ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 8 November 2021

JUDGEMENT IN CASE No. 99

AA
v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 99 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 11 October 2021

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of **:**

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

And Mr. Chris DE COOKER

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

The Tribunal heard

Mr. Jean Luc MATHON, counsel of the Applicant ;

Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General ;

INTRODUCTION

1. In her application for compensation lodged with the Registry on 5 February 2021, Ms AA (hereinafter the Applicant) requests that the decision of the Secretary-General (hereinafter the Organisation) of 2 November 2020 rejecting her prior request of 28 August 2020 for the withdrawal of a decision of the Organisation of 31 July 2020 be annulled, and that compensation totalling €751,751 be awarded to her. This compensation is broken down as follows: €15,000 for future health care expenses; €94,286 for loss of future professional earnings; €24,105 for income tax; €80,000 for professional impact (career damage); €44,880 for total temporary loss of functioning; €75,480 for partial temporary loss of functioning; €200,000 for physical and mental suffering; €80,000 for moral damages caused by the insurer HENNER; €108,000 for permanent loss of functioning; €12,000 for diminution of enjoyment of life; €3,000 for permanent disfigurement; €15,000 for procedural costs.

2. The Organisation submitted its comments on 9 April 2021.

3. The Applicant submitted a reply on 7 May 2021.

4. The Secretary-General submitted his comments in rejoinder on 10 June 2021.

5. All the documents cited and produced by the Applicant (annexes) bear the reference letter **R**, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter **O**.

6. The application hearing was held on 11 October 2021. Counsels for the Applicant and the Organisation were heard.

THE FACTS

7. After reviewing the documentary evidence, the Tribunal singles out the following facts as relevant:

8. The Applicant, who took up her duties at the Organisation in 1998, worked there as a social adviser at grade B5 in the Human Resources Management Service (EXD/HRM). At the time of the incident to which the facts relate, she was working in Boulogne-Billancourt, in the DELTA building leased by the Organisation to accommodate some of its staff.

9. On entering a lift on 14 March 2013, she suffered a fall due to a difference in level between the landing and the floor of the cabin. The fall resulted in a ruptured left Achilles tendon, necessitating initial surgery on 15 March. Due to a serious infection, a further hospitalisation took place from 9 to 24 April 2013.

10. On 15 July 2013, the Organisation recognised that the Applicant's fall constituted a work accident, and therefore kept her on full pay while allowing her to benefit from 100% coverage of the health care expenses related to the consequences of the accident.[1]

11. Having been determined for the first time on 4 March 2015 by a doctor designated by the Organisation, and then for a second time, following a challenge by the Applicant and after expertise medical opinion had been sought, on 21 September 2017 with sequelae and continuation of care for one year, the date on which the Applicant's state of health had stabilised was determined as 13 March 2018 by the medical and invalidity boards. They found that she was suffering from total permanent disability with permanent sequelae attributable to the work accident and that she was entitled to an occupational disability pension under Article 14 § 2 of the Co-ordinated Pension Scheme Rules.

[1] Document R-1.

12. Following the opinion issued by these boards, the Organisation decided by letter dated 22 March 2018 to award the Applicant a disability pension from April 2018, representing 70% of her final remuneration, as well as, in accordance with Rules 17/1.11 a) and 17/1.14 c) of the Staff Regulations, a capital sum corresponding to five years' remuneration, i.e. €387,858.[2]

13. In a letter dated 12 March 2020 addressed to the Secretary-General, the Applicant's counsel sought additional compensation for alleged inexcusable negligence on the part of the Organisation. The rejection of this claim at all procedural stages led to the submission of the application to the Tribunal.

14. The Secretary-General argues in defence that the Applicant has already been properly compensated. She received €850,000, i.e. €330,000 in full maintenance of her remuneration for five (5) years from March 2013 to March 2018, and a disability pension, since April 2018, at the higher rate of 70% of her final salary, i.e. a monthly sum of €4,360.46, and lastly the payment of a capital sum corresponding to five (5) years of emoluments for the sequelae of the work accident, i.e. €387,858. The Applicant also received 100% reimbursement of health care related to the work accident until the date on which her state of health was deemed to have stabilised.

15. His principal plea is that all of the Applicant's claims should be dismissed as inadmissible; in the alternative, he requests the dismissal of the claims for reimbursement of future health care costs and compensation for moral damages attributed to the insurer Henner as inadmissible, and of the other claims as unfounded.

16. In her rejoinder, the Applicant maintains all her claims, with the exception of those relating to procedural costs, now assessed at €15,000 and, in the alternative, requests

[2] Document R-15.

the appointment of an expert to quantify the heads of damage not covered by the compensation which was granted to her.

