UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/090
Judgment No.: UNDT/2015/066
Date: 24 July 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LACA DIAZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

judgment. The parties thereafter confirmed that the matter could be decided on the papers, the Respondent alone filing closing submissions.

5. For ease of reference, the facts, agreed upon by the parties in the joint statement, are reproduced below, with footnotes italicized and in parenthesis:

> 2. On 2 October 1991, the Applicant was injured while performing duties on behalf of the United Nations. He injured his lower b4 0sD18.05 0 [illegible]

7. On 23 July 2012, the Secretary of the ABCC referred the Applicant's claim to the MSD for consideration of permanent loss of function and other matters related to sick leave and disability considerations.

8. On 14 November 2012, the MSD determined that the Applicant reached MMI on 23 July 2012. *(Although the Applicant asserts that he has just learned of this determination.)* The MSD also determined that the Applicant's loss of function was permanent and assessed the loss at percent of the whole person as of 23 July 2012. MSD based its assessment on the AMA Guidelines. *(The AMA Guidelines are considered the industry standard for calculating permanent loss of function.)*

9. On 18 December 2012, the Applicant's claim was presented to the ABCC at its 461st meeting. *(The ABCC considered the Applicant's claim for compensation under Appendix D at its 367th, 431st, 433rd, 439th, and 445th meetings, wherein the ABCC recommended that the Applicant be granted special sick leave credits for lower back injury sustained on 2 October 1991. Special sick leave is not an issue or consideration in assessing permanent loss of function.)* The ABCC recalled that on 3 August 1995, the Secretary-General determined that the Applicant's injury was found to be service-incurred and that the Applicant was granted special sick leave credits by decisions dated 17 May 2008 and 6 July 2009. The ABCC considered the MSD's reports and advice, based on the AMA Guidelines, that the Applicant sustained a permanent loss of function of 20 percent of the whole person due to his injury and recommended that the Applicant be awarded compensation in the amount of USD28,748.00, which it calculated to be equivalent to 20 percent permanent loss of function of the whole person as provided for in Article 11.3 of Appendix D. The ABCC based its calculation of the award using the pensionable remuneration scale in effect on the date of the injury.

10. On 19 February 2013, the Controller, on behalf of the Secretary-General, accepted the ABCC's recommendation. On 7 March 2013, the Secretary of the ABCC informed the Applicant of the Secretary-General's decision to award him compensation in the amount of USD28,748.00, and subsequently paid the award. On 6 June 2013, the Applicant filed an appeal with the Dispute Tribunal.

Agreed Matters

11. The parties are agreed that the basic calculation for compensation under Appendix D, Art. 11.3, involves multiplication of two numbers:

> (a) The percentage of permanent loss of function of the whole person; and
>
> (b) "Twice the annual amount of the pensionable remuneration at grade P-4, step V" (see "Schedule" under Appendix D, Art. 11.3(c)).
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> 12. The parties are agreed that the percentage in this case is 20%. The disputed amount for the basic calculation is the pensionable remuneration number.
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> 13. The pensionable remuneration number(s) are found in Appendix A to the Staff Rules.

Issues

6. There is no dispute in this case regarding the Applicant's eligibility for compensation for permanent loss of function, or the degree of his permanent impairment. Indeed USD28,748.00 has already been paid to the Applicant as compensation, and the Respondent has tendered a further sum of USD1,494.80 (see the Respondent's Additional Submission dated 22 June 2015). The issue in the present case concerns the applicable salary scale that the Organization should use in calculating the award for compensation under Appendix D to the Staff Rules for the work place injury suffered by the Applicant in 1991, from which injury he reached maximum medical improvement ("MMI") in July 2012.

7. The Respondent contends that the compensation should be based on the P-4, step V salary scale at the time of the date of injury, i.e. 1991, whilst the Applicant contends that the applicable scale should be that at the date of payment. Alternatively, the Applicant contends that if the date of injury is used, he was in any event paid the

extraneous factors, the Tribunal will not overturn a factual determination or substitute its judgement for that of the ABCC (citing UN Administrative Tribunal Judgment Nos. 1133, *West* (2003) and 570, *Roth* (1992); and *Shanks* UNDT/2011/209).

