributable to the performance of duties 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 (…)"*
>
> In this context, your opinion should concern the following issue:

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

[...]

For the sake of completeness, please find annexed herewith a copy of the provisions quoted above and the Instructions pertaining to the definition of an occupational disease, as well as those pertaining to the specialist medical review procedure (Instruction 122/4 and following). '[4]

[Italics and bold font in the text]

33. On 16 March 2016, a meeting of the medical board was held which was attended by all members. It was concluded by a majority that the Applicant's incapacity was greater than 25%, but was not an occupational disease caused directly and essentially by her usual work within the Organisation. Dr AM, who disagreed with this conclusion, did not sign the form[5].

34. The medical board chose to apply on an analogous basis French legislation on occupational diseases, taking the view that there were problems with interpreting the principles set out in the Instructions.

The Law

35. The Applicant alleges that the Secretary-General's decision is unlawful because it is vitiated by an error of law. It is based, she argues, on a medical opinion formed on the basis of an unlawful form; consequently, the medical report derived from this form is itself vitiated by an obvious error.

36. Moreover, the Applicant believes that an inaccurate detailed report from the Organisation was sent to the two (2) majority-voting members of the medical board, but not to her designated doctor, Dr AM [6]. As a result, she claims, the medical board's report is vitiated by an obvious material error.

The unlawful form and the application of French law

37. According to the Applicant, the definition of occupational disease is clear and constitutes a right, and the medical board did not need to refer to French law. Moreover, the standard form, on which the medical board's findings appear, violates the Regulations by setting

[4] Exhibit R-32.
[5] Medical board report, case 11071, 18 April 2016, Exhibits SG-3 and R-23.
[6] Correspondence and document for the doctors of the Medical Board, Exhibits R-46, R-47, R-48, R-49 and R-50.

additional conditions. Finally, it is claimed that the Applicant's illness is undeniably an occupational disease and should have been recognised as such.

38. The *Staff regulations, rules and instructions applicable to officials of the organisation* (hereinafter 'the Officials' Regulations') define work accident and occupational disease as follows:

    17/1.12

    a) An accident shall be deemed to be a work accident where it occurs as a result of, or in connection with, functions performed within the Organisation and causes physical injury to a serving official.
    b) …

    c) An occupational disease which is attributable to the performance of functions within the Organisation shall be deemed to be a work accident.

    d) In the event of difficulty in interpreting principles set out in paragraphs a) to c) hereinabove, analogous reference shall be made to the French legislation applicable to work accidents and occupational diseases, and to relevant decisions of the French courts...

39. The medical board's powers are defined in Instruction 122/4 of the Officials' Regulations. This states that where the Secretary-General takes a decision based on a medical opinion and where the official concerned disagrees with the opinion, the latter may request the specialist medical review procedure so that a new opinion can be issued either (1) in the form of a joint opinion of the two parties' doctors or (2) by a medical specialist chosen by the parties' doctors or by the Tribunal or (3) by a tripartite medical board.

40. Instruction 122/4.5 states that the findings of the medical board are final, except where there is an obvious material error. This concept was explained by the Tribunal in Judgment 79. The Tribunal ruled that this criterion refers not to an erroneous appraisal of the facts, but rather to a material inaccuracy concerning the facts which does not involve any appraisal. Thus the term material error covers 'both a typographical error or miscalculation and a simple error in the material accuracy of the facts which does not involve any appraisal'.[7]

[7] Supra, note 2, paragraph 52

41. In the present case, the opinion was to be given by the tripartite medical board composed of the medical specialist, the doctor designated by the Secretary-General and the doctor designated by the official. The medical specialist chosen by consensus by the two parties' doctors chaired the board.

42. The chair of the medical board, Dr ND, was able to inspect the Applicant's medical file. He also saw her for a professional consultation with a view to making his assessment.

43. The medical board found that the Applicant had indeed been incapacitated, but did not accept the diagnosis of occupational disease, i.e. a disease whose origin must be attributable to the performance of functions in the Organisation.

44. In order to reach this conclusion, the board, which took the view that there was a difficulty of interpretation in the case, referred to the French legislation and applied the two (2) criteria of the Social Security Code for diseases which are not officially classified as occupational diseases, i.e. (1) a direct and essential link between the illness and the person's habitual work and (2) a disability percentage of at least 25%. It should be noted here that the form transmitted by the Organisation may have led it to choose French legislation merely by virtue of its title, *Confirming the occupational nature of an unclassified disease*. This latter concept derives directly from the Social Security Code.

45. Before examining the two criteria chosen by the medical board, it is necessary to determine whether the French legislation to which the board referred was applicable here.