17. The Secretary-General submitted a surrejoinder dated 10 June 2021 maintaining his observations in defence.

EVIDENCE

18. In support of her claim, the Applicant produced documentary evidence but did not call any witnesses.

19. The Organisation also submitted documentary evidence. In addition, it obtained the Tribunal's permission to present four (4) written testimonies as evidence, from BB, Mr CC, Ms DD and Ms EE. The filing of these written testimonies was made subject to cross-examination by the Applicant. On 21 September 2021, Maître Mathon, counsel for the Applicant, decided not to cross-examine the witnesses.

ANALYSIS

1. ADMISSIBILITY

20. The Tribunal must consider whether the application is admissible *ratione temporis*. The Secretary-General argues that seven years elapsed between the accident and the Applicant's initial request. He concludes that the application was filed 'at a time that was clearly late'.

21. It is beyond dispute that the application in no way seeks, either directly or indirectly, to annul old decisions which have become definitive because their legality was not challenged within the time limits set by the Staff Regulations. It is in no way disputed that the Applicant obtained compensation in accordance with the provisions of the Staff Regulations, as regards both the rate of her pension and the capital sum paid to her.

However, she maintains that this compensation does not remedy all the damages caused to her by the accident that she suffered as a result of the Organisation's negligence.

22. The question before the Tribunal is not whether, in general, officials or former officials derive from the Staff Regulations the right not only to appeal for annulment of decisions but also to claim compensation in accordance with specific procedural arrangements. It is recognised that this right exists where the alleged damage is based not on a contested decision of the Organisation, but on negligent behaviour by the Organisation unrelated to any decision. A claim for compensation for a work accident or occupational illness on the basis of inexcusable negligence on the part of the Organisation is a case in point[3].

23. As compensation is being claimed in addition to that already awarded to the Applicant in accordance with the Staff Regulations, for damages not covered by the latter, the starting point of the period within which action had to be taken must be set no earlier than 22 March 2018, the date on which the Organisation sent the Applicant a letter informing her of the definitive financial terms (disability pension and capital sum) under which she would be compensated under the Staff Regulations, Rules and Instructions. It would undoubtedly have been useful, in this case, to request an advisory opinion from the Joint Advisory Board (JAB).

24. The time limit for acting is two years, with reference to the limitation period set by Rule 17/8 of the Staff Regulations for claims against the Organisation arising from the application of the Staff Regulations, Rules and Instructions.

[3] Judgment No 68 of the Tribunal.

25. The interruption of the limitation period follows from the application of Rule 17/8.2 of the Staff Regulations, which states: 'The limitation shall be interrupted by a claim in writing submitted before the expiry of the period of limitation'.

26. In the present case, the Applicant submitted, on 12 March 2020, a claim in writing for additional compensation, which therefore interrupted the limitation period in accordance with the rules. As all other time limitation conditions are satisfied, the Tribunal finds that the application is admissible.

2. THE MERITS OF THE CASE

27. At this stage, it is necessary to clarify what legal criteria must be applied to decide whether the Organisation has, as the Applicant maintains, committed some fault or breach that would justify compensation in addition to that awarded to her under the Staff Regulations.

28. The case law of international administrative tribunals recognises the right for the victim of a work accident to seek compensation in addition to that provided for by the staff regulations, even if these specify that the regulatory indemnities are the only reparation to which the person concerned is entitled with regard to any claim for compensation based on his or her status as an official.[4] This right is recognised when the organisation has not taken reasonable measures to avoid damage the risk of which is foreseeable: such negligence constitutes a breach of duty because international organisations have a duty to provide their officials with a safe and appropriate environment, and their officials have the right to demand that their safety and health be protected by appropriate measures.[5]

[4] see ILOAT Judgment 4222 of 10 February 2020.
[5] see ILOAT Judgment 2804, consideration 25.

29. This Tribunal recognised in two judgments, the first of which dates from 20 years ago, the possibility for the victim of a work accident who has received the regulatory compensation to seek additional compensation on the basis of inexcusable negligence on the part of the employer. [6] However, in neither of these two cases did the Court specify any of the conditions likely to justify compensation for damages not covered by the work accidents scheme.

30. It has long been recognised by the jurisprudence of the international tribunals that an official of an organisation may seek compensation for damages for which no reparation is provided by the staff regulations under which he or she falls. This is the case, for example, in the event of culpable negligence on the part of the employer. According to the established case law of the Administrative Tribunal of the International Labour Organization (ILO), culpable negligence is understood to mean the failure to take reasonable measures to avoid damage the risk of which is foreseeable. Liability for negligence is incurred when the failure to take these measures results in damage that was foreseeable.

