

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. 98

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 98 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 8 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. Christophe COURAGE, 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 ;

Monsieur Jeremy MADDISON, Président de l'Association du personnel

INTRODUCTION

1. In her application for annulment and compensation lodged with the Registry on 9 November 2020, Ms AA (hereinafter the Applicant) requests that the Secretary-General's decision of 23 August 2020 rejecting her prior request of 7 July 2020 for the withdrawal of a decision of 11 May 2020 refusing her request to refer a matter to the Joint Advisory Board (JAB) of the Organisation for Economic Cooperation and Development (hereinafter the Organisation) be annulled. She asks the Tribunal to order the Organisation to convene the Joint Advisory Board (JAB) for the purpose of obtaining an opinion, and to order it to pay her 1,000 euros in moral damages as well as 3,840 euros in costs.
2. The Secretary-General submitted his comments on 12 January 2021.
3. An application for an extension of the time limit for the Applicant to present her reply was made on 4 February 2021. This application was granted by the Chair of the Tribunal, who extended the time limit to 12 March 2021.
4. The Applicant submitted a reply on 12 March 2021.
5. The Secretary-General submitted his comments in rejoinder on 15 April 2021.
6. The Staff Association submitted written comments on 17 February 2021.
7. 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**.
8. The application hearing was held on 8 October 2021. Counsels for the Applicant, the Organisation and the Staff Association were heard.

The facts

9. After reviewing the documentary evidence, the Tribunal singles out the following facts as relevant:
10. The Applicant is of British nationality. She took up her duties at the Organisation on 1 July 2000.
11. The Applicant alleges that from March 2015, while she was Resource Management Officer (RMA) for the Financial Action Task Force (FATF), she was the victim of psychological harassment by her supervisor. This took the form of constant denigration which led her to seek help from Human Resources Management, unfortunately without success.
12. The harassment led her to consult her doctor, then a specialist doctor and finally a psychotherapist in September 2015.
13. On 28 September, 2015 the Applicant was placed on sick leave. This time off work was extended continuously until her departure.
14. In January 2016, the Applicant submitted a request for recognition of an occupational disease on the basis of a medical certificate issued by her doctor, who concluded that she had a 'severe depressive syndrome following suffering at work'¹.
15. On 4 November 2016, after a clinical and psychopathological analysis, the doctor designated by the Organisation concluded that she did have an occupational illness and noted that this had progressively deteriorated in less than six (6) months. The doctor wrote:

'Examination of the documents in the medical file and the long interview we had with Ms AA do not reveal any particular signs of pathological psychological functioning prior to the current episode.

Among other things, the biographical interview did not bring to light any history of anxiety requiring medical or psychological help or any clear depressive episode.

...

Instead, regular professional assessments, including the opinion of her manager, show a definite and indeed remarkable adaptability in her various positions, given that Ms AA has received

¹ Document R-2.

exceptional promotions on several occasions by which she has moved to higher levels of responsibility both in certain technical tasks, and also in various team management roles.

...

Worth noting, however, is that she has had the experience of being 'pushed aside' to some extent by being relieved of tasks that were hers before the conflict and by being deprived of opportunities for liaison and formal exchanges with the team. These unverbaised "punitive" measures have created a distressing sense of being sidelined, of isolation and of professional demotivation.²

16. In a letter on 31 March 2017, the Organisation recognised the occupational nature of the Applicant's illness, which was now governed by Regulation 17/1.13 of the Staff Regulations.
17. On 30 August 2018, the medical and invalidity boards met to examine the Applicant's situation and concluded that she was suffering from partial permanent incapacity (PPI) of 15%, resulting from an illness attributable to the performance of her duties at the Organisation, but that she was not suffering from a permanent incapacity that rendered her completely incapable of performing her job or the duties associated with it.³
18. On 16 January 2019, a prior fitness examination conducted by a doctor designated by the Organisation found that the Applicant was unable to return to work. On 30 January 2019, the Organisation therefore notified the Applicant of its intention to terminate her appointment.⁴
19. On 22 May 2019, the Organisation's Head of HRM met with the Applicant and took note of the written observations she had prepared for the Staff Committee. She sent her a letter which concluded as follows:

'In my capacity as Executive Director, I wish to let you know that I am aware of the concerns you expressed in your letter. I recognize the need for a number of changes in relevant policies and procedures. Accordingly, I have asked HRM to continue reviewing the various administrative and medical processes of which you have recent experience, in order to improve them especially by making the handling of such situation like yours more expeditious.'⁵

² Document R-5.

³ Document R-9.

⁴ Document R-10.

⁵ Document R-13.