46. In the first place, it should be recalled that the common law on social protection in France applies to employees in the private sector, since civil servants benefit from a special regime; in light of this, the reference made by the Regulations to the French legislation on occupational diseases should be interpreted, in the absence of any statement to the contrary, as a reference to the regime defined by the Social Security Code and to the jurisprudence of the courts of the judicial system.

47. Secondly, the institution by the Organisation of a specific social protection scheme for its officials is taken into consideration by the Agreement between the Government of the French Republic and the Organisation signed on 24 September 1991, which appears in Appendix 1 to Annex XIV of the Regulations. This agreement stipulates to what extent the Organisation's staff, henceforth subject to 'an autonomous social protection scheme', are consequently exempt from 'compliance with the French Social Security scheme', and to what extent they remain subject to it and continue to benefit from it (Articles 1 to 4). It also stipulates the extent to which the Organisation, as an employer, is subject to 'French Social

Security legislation' (Article 5). The same expressions ('French Social Security', 'French Social Security scheme', 'Social Security legislation or regulations', etc.) are used in many other provisions of the Agreement, as well as in the Administrative Arrangement established by the parties on the same date for the application of the Agreement. As this is an agreement between a State and an international organisation, reference should be made to the principles of interpretation set out in the Convention on the Law of Treaties between States and International Organizations or between International Organizations established in Vienna on 21 March 1986.

48. Article 31 of this convention states that: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. '

49. On the one hand, as stated earlier, the ordinary meaning of the term 'French legislation on occupational diseases' is the legislation codified in the Social Security Code. It is nowhere stated that the intention of the parties would have been to give a special meaning to those terms.

50. On the other hand, the context in which this Agreement was concluded must be taken into account, namely the fact that it supersedes the previous Agreement of 5 March 1959 which provided for the application of 'French Social Security legislation' to the Organisation's staff. The constant element here is that the officials were, under the terms of this Agreement, affiliated to the general French social security scheme. These terms have not changed meaning merely because the Organisation has set up its own social protection scheme, which the 1991 Agreement takes into account and recognises as replacing the French Social Security scheme. It follows that in the context of these Regulations, the terms in question have retained the meaning they have had since 1959.

51. Let us now consider the two chosen criteria applied by virtue of the Social Security Code.

52. <u>The first criterion</u> - the existence of a direct and essential link - differs little from that already defined in Instruction 17/1.12 c): the attributability of the origin of the disease means that the direct and essential cause of the disease lies in the person's work within the Organisation, without any need to refer to French legislation if the matter can be resolved without further difficulty.

53. The expression 'originally' refers to the primary source of the event, to its decisive cause. The origin of the occupational disease must be directly and essentially attributable to the performance of the Applicant's functions within the Organisation. This is the criterion that

the medical board applied. If an occupational disease which originates directly and essentially from the performance of functions within the Organisation has grown worse or has caused deterioration resulting from the vulnerability that it originally caused, this does not alter its classification. It will remain an occupational disease.

54. Moreover, to a certain extent and depending on the particular circumstances of each case, the existence of a pre-existing, asymptomatic, personal health condition is not an absolute obstacle to recognition of an occupational disease, if it is found that the performance of the functions was the direct cause of the incapacity resulting in unfitness for work.

55. Finally, the medical board must be aware that the burden of proof for an occupational disease lies not with scientific certainty but with the balance of the evidence.

56. The second criterion, namely the percentage of permanent partial incapacity, was not specifically mentioned in Instruction 17/1.12 c) and might have constituted an additional condition not provided for in the text, but this point is irrelevant here, as the medical board found that the Applicant was suffering from a disability of more than 25%. The question is therefore purely academic.

57. Despite the confusion which the form may have caused by its title and the use of the conjunction 'and' instead of 'or', the fact remains that the medical board did not commit an obvious error, i.e. an error of fact not involving any appraisal, when it concluded that the occupational disease had not been caused by the performance of functions within the Organisation.

58. However, it would be good practice for the Organisation to transmit to the medical board a completely neutral form which (1) is simply entitled Request for medical opinion and (2) places Instruction 17/1.12 c) in a separate section from Instruction 17/1.12 d).

59. Finally, the Applicant claims that the Organisation transmitted a detailed confidential document on the Applicant's professional and personal situation without her designated doctor, Dr AM, receiving a copy of it.[8]

60. Dr FB, the Organisation's designated doctor, issued a certificate on 2 February 2017 stating that he had transmitted the document prepared by the Organisation to his two colleagues, Dr AM and Dr ND. She states that she posted the report on 3 January 2016. She adds that the contents of the report were discussed during the full session of the medical board.

