ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 3 October 2018

JUDGEMENT IN CASE No. 90

Ms. AA
Applicant

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 90 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on 17 September 2018
At 10 a.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. Giovanni M. PALMIERI, counsel of the Applicant ;

Mr. Rémi CEBE, Head of General Affairs Division of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General; He was assisted by Mr. Auguste NGANGA-MALONGA, acting Head of the Staff Matters, Privileges and Immunities Coordination Unit of the Organisation's Directorate for Legal Affairs

INTRODUCTION

[1] In her application for annulment and compensation registered with the Registry on 19 December 2017, the applicant, AA, seeks the annulment of the decision of the Secretary-General of the Organisation for Economic Cooperation and Development (the 'Organisation') of 14 November 2017 dismissing her request for the withdrawal of a decision of 11 August 2017 refusing her full coverage of live-in care expenses. The applicant also seeks the reimbursement of the sums due for private nursing services, namely 65,422.13 euros. Moreover, she claims moral damages on the grounds of a breach of the Organisation's duty of care to her, while leaving it to the Tribunal to determine the amount. Finally, the applicant seeks reimbursement of the costs of proceedings in the amount of 10,000 euros.

[2] The Secretary-General of the Organisation submitted his comments on 19 February 2018.

[3] The applicant submitted a reply on 3 April 2018.

[4] The Secretary-General of the Organisation submitted his comments in rejoinder on 4 May 2018.

[5] The parties were authorised to submit documentary evidence and the applicant submitted a short video to demonstrate her incapacity.[1]

The facts in the contentious situation

[6] The applicant, who was born in 1960 and is of Spanish nationality, took up her duties at the Organisation on 3 April 1989 as a grade A2 Administrator at the International Energy Agency.

[7] On 23 August 1989, four (4) months after taking up her duties, she was involved in a serious traffic accident in which her mother died and her sister was seriously injured.

[1] The exhibits submitted by the applicant are identified under reference R and those submitted by the Secretary-General under reference O.

The applicant herself suffered a serious head injury with irreversible damage of all kinds that resulted in total permanent incapacity under the law of her country of origin.

[8] Since the accident in 1989, the applicant's state of health has required substantial medical care, which is covered by the Organisation through its own medical insurance system 'OMESYS'; this is managed by a service provider – initially GMC, today Henner. The cost of this care is paid for in full by the insurer, as the applicant has been recognised as disabled under Spanish law.

[9] The evidence provided by the parties shows that since 1989, the applicant's condition has also required life support care to compensate for her loss of autonomy.

[10] This daily care is provided by non-qualified live-in carers specialising in the provision of daily care to patients suffering from complex neurological disorders. These latter are not medical nurses.

[11] Moreover, the incapacity was recognised by the Organisation, which has paid her a disability pension since 1 November 1990, the date on which she was placed on permanent non-active status. As of 1 January 2018, the amount of this pension was 4,187 euros per month.

[12] Since 1991, the manager of Omesys has reimbursed the applicant from year to year for the live-in care expenses incurred within the limits of the applicable ceilings (in 2016, 168 euros per day).

[13] Thus, on 10 March 2009, GMC wrote a letter to the applicant headed *'Medical decision on a request for prior agreement'* to inform her that the medical officer had issued a favourable opinion on the reimbursement of live-in care expenses within the limit of a ceiling of 168 euros per day beyond 8 hours per day. This letter states: '*Duration of this agreement*: *Six months from the date of the medical officer's opinion, subject to your entitlement to benefits on the date on which the care is actually provided*.'[2]

[2] Exhibit R-7 of the application.

[14] In 2014, the Organisation asked the manager of Omesys to review the situation of former staff members who benefited from the reimbursement of live-in care expenses under the statutory rules.