31. The time has come to harmonise the jurisprudence of this Tribunal with that of the international tribunals. Consequently, the Tribunal will accept the concept of negligence constituting a fault or breach as the central criterion for the compensation additional to that already awarded under the Staff Regulations.

32. The Tribunal considers it preferable to use this concept as an analytical approach rather than to rely solely on French law and the jurisprudence of the French courts, which the Staff Regulations do not prescribe in this matter.[7]

[6] see Judgment 35 of 21 January 1999 on occupational disease and Judgment 68 of 15 March 2011 on a work accident.

[7] Reference to French legislation and to the jurisprudence of the French courts is prescribed by the Staff Regulations solely for the definition of a work accident 'In the event of difficulty in interpreting' (Rule

33. The onus is on the person claiming additional damages from the Organisation to present clear evidence of negligence constituting a fault or breach.[8] This evidence will take the form of written or oral testimony or documentary evidence.

34. The Tribunal will first examine whether there was negligence on the part of the Organisation justifying compensation in addition to that awarded to the Applicant under the terms of the Staff Regulations. In other words, was the Organisation aware of the danger presented by the difference in level between the landing on the 6th floor of the Delta building and the lift cabin and, if so, did it reasonable steps to prevent an accident?

35. The relevant facts are as follows. The Delta building was not owned by the Organisation, which leased part of it from an outside company. Responsibility for the management and maintenance of the premises, in particular the lifts located in the common areas, lay with the lessor, and the maintenance of the lifts was carried out by the company Schindler. It is true that the report drawn up by Schindler on 27 March 2014, following an inspection carried out on 15 and 16 March in response to a request from the lessor, which had been duly informed by the Organisation of the accident on 15 March, does not rule out the possibility that an 'intermittent' malfunction occurred on 14 March. However, these lifts were the subject of monthly reports and the maintenance log for the disputed lift shows that it had been checked on 12 March 2013, two days before the accident, without any anomalies being detected.

36. The Applicant maintains that on 14 March the lift had been out of order for several hours and that the problem was reported to the health and safety committee at around midday. In particular, the Organisation's Chief Medical Officer, and Ms DD, who at that time was in charge of a project relating to medical insurance for former officials of the

17/1.12 d) and of the rate of permanent incapacity (Rule 17/1.4). In the present case, there is no debate on these two points.

[8] see ILOAT Judgments 2804, already mentioned, 3215, consideration 12, and 3733, consideration 12.

Organisation, are said to have assured the Applicant that they had reported this problem to the Organisation's technical services on the same day and informed several members of their respective teams about it. The Applicant does not provide any evidence to support her assertions.

37. On the contrary, Dr BB attested on 7 April 2021 that he had certainly not assured the Applicant that he had reported a problem on 14 March 2013, as he was on annual leave from 9 to 17 March.[9]

38. A colleague of the Applicant, Ms EE, wrote to Dr BB on 6 April 2021 stating that on 14 March 2013 she and the Applicant left the office between 8 and 8.30 pm, and that she entered the lift before the Applicant without any problem 'without realising that there was a difference of level between the 6th floor landing and the lift shaft, otherwise I would have warned AA'.[10]

39. However, it appears from Ms DD's written testimony dated 8 April 2021 that on the day of the accident, she used one of the lifts on the 6th floor at around 4 pm. She was looking back and talking to a colleague, so she struck the landing with her foot and tripped without falling. Leaving the lift on the ground floor, she informed the OECD reception officer of the incident.[11]

40. According to the written testimony of 8 April 2021 of Mr CC, of the Site Maintenance Unit within the Organisation's Buildings, Logistics and Services Department, 'searches in the archives of (my) unit have not revealed any sign of any accident report on this Delta lift group on 14 March 2013 prior to the Applicant's accident at 8.30 pm'.[12]

[9] Document 10 attached to the SG's observations in defence.
[10] Document 11 attached to the SG's response.
[11] Document 8 attached to the SG's observations in defence.
[12] Document 9 attached to the observations in defence.

41. The Organisation adds, first, that the reception officer informed by Ms DD of this incident reported it to the fire safety control post and, second, that a member of this post, who was an employee of a company that provided services to the lessor, went to check the installations.

42. In summary, it is accepted that at around 4 pm on 14 March 2013, an incident involving Ms DD took place at the entrance to a lift on the 6th floor of the Delta building and that this was reported to an OECD reception officer. The Organisation's assertions that the building's safety control post was informed of this incident and that an official from this control post went to the scene without finding any problem are not called into question by clear evidence.