8. The core question is succinctly addressed by the parties as part of the issues in dispute in their 20 September 2013 joint statement:

> 14. The Applicant asserts that no policy has been published stating that the Appendix D, Art. 11.3 should use the injury date.
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> 15. The Respondent asserts that Appendix D is the published policy. Appendix D to the Staff Rules requires the use of the salary scale in effect on the date of injury to calculate the compensation payable under Article 11. This was the intent of the drafters, as confirmed by the legislative history of Appendix D, including the report of the [Consultative Committee on Administrative Questions ("CCAQ")] dated 14 May 1952 and report of the ABCC dated 24 June 1968. The ABCC has consistently applied the policy of using the date of injury for its calculations since the adoption of Appendix D.
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> 16. The Respondent asserts that there is no policy instrument that would permit the Organization to use any other date for calculation of awards, or would permit the payment of interest.
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> 17. The Applicant agrees that Appendix D was published. He asserts that Appendix D requires the use of a different date (the scale in effect at the claim or judgment date, and no later than the MMI date). With respect to authority to pay interest, the Applicant relies upon the cases cited in the Application and the policies cited therein.

9. The Respondent argues that the determination that the amount of the award is based on the date of accident or date of disability has historically been applied consistently and uniformly by the ABCC. The Respondent avers that, at its 151st meeting in 24 June 1968 in reviewing the policy rationale, the ABCC's report stated that "compensation payments based on such

provided a fixed schedule of lump-sum benefits expressed in dollars. The fixed lump-sum in 1963 was adjusted upwards by about fifty percent, and then by 1976, when it was evidently recognized that constant adjustments would be required, the P-4, step V pensionable remuneration scale was introduced without debate. Therefore, any deflating compensatory award would militate against this clear intention, contending also that it is for this reason the United Nations Appeals Tribunal ("UNAT") has set non-pecuniary damages based upon salary scale at the time of judgment rather than at the earlier time of the breach of a staff member's rights.

11. In the closing submissions, the Respondent further contends that there is no legal basis for the Applicant's claim for interest, or for the delay in considering his ABCC claim. The Respondent contends that "the applicant continued to receive his salary, benefits and entitlements during the 21 years since his injury …" (para. 3 of Respondent's closing statement). Further, the Respondent claims that the Organization does not award interest on ABCC claims, and that "since the date of injury, the Applicant has been paid his salary, has been granted sick leave credits, and the Organization has paid for his medical expenses" (para. 8). Also that "the ABCC could only consider the Applicant's request once he reached MMI and filed his claim, which he did 21 years after the date of injury".

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Summary judgment

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whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in multiple jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims, on the merits, and is not a procedure normally used for disposal of matters on receivability or admissibility. In other jurisdictions it may be otherwise. Whatever nomenclature is given to the process is, to my mind, not material, as the Tribunal has dealt with matters summarily by striking out, or dismissal, on the grounds of vexatiousness, frivolity, abuse of process, manifest inadmissibility, failure to disclose a cause of action, and so on. In the instant case, the Tribunal found that, whilst the facts appeared to be common cause, the issues of law are complex and diametrically opposed. The legal issues are not straightforward nor clearly in favour of the moving party, the Applicant. This is illustrated by the fact that the Respondent requested leave to file further submissions following the Applicant's motion for summary judgment. In this regard, the legal positions of both parties were not substantially supported by appropriate legal authorities. Moreover, the legal issues appear to be new ground not previously traversed, and required a considered and reasoned analysis.

14. The Tribunal also found it necessary to seek clarification from the parties as to the exact details of the documents they relied upon to support their submissions regarding the correct quantum to be awarded to the Applicant, as there appeared to be some discrepancies. The parties were ordered to attend a case bpurosed A epplicant'clarifiise that,the epplica4.6(a4.6(n.8(a's mubm)8.26issi)5i)-1.4(sn tisthat,]TJ12 . 0 TD0 Tc.3136 Tw[(ethe)elievnt'cper

out in ST/IC/1990/45, effective 1 July 1990. The Respondent submitted that the applicable pensionable remuneration scale is set out in ST/IC/1990/76 (Pensionable remuneration for staff in the professional and higher categories and for staff in the field service category), effective 1 November 1990. Given the need to resolve the matters discussed above, the Tribunal denied the motion for summary judgement.