[15] In this context, the manager of Omesys, Henner, sent the applicant and her father, who is her legal guardian, a letter dated 15 February 2016 stating that dependency expenses were not covered by the contract between the Organisation and the manager of Omesys, and that the past coverage of live-in care expenses arose from '*a misinterpretation by [our] services of the Omesys contract*'.[3]

[16] Without claiming the repayment of '*the amounts incorrectly paid*', the manager informed the applicant that the coverage of live-in care costs would be limited, after a period of six months, to two hours per day from 15 August 2016, to give her a chance to make alternative arrangements.

[17] This decision was immediately contested by the applicant's guardian, her father.[4]

[18] The Organisation, which was informed of the situation, initiated discussions to settle the dispute, but no agreement has been reached so far. There were two negotiation sessions.

[19] At first, on 19 January 2017, it was arranged that each party would appoint a doctor to determine the applicant's needs, in particular for a live-in carer, and that the applicant would withdraw from the civil proceedings instituted before the Tribunal de Grande Instance in Nanterre, which was initiated.

[20] A medical board of designated doctors, thus, examined the applicant. However, the two doctors, Dr TR for the applicant and Dr J for Henner, the manager of Omesys, were unable to reach agreement on Omesys assuming the live-in care expenses, although Henner's doctor did acknowledge that the applicant's condition required a permanent presence at her side.[5] The joint report specified the need for someone to be with the applicant 24 hours a day, in particular during meals, when moving around, for

[3] Exhibit R-8 of the application.
[4] Exhibit R-10 of the application.
[5] Exhibit R-9 of the application.

hygiene care and support with general activities. However, consensus could not be reached on the provision of all such care by a live-in carer.

[21] The Organisation therefore eventually suggested to the applicant's counsel that discussions should be initiated with a view to an exceptional proposal for the assumption of financial responsibility, subject to a confidentiality undertaking signed by the parties. This commitment stipulated that confidentiality must be respected, even before the Administrative Tribunal, in the event that the discussions broke down.

[22] During a meeting on 10 July 2017, the Organisation then proposed, on an exceptional basis, that the applicant's live-in care expenses should be covered not for 2 hours per day, but for 14 hours per day, 7 days a week, thus leaving 10 hours to be covered by the applicant.[6] The applicant's guardian declined this proposal.

[23] This negotiation session was held under a confidentiality agreement. However, as the proposal now constitutes a formal offer recorded in these proceedings, it is permissible to refer to it on this basis alone; the discussions that took place between the parties remain fully protected by the confidentiality agreement.

Disputed matters

[24] As a first step, the Tribunal will have to decide on the admissibility of the application, since the Organisation claims that it is not directed against the Secretary-General's final decision and was filed outside the time limits set by the Council Resolution on the status and functioning of the Administrative Tribunal.

[25] Then, on the substance of the case, the Tribunal will have to determine whether the contested decision was taken in breach of the rules of the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation (the 'Staff Regulations') and above all of the social protection scheme. In addition, it will be necessary to decide whether there has been a clear breach of the duty of care and the principle of sound administration to which the Organisation is subject.

[6] Secretary-General's comments, paragraphs 73 and 76; Rejoinder, paragraphs 59 and 60.

Analysis

Formal points

[26] The Organisation argues that the Secretary-General's final decision was the decision of 11 August 2017[7], received on 17 August 2017. Consequently, the three-month period provided for in Article 4a) of Annex III of the Staff Regulations set a deadline of 17 November 2017 for the submission of the application. As it was submitted on 14 December 2017, the Tribunal should declare the application inadmissible because it was filed late.

[27] Article 3 'Written request prior to the filing of applications' of Annex III to the Staff Regulations states that:

> 'Subject to the provisions of Article 4 b) below, applications to the Administrative Tribunal shall not be admissible unless the applicant has given the Secretary-General a prior written request for withdrawal or modification of the contested decision, and the Secretary-General has rejected such request or has not replied within a period of one month. Such prior request shall be given to the Secretary-General within two months from the date of notification of the contested decision in the case of members of staff, the Staff Association or trade unions or professional organisations, or within four months from the date of such notification in the case of former members of staff or duly qualified claimants to the rights of members of staff or former members of staff.'