[8] Letter of 3 August 2016, Exhibit R-46.

61. The detailed confidential document, which takes the form of a report, is a summary of the Applicant's career, the chronology of the events related to her alleged occupational disease and the context of her reassignment. Ten (10) annexes are attached to this document. These annexes are said to have been sent on 20 December 2015.

62. The process of transmitting an exhaustive summary statement to the neutral medical board responsible for evaluating, finally and definitively, whether the Applicant is suffering from an occupational disease should be confined to sending the medical file in its existing form. All that is really required is to notify the medical board of the question to be resolved in plain and simple terms, especially as the Organisation has already designated a doctor to the board who is familiar with the case.

63. That being so, it will be necessary to consider here the circumstances of the communication of this document and its contents, to decide whether an obvious material error was committed.

64. It is clear that the existence and contents of this report were discussed during the full session of 16 March which was attended by the three (3) doctors. Moreover, the Applicant was also made aware of the information in that report during her individual assessments by Dr FB and Dr ND.

65. The examination of this document mainly reveals an outline of facts already known to all the parties to the dispute: it is a summary of the case. The question of the professional assignment was the subject of an exhaustive judgment by the Tribunal, which refused to recognise the unlawfulness of the assignment. Payment of a symbolic sum of 5,000 euros was ordered in view of the stress and anxiety generated by this long process involving the six (6) coordinated organisations. Judgment 79 – which gave rise to the second medical board – is also quoted at length in the report. Judgments 72 and 79 were both in the hands of the members of the medical board.

66. More questionable is the reference to 'extra-professional factors' to be taken into account in the analysis of the Applicant's illness. Reference is made here to the tragic family circumstances – the death of her son – which were alleged to have caused the Applicant's illness. These facts had long been known to the doctor appointed by the Applicant, Dr AM, who had also commented extensively on them in several documents in order to downplay their importance with regard to the origin of the occupational disease. Given that these significant circumstances were close in time to the sequence of events surrounding the reassignment, it made sense for the board to be informed of them.

67. However, this last point calls for some clarification on the part of the Tribunal. The Applicant's psychological illness is an 'unclassified' disease under the Social Security Code. To be recognised as an occupational disease in accordance with Instructions 17/1.12c) or d), there must be a direct and essential link between the origin of the disease and the performance of functions within the Organisation. The present case does not concern a work accident that has caused the victim physical injury and whose occurrence is well defined in time and space.

68. This being so, the official's professional profile and an account of the development of the symptoms in light of the significant events that she experienced during the period of the onset of the disease can be regarded as an indispensable element of the medical board's evaluation.

69. Finally, it should be stressed that Judgments 72 and 79 were already in the hands of the medical board in order to make the case easier to understand. It was already stated in those judgments that the Applicant's new assignment involved the maintenance of her salary and allowances. The indication in the report of the amount of her pension or of her severance pay did not, in the Tribunal's view, constitute a significant point.

70. This being so, while noting that the transmission of detailed reports should be replaced by the transmission of the medical file and the existing documents attached to it, the Tribunal considers in this instance that the detailed report added no decisive element to the profile that was already familiar and had been presented by the two doctors designated by the Applicant and the Organisation. This is the third application concerning the reassignment and its alleged effects. Omissions, inaccuracies or superfluities could be corrected or qualified during both the full meeting and the individual evaluations.

71. Finally, the Tribunal considers that where (1) the medical board concludes by a majority of its members and not by unanimity or (2) the medical specialist concludes alone, it would be highly desirable for those conclusions to include 'in the form of a separate document, considerations and justifications of a medical nature to be disclosed only to the doctor designated by the Secretary-General and the doctor designated by the official'[9] so that the medical opinion of the majority or that of the medical specialist can be understood by the staff member and the Organisation according to the rule of procedural fairness. This opinion – which may be filed by either party – will also be of use to the Tribunal in its examination of

[9] Instructions 122/4.1

any obvious material error. If this is not done, the Tribunal may ask the chair of the medical board or the medical specialist to come and explain the medical opinion.

72. In the present case, in light of the foregoing, the Applicant has not shown that the Secretary-General's decision was unlawful and, consequently, the application is dismissed.

73. However, the new form and the detailed report required elaborate argumentation and the disclosure of documentary evidence. The Organisation must therefore pay costs in the amount of 5,200 euros.

FOR THESE REASONS, THE TRIBUNAL

DECIDES

The application for annulment and compensation is dismissed except in respect of costs which are limited to 5,200 euros.

All other claims in the application are dismissed.