Applicable and relevant law

15. It is the professional and ethical duty of Counsel to assist the Tribunal by filing precise pleadings and annexes. As some of the annexes or documents filed by the parties were incomplete (in particular the Respondent had not explicitly identified the applicable instruments relied upon in the submissions, nor identified the name of, or the subject matter covered by, the instruments annexed to the reply), the Tribunal directed the parties to attend the CMD on 18 June 2015 with full and complete copies of all documents referred to or relied upon in their submissions—see para. 5 of Order No. 110 (NY/2015), dated 9 June 2014. At the CMD, a composite bundle of approximately 1,000 pages, including legal authorities, was submitted by Applicant's Counsel. Counsel for the Respondent was still awaiting confirmation from the United Nations Chief Executives Board in Geneva as to whether the documents submitted as annexes to the reply were complete copies, and confirmed subsequently via email dated 19 June 2015 that "the copies of the CCAQ documents attached as annexes R/5 and R/6 to the Respondent's Reply are complete copies …". The Respondent having confirmed that the documentation filed was complete, the Tribunal proceeded to render its decision, the parties having agreed that the matter can be disposed of on the papers before it.

16. The Tribunal will now deal with the consideration of the legal arguments. ST/SGB/Staff Rules/Appendix D/Rev.1/Amend.1 (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) of 8 January 1976 states as follows (emphasis added):

Section II. Principles of award and general provisions

Article 2. Principles of award

The following principles and definitions shall govern the operation of these rules:

…

(e) "Pensionable remuneration" shall have the meaning assigned thereto under article 1.3 of the Regulations of the United Nations Joint

		grade P-4, step V
(ii) Arm	(at shoulder)	60% of (i)
	(at or below elbow)	57% of (i)

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The total compensation may not in any case exceed that under (i) above. In the case of General Service personnel, manual workers and locally recruited mission personnel whose salaries or wages are fixed in accordance with staff rules 103.2, 103.3 or 103.4, appropriate

How should the phrase "the pensionable remuneration at grade P-4, step V" in Appendix D of the staff rules be interpreted?

18. The Respondent submitted in his closing statement that "[t]his is not a case where the policy is silent as to which salary scale to use for computation of an award for permanent loss of function under Appendix D." This averment is clearly erroneous. Article 11.3(c) is ambiguous. Pensionable remuneration scales are adjusted regularly and there is no explicit statement or guidance in Appendix D to indicate the relevant or operative date for assessing the pensionable remuneration at grade P-4, step V in any given case.

Legislative history

19. The Respondent submits that the "legislative history of the Organization's social security plan" demonstrates the intent of the drafters of Appendix D to the staff rules, i.e., that compensation is to be awarded based on the pensionable remuneration scale in effect at the date of the injury or accident. Reference is made to three documents—Annexes R/5, R/6 and R/8 to the Respondent's reply—to support this interpretation of art. 11.3(c) of Appendix D to the Staff Rules. Before examining the submissions of the Respondent on this issue, the Tribunal will briefly outline the evolution of Appendix D and, in particular, the provisions dealing with permanent loss of function, also referred to in earlier documents as permanent partial disability.

A. The evolution of Appendix D to the Staff Rules

20. Provisional rules governing compensation to staff members in case of death, injury or other disability attributable to service ("May 1952 provisional rules") were attached to the report of the twelfth session of the CCAQ dated 14 May 1952 ("May 1952 CCAQ report") along with a report of the CCAQ's Working Group on Social Security Provisions ("WGSSP") ("WGSSP report"). The relevant provision on permanent loss of function from the May 1952 provisional rules (art. 10.2) stated (emphasis added):

today (see para. 16 above) except for art. 11.3(c), which was identical to the schedule set out in art. 11.2 of the May 1953 provisional rules, except with higher fixed lump-sum dollar amounts. For example, the compensation award for loss or total loss of use of an arm at or above the elbow was increased from USD10,500 under the May 1953 provisional rules to USD15,750 under the 1963 provisional rules. Article 11.3 on permanent loss of function remained unchanged when Appendix D to the Staff Rules was next amended by ST/SGB/Staff Rules/Appendix D/Rev.1 dated 1 January 1966 ("1966 rules").