[28] Article 4 a) of Annex III to the Staff Regulations reads as follows:

> 'Applications shall be filed with the Registry of the Tribunal within three months from the date of notification of the rejection by the Secretary-General of the prior request or from the date of the implied refusal of such request. However, in exceptional cases, the Administrative Tribunal may admit applications filed after such time limit has expired.'

[29] The letter of 15 February 2016 which communicates the decision of the manager of Omesys does not come from the Secretary-General, does not mention that the decision was taken under his delegation and does not copy him in to the decision.

[30] The applicant's guardian could not have known that this decision should have been considered as a decision of the Secretary-General, and the absence in the letter

[7] Exhibit R-12 of the application.

of 15 February of any indication of the means and time-limits for appeal inevitably misled the guardian concerning his procedural obligations if he intended to contest the decision. The Tribunal therefore rules that this letter did not pose any time limits.

[31] Second, the Organisation's response to the receipt of the complaint of 5 April 2017 shows that the parties engaged in a negotiation process that was supposed to lead to a new administrative decision. This is what in fact happened: the decision of 11 August 2017 increased the Organisation's coverage of the corresponding costs from 2 to 14 hours of live-in care per day, with effect from 5 April 2017. This was the Organisation's decision.

[32] From the date of receipt of this decision, the applicant was required to submit a prior request within the two-month period stipulated in Article 3 a) of the Staff Regulations, which she did on 29 August 2017.[8] The Secretary-General having rejected this request on 14 November 2017[9], the application registered at the Tribunal on 14 December 2017 was filed within the three-month period provided for in the Staff Regulations. It is therefore admissible.

[33] The Tribunal notes that its decision on the admissibility of the complaint is in line with a significant and consistent body of international administrative case law. For example, the following was decided in Judgment 2584 of the ILO Administrative Tribunal:

> 'If an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions as extending the time for the taking of any further step. That is because settlement discussions must proceed on the basis that no further step will be necessary. Where, as here, there has been no actual decision but the Organization has invited settlement discussions, the duty of good faith requires it to treat the time for taking a further step as running from the termination of those discussions and not from some earlier date identifiable as the date of an implied negative decision. That is because the invitation necessarily

[8] Exhibit R-13 of the application.
[9] Exhibit R-14 of the application.

implies that, no matter what the Staff Regulations or Staff Rules provide, no final decision has been or will be taken during the course of discussions.'[10]

The substance of the case.

[34] Regulation 17 of the Staff Regulations provides that:

'Officials shall be entitled, in accordance with Rules of the Secretary-General, subject to approval by the Council:

a) to benefits in case of sickness, maternity, work accident, invalidity or death…'

[35] Instruction 117/1.6.1 a) states that:

'In the event of sickness, maternity or accident other than those mentioned in Rule 17/1.12, the beneficiaries listed in paragraph a) of Instruction 117/1.4.1 shall be entitled to cover for expenses in respect of medical attention or surgery or of treatment or prescriptions, subject to the limits and according to the procedure laid down in Annex XIV of these Regulations. Such cover may take the form of direct payment, in full or in part, to the supplier or provider of services or of reimbursement of the person affiliated. …'

[36] Instruction 117/1.6.2 c) provides that:

'Subject to application of Article 4 of Annex XIV and the other conditions set out in Article 11 of this annex, the rate of cover for health care expenses directly related to the handicap shall be 100% of the costs incurred when the beneficiary is recognised as handicapped under the legislation of his/her country of residence or is entitled to the allowance for a handicapped child under Regulation 16 g) of the Staff Regulations.'