43. Finally, it is not disputed that as soon as the Applicant's accident became known, the Organisation took the necessary steps with the lessor to prevent any further accident.

44. In these circumstances, the Tribunal considers that there is no proof that the Organisation committed a fault or breach justifying the award of compensation in addition to that granted to the Applicant.

45. It is now necessary to examine the other basis for the claim for compensation. The Applicant contends that the Organisation was responsible for the procrastination of the insurance company, Henner, and of its medical advisers, and that she suffered significant moral damage as a result.

46. It is recalled at this stage that Henner manages the medical insurance scheme for the Organisation's staff ('OMESYS') on its behalf. In accordance with Article 9 of Annex XIV to the Staff Regulations, which regulates the conditions for reimbursement of health expenses pursuant to Article 17 a) of the Staff Regulations, Henner acts by delegation from the Secretary-General. It follows from this situation that the Organisation may be

held liable in the event of a fault or breach committed not only by its officials but also by its delegatee.

47. The Organisation maintains that the Applicant's claims based on the insurer's procrastination are inadmissible, because of her failure to contest the decisions taken by Henner in accordance with the means and time limits for appeal set out in Regulation 22 of the Staff Regulations. Consequently, it argues, these decisions, being more than five years old, have become definitive.

48. The Tribunal notes that the Applicant is in no way seeking to challenge certain decisions taken by Henner concerning the Applicant. She is seeking compensation for the specific damage allegedly caused by the attitude of the insurer Henner. Consequently, her claims cannot be regarded as out of time and consequently inadmissible.

49. It is clear that the Applicant has gone through some extremely painful physical and psychological ordeals since the accident of 14 March 2013. She has undergone several operations, including two emergency procedures, all under epidural anaesthesia; in 2013 she feared that all or part of her left leg would be amputated as a result of sepsis; she pursued with determination intensive and painful rehabilitation programmes which required bariatric surgery beforehand. While her condition could be regarded as having stabilised in 2018, she still has significant physical and psychological sequelae from the accident and its aftermath.

50. However, the Applicant's allegations regarding the quality of care received at Hospital X should be highlighted. She attributes part of her difficulties with healing and recovery to the treatment received at this hospital. She emphasises that her nosocomial infection was probably contracted during the first operation, as the assistant surgeon reportedly told her.

51. In her application, she recounts the long waits experienced before the operations (12-15 hours), the postponement of the application of a cast due to lack of time, the interruption of continuity of care during the strike at the analytical laboratory, the belated treatment of her infection, the delay in antibiotic treatment and the lack of nurses during the Easter break. These events certainly considerably aggravated the traumas experienced by the Applicant.

52. In such a context, the Applicant had hoped that the Organisation would be more concerned to address the shortcomings that she was already pointing out during the hospitalisation and the long stabilisation process, which took five years and from which she still has significant sequelae.

53. However, the Organisation cannot compensate for shortcomings and deficiencies which are not its own doing. In addition, the insurer is not required to comply immediately with every request for reimbursement of an expense, even if it is medically justified. Moreover, timing may be justified both by medical demand and in light of the rules of the Omesys scheme.

54. The fact remains, however, that certain decisions played a part in increasing the difficulties experienced by the Applicant, especially in connection with the decision made by the Organisation that her condition had stabilised by March 2015, when she was in the midst of the rehabilitation process. The Applicant had to challenge this decision and it was necessary for the Organisation to appoint a new medical expert to conclude that stabilisation had not been achieved in 2015, nor in 2016 or 2017, and in fact not until 2018.

55. Furthermore, it appears that a medical expert designated by the Organisation behaved towards the Applicant in a way that she felt obliged to complain about to the Organisation.[13]

56. From an administrative point of view, the Applicant had great difficulty in getting the Omesys manager to admit: a) the causal link between the work accident and the nosocomial infection, b) appropriate payment of the costs of private nursing in 2013 and 2014, and c) the link between the accident and bariatric surgery in 2014.

57. In view of the Applicant's special case, the Tribunal considers that the Organisation should have shown her more solicitude. Consequently, the Tribunal awards her €15,000 in compensation for moral damage.[14]

58. As her application is partly successful, the Applicant is entitled to costs, which the Tribunal sets at €5,000.

FOR THESE REASONS, THE TRIBUNAL

1. **DECIDES** that the Applicant's application is admissible
2. **DISMISSES** the claim for compensation presented by the Applicant except for an amount of 15,000 euros to be paid to her by the Organisation for moral damage.
3. **SETS** the costs awarded to the Applicant's counsel at 5,000 euros.

[13] Document R-28.
[14] ILOAT Judgment 4222, already cited, § 19.