24. According to a Review of Compensation Benefits by the ABCC dated 24 June 1968 ("1968 ABCC report"), at "an earlier meeting" of the ABCC "[i]t was suggested by the Chairman [of the ABCC] that [the existing schedule], which is based on an assessment of the 'whole man' at USD30,000, was no longer adequate in terms of present day level of salaries, costs, etc.". It is clear, therefore, that at this time the ABCC itself was already cognizant of the issue of adjusting lump sum awards to reflect the economic realities of the time at which they were awarded, and instructive that the "present day level of salaries, costs etc." was a consideration . It is likely that this was the reason for revising the awards upwards in 1963. However, five years later, the new awards were already considered inadequate by the Chairman of the ABCC.

25. In 1976, the Organization amended art. 11.3(c) of Appendix D to the Staff Rules through ST/SGB/Staff Rules/Appendix D/Rev.1/Amend.1. The amendment to art. 11.3(c) indexed lump sum payments for permanent loss of function to pensionable remuneration at grade P-4, step V. As pensionable remuneration rates are regularly adjusted, this amendment eliminated the need for continued revision of lump sum dollar amounts. As the Applicant put it in the application, the indexing of awards to pensionable remuneration amounts to a "built-in adjustment mechanism".

B. Documents referred to by the Respondent

26. The Respondent states in the reply that "[t]he CCAQ extensively discussed

Tribunal to determine the issues in this case because it relates to an alternative compensation scheme that was never adopted. Lump sum payments remain part of the compensation scheme under art. 11.3(c) of Appendix D and considerations such as the age, occupation, and wage of the injured staff member prior to injury have never been part of the formula for calculating such awards.

C. Conclusion

31. The Respondent's reliance upon the legislative history of Appendix D to support the submitted interpretation of art. 11.3(c) is misguided. When read in context, and taking into account the evolution of Appendix D over time, none of the three documents referred to by the Respondent supports the interpretation that pensionable remuneration is to be assessed at the date of injury.

Past practice

32. The Respondent submits that the ABCC's "consistent practices since the adoption of Appendix D has been to use the pensionable remuneration salary scale in effect on the date of the injury or the date of the accident" without adjustment. In support of this contention, the Respondent included in evidence (Annex R/7 to the reply) an email from the Secretary of the ABCC dated 21 June 2013, which stated as follows:

> The practices and procedures which I describe below have been applied consistently and uniformly, without exception, during my two-year tenure as secretary of the ABCC and during the approximately seventeen-year tenure of my immediate predecessor in my position. They are consistent with the provisions of Appendix D.
>
> …
>
> > The compensation calculation is based on the compensation in effect at the time of the onset of the injury or illness or incident causing the same. It is my understanding that this is consistent with the standard workers' compensation practice in the private sector.
>
> …

33. The Applicant submits that the continuous practice of the Organization does not assist the Respondent, citing for support *Valimaki-Erk* 2012-UNAT-276. In that case, UNAT held that a policy that required individuals to renounce permanent residency status acquired in a country other than that of their nationality prior to recruitment had no legal basis despite the Organization enforcing the policy for 59 years. The policy stemmed from a recommendation contained in a Report of the Fifth Committee of the General Assembly dated 7 December 1953. UNAT noted that the Fifth Committee had required that its decisions from the relevant session were to "be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved *through appropriate amendments to the Staff Rules* (emphasis in original)" and that the policy had not been reflected in any administrative issuance. It therefore had no legal basis.

34. The situation in the current case is somewhat different to that in *Valimaki-Erk* in that there is an administrative issuance in effect, but it is silent as to the pr pol126.0pc8 1 Tfi.4755

which the Secretary-General has accepted for consideration, if the claim was filed more than four months after the injury, as in the Applicant's case. The previous practice of the ABCC therefore, cannot in itself be a constraint to the correct interpretation of art. 11.3(c).