[37] Annex XIV, entitled '*Cover for health care expenses under Regulation 17a)*' asserts:

'Article 1

This Annex lays down arrangements and procedures for payment or reimbursement of health care expenses by the Organisation's medical and social system in accordance with Instructions 117/1.6.1 and 117/1.13.1. It shall apply to the officials and beneficiaries referred to in Rules 17/1.17, 17/1.21 and 17/1.22 in accordance with Article 10 below.

[10] ILOAT, judgment no. 2584, Mr L.A.M., 7 February 2007. See also ILOAT, judgment 509, Villegas; ILOAT, judgment 2066, Tekouk; UNAT 9-9-1955, Hilpern, 57 Rec. 1,273; CJEC 11-7-1974, Guillot.

Cover for health care expenses
Article 2

a) The health care expenses payable or reimbursable by the Organisation's medical and social system under Rules 17/1.6 and 17/1.13 shall be those set out in the tables in Article 11 below which describe the thirteen categories of expenditure covered and specify, where appropriate, any ceilings on reimbursement or special conditions attached to such cover.

b) Cases in which health care expenses are only payable or reimbursable subject to prior approval are specified in the tables in Article 11...'

[38] The table in Annex 11 which is relevant to this case is in Heading IV, 'Medical aides'. It reads as follows:

Nature of Reimbursable Services and Items (1)	Rate of Reimbursement of Costs Incurred (2)	Reimbursement ceilings (3)		Prior Agreement	Special Requirements or Modalities
		European countries and assimilated (15)	Other Countries		
III – SPECIALIZED CARE					On prescription
1/ Electrotherapy	100 %	(**)	(**)	---	Direct payment in full or in part may be made to the treatment center
2/ Dialysis	100 %	(**)	(**)	---	
3/ Chemotherapy	100 %	(**)	(**)	---	
4/ Radiotherapy	100 %	(**)	(**)	---	
IV – MEDICAL AIDES					On prescription
1/ Nurses	92.5 %	(**)	(**)	No	
2/ Masseurs and physiotherapists	92.5 %	(**)	(**)	Yes (5)	
3/ Speech therapists and orthoptists	92.5 % (*)	(**)	(**)	Yes (5)	(*) 100% for a child under the age of 16
4/ Chiropodists and podologists	92.5 %	(**)	(**)	Yes (5)	
5/ Private nurses for less that 8 hours/day	92.5 %	109 € per day	199 € per day	Yes (6)	
6/ Private nurses for 8 to 24 hours/day	92.5 %	168 € per day	305 € per day	Yes (6)	
7/ Occupational therapists	92.5 %	(**)	(**)	Yes (5)	
8/ Psychomotor specialists	92.5 %	(**)	(**)	Yes (5)	
9/ Travel expenses of medical aides	92.5 %	9 € per act	9 € per act		

'

[39] Note 6, to which the following sub-headings refer: '5/ live-in carers for less that [sic] 8 hours/day' and '6/ live-in carers for 8 to 24 hours/day', reads as follows:

> '6. Prior agreement is necessary when the number of days prescribed is higher than seven. Nursing may be provided for the first seven days without waiting for the agreement.'

[40] The other table relevant to the dispute is at Heading XIV. This is worded as follows:

Nature of Reimbursable Services and Items (1)	Rate of Reimbursement of Costs Incurred (2)	Reimbursement ceilings (3)		Prior Agreement	Special Requirements or Modalities
		European countries and assimilated (15)	Other Countries		
XIV – CARE DIRECTLY RELATED TO THE HANDICAP (12)					
- Care directly related to the handicap and board and lodging in medical establishments providing such care	100 %	(**)	(**)	No	Direct payment in full or in part possible
- Equipment and prosthesis directly related to the handicap (including repairs)	100 %	(**)	(**)	Yes	Except if the amount of the equipment or repair is lower than € 229 Cover provided only for equipment and prostheses covered by the nomenclature of French Social Security
- Travel expenses directly related to the handicap (as laid down under the French Social Security)	100 %	(**)	(**)	No	Cover for the handicapped person and, if necessary, for someone accompanying him/her **Outside France**: same principle or application of local legislation
- All other services and goods directly related to the handicap reimbursable in accordance with the preceding tables	100 %				Same conditions as for non handicapped persons

[41] It follows from these tables that, in the case of persons with disabilities, the provision of live-in carers falls under the last category of Heading XIV, i.e. 'All other services and goods directly related to the handicap reimbursable in accordance with the preceding tables'.

[42] While it is true that there is no mention of the need for prior agreement, Heading XIV makes it clear that the coverage of such expenses is subject to the 'same conditions as for non-disabled persons'.

[43] These conditions are given in Heading IV ‘Medical aides’, which includes two categories relating to live-in care. In particular, category 6, ‘live-in carers for 8 to 24 hours/day’, expressly specifies the need for prior agreement. The note – to which this category refers – states: ‘*Prior agreement is necessary when the number of days prescribed is higher than seven*’, as is the case here.

[44] The concept of prior agreement, as provided for in Article 2 b) of Annex XIV, refers to the approval given by the competent authority at the request of a person.

[45] The Tribunal therefore considers that the coverage of live-in care expenses was and remains subject to the agreement of the Secretary-General. It observes, moreover, that Exhibit R-6 of the application, headed ‘Medical decision on a request for prior agreement’, which is explicitly described as ‘relating to a live-in carer’, makes it clear that the coverage of this benefit was subject to a renewable prior agreement. This is in contrast with the coverage of the expenses relating to a long-term condition, which has been undertaken ‘on a permanent basis’, as can be seen from Exhibit R-7 of the application. It should be noted that the two exhibits cited (R-6 and R-7) bear the same date (10 March 2009) and the same signature.

[46] It is incumbent on the Tribunal at this stage to clarify how much discretion the Secretary-General has and what criteria should be employed.

[47] This is not a case to which the competence of the Secretary-General is linked, as for example when a medical board has been consulted and given its opinion. The prior agreement in question is a matter for the informed discretion of the Secretary-General, subject to the scrutiny of the Tribunal.

[48] The Tribunal considers that the Secretary-General is entitled, with regard to the payment of live-in care expenses, to take into account the disabled person's own resources and, where appropriate, those of his or her family members.

[49] With regard to the amount of the disability pension that the Organisation pays to the applicant, that is 4,187 euros per month as of 1 January 2018, and the current resources of her family, the Tribunal considers that the Secretary-General’s decision to limit to 14 hours per day the coverage of the applicant's live-in care expenses as of 5

April 2017 is not unreasonable, and is consistent with the duty of care that the Organisation owes to a former agent in a condition of total and permanent disability.

Compensation

[50] The lack of communication and follow-up between the medical insurance scheme manager (Omesys) and the applicant resulted in several months of uncertainty and administrative confusion. The applicant's guardian even had to use the services of a lawyer to sue the Organisation. He brought civil proceedings before the Tribunal de Grande Instance of Nanterre, which he later withdrew.

[51] It was only when the Organisation was made aware of the applicant's situation that the negotiations were conscientiously undertaken. Legal expenses were therefore unnecessarily incurred by the applicant in order to protect her rights. The Tribunal therefore agrees to award a nominal sum of 1 euro in moral damages, in acknowledgement of this difficult transitional period.

[52] Finally, the Court considers that the objection of inadmissibility has caused the applicant to incur costs unrelated to her substantive claims. She should therefore be awarded a sum of 2,000 euros to reimburse her costs of proceedings.

FOR THESE REASONS, THE TRIBUNAL

[53] DECIDES that the applicant's application is admissible.

[54] DISMISSES the application for annulment of the Secretary-General's decision.

[55] DECIDES to award 1 symbolic euro in moral damages.

[56] DECIDES to award 2,000 euros in legal costs.