Policy considerations

A. The issue of delay

36. There are obvious policy and practical reasons for requiring claims for injury compensation to be submitted promptly after the injury of a staff member. Expedient submission of a claim allows the Organization to assess, while the events are fresh, the circumstances surrounding an accident to determine whether any resulting injury qualifies as service-incurred. The Organization can also approve support for the staff member through payments for medical treatment and rehabilitation in a timely manner, and potentially avoid any worsening of the injury. It is likely that the drafters of art. 12 of Appendix D to the Staff Rules had such considerations in mind when establishing a time limit of four months after the date of the injury for submitting an injury compensation claim.

37. However, the compensation provided for under art. 11.3 of Appendix D to the Staff Rules differs in its purpose and means of assessment to the other heads of compensation provided for under Appendix D, such that it will not always be possible to submit a claim under this head within four months of the date of the injury. Article 11.3 provides for the payment of a lump-sum compensation award in the case of injuries resulting in *permanent* loss of function, as the parties agree occurred in this case. Article 11.3 requires an assessment as to the permanent loss of function assessed as a percentage of the whole person. The parties are agreed that these determinations—i.e. whether the loss of function is permanent and, if so, what percentage of the whole person is affected—can only be carried out when the staff member has reached MMI. MMI is the point at which an injured worker's medical

condition has stabilized and further improvement is unlikely, even with continued medical treatment or rehabilitation.

38. The assessment of the date of MMI is a medical determination and the length of time taken to reach such a status will depend on the nature of the injury and response to medical treatment and rehabilitatio

Conclusion

45. The Tribunal finds that the legislative history of Appendix D does not

follows. Consequently, absent exceptional circumstances, the date of injury, date of MMI, date of claim and date of decision would all occur during the application of the same salary scale. By accepting the Applicant's claim 21 years later under what are exceptional circumstances, considering the applicable time limits, the Organization cannot then apply the requirements of a normal claim. Due to the extreme passage of time and in fairness to justice and to prevent any iniquity, the Applicant's case calls for exceptional treatment.

51. In light of the legislative history, the provisions of Appendix D regarding adjustments to wages and salaries and actuarial lump-sum payments, the fact that "pensionable remuneration" is by definition adjusted from time to time, and the particular facts of this case, the Tribunal finds that the computation of compensation based on the salary scale at the time of injury in the Applicant's case was unreasonable. The only logical and reasonable conclusion is that the compensation should be calculated on the salary scale as at the date of MMI, particularly more so based on the Respondent's admission that no assessment could be made until such time as the Applicant had reached full MMI, at which point his claim would have crystallized and he would have been entitled to payment.

Remedy

52. The parties agree that the Applicant has already been paid the amount of USD28,748.00 as a result of his claim. In a submission dated 22 June 2015, the Respondent acknowledged that the Organization erred in calculating the award to which the Applicant was entitled based on the pensionable remuneration scale in

Respondent has therefore acknowledged liability in the total amount of USD30,242.80, which should have been paid by 22 July 2015 at the latest.

53. By Order No. 123 (NY/2015) dated 23 June 2015, the Applicant was granted leave to file comments, if any, on the Respondent's submission dated 22 June 2015 regarding this error. By email to the New York Registry of the Dispute Tribunal dated 23 June 2015, the Applicant informed the Tribunal that he had "no comments" in response to the Respondent's submission.

54. The Respondent asserted that there is no policy instrument that would permit the Organization to use any other date for calculation of awards, or that would permit the payment of interest. In UN Administrative Tribunal Judgment No. 1197,

c. The Respondent is ordered to pay the Applicant the difference between the amount already paid—USD30,242.80—and the amount applicable under Appendix D to the Staff Rules at the date of MMI.

d. The Respondent is ordered to pay to the Applicant interest on the amount identified at para. 55(c) at the United States prime rate from 23 July 2012 until payment of the said amount.

e. The Respondent is ordered to pay to the Applicant interest on the amount of USD1,494.80 from the date of MMI until the date the amount was paid.

f. The amounts in para. 58(d) and (e) above shall be paid with interest at the United States prime rate with effect from the date that this Judgment becomes executable until payment of the said amount. An additional five per cent shall be added to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of July 2015

Entered in the Register on this 24th day of July 2015

(Signed)

Hafida Lahiouel, Registrar, New York