20. On the same day, 22 May 2019, the Organisation dismissed the Applicant under Regulation 11a) iii) of the Staff Regulations, on the suppression of functions.⁶
21. On 20 September 2019, the Applicant submitted to the Organisation a claim for compensation for the damages she had suffered.⁷
22. On 6 November 2019, the Organisation rejected the Applicant's request, specifying instead that the termination of her appointment was based on her incapacity for service at the end of the period of non-activity, i.e. on Regulation 11a) vii) of the Staff Regulations.⁸
23. Then, in an email dated 20 April 2020, the Applicant asked the Secretary-General to convene the Joint Advisory Board (JAB) to give its opinion on the compensation related to the deterioration of her state of health resulting from the bullying she had experienced at work and its consequences and from the refusal to grant her a disability pension.⁹
24. On 11 May 2020, this request was rejected by the Secretary-General, as the disputing of the termination of her appointment and of the refusal to grant her a pension had not been submitted in time and was time-barred.¹⁰
25. On 9 November 2020, the Applicant contested the rejection of her request for referral to the JAB before the Tribunal.

The dispute

26. The Applicant alleges that the decision to deny her access to the Organisation's Joint Advisory Board (JAB) is groundless in that:
 - i) Her request for referral to the JAB was admissible because it was submitted within the time limits provided for in the Staff Regulations.
 - ii) The JAB is competent to give an opinion on an individual dispute concerning the inequitable treatment resulting from the bullying she suffered at the hands of her

⁶ Document R-14.

⁷ Document R-15.

⁸ Document R-16.

⁹ Document R-17.

¹⁰ Document R-18.

superior, which ultimately resulted in her dismissal and the refusal to grant her a disability pension. She seeks compensation for the damages suffered.

27. The Organisation disputes the Applicant's request, claiming that the application seeking referral to the JAB is late, and therefore inadmissible, given the nature of the requests made, challenging the ending of her appointment and the refusal to grant her a pension, which were not presented within the time limits provided for in the Staff Regulations.

Analysis

Admissibility

28. The application to the Tribunal was submitted on time, i.e. within three months of the notification of the decision dated 20 August 2020 rejecting the previous request.

29. Consequently, the application is admissible and the Tribunal will examine the parties' pleas on the merits of the case.

The merits of the case

The admissibility of the request for referral to the JAB

30. Under the title 'Disputes', Regulation 22 of the Staff Regulations provides for two advisory bodies, namely the Joint Advisory Board and the Re-evaluation Commission, whose missions are defined below:

- a) 'The Secretary-General shall establish an Advisory Board comprising a Chairman from outside the Organisation, and six other members, three of whom shall be nominated by the Staff Association. Unless, under a specific provision, another body is responsible for giving its opinion in a particular field, this Board shall advise the Secretary-General, at the request of the official concerned, on any individual dispute arising from a decision of the Secretary-General and which an official, former official or the duly qualified claimants to

their rights consider inequitable to themselves or contrary to the terms of the appointment or to the provisions of these Regulations or of applicable Rules.

- b) The Secretary-General shall establish a Re-evaluation Commission comprising a Chairman and two members nominated by him/her. This Commission shall advise the Secretary-General, at the request of an official, on any individual dispute arising from a decision of the Secretary-General relating to the official's performance evaluation, periodic advancement or post classification and which the official considers contrary to the terms of the appointment or to the provisions of these Regulations or of applicable Rules. Prior referral to this Commission is a precondition for filing an application with the Administrative Tribunal mentioned in paragraph c) of this Regulation.'

31. Instruction 122/1.3 of the Staff Regulations adds:

' a) Where an official, a former official or a duly qualified claimant to the rights of an official or former official wishes to have a dispute referred to the Joint Advisory Board, he shall submit a request to the Secretary-General within six months of the date on which he was notified of the decision by the Secretary-General that he is challenging.

b) As part of the request for referral to the Joint Advisory Board, he shall attach:

- the challenged decision of the Secretary-General as mentioned in the preceding paragraph;
- the main reasons for requesting the opinion of the Joint Advisory Board;
- the main points on which he wishes the opinion to bear;
- and if he claims to have suffered damages, the documents he deems useful to the review of his claims in this respect.

c) In exceptional cases, the Secretary-General may accept a request submitted after expiry of the time limit provided in paragraph a) above.'

(our underlining)

32. The request for referral to the JAB was presented to the Secretary-General on 20 April 2020. This request does not challenge either the termination of the appointment or the

refusal of a disability pension. These measures have never been disputed before the Tribunal.

33. Rather, the Applicant seeks the JAB's opinion on the inequitable treatment she experienced from 2015 onwards and on its consequences, including the ending of her career after 20 years at the Organisation and the deterioration of her health. She seeks an opinion on compensation for the alleged damages.¹¹
34. The Applicant submitted her request for referral to the JAB within six months of the Secretary-General's refusal to consider her claim for compensation for the damages resulting from the alleged bullying. Referral of a matter to the JAB is not a legal remedy but a request for an opinion based on the existence of an individual dispute.
35. The JAB is a joint consultative body of a statutory nature which issues opinions which are not binding on the Secretary-General, but enable him or her to obtain an informed opinion on the dispute. This is a non-judicial mode of dispute resolution, since the opinions do not have the status of a final and binding decision.
36. There is nothing in Regulation 22 a) or in Instruction 122/1.3 of the Staff Regulations to prevent the JAB from giving its opinion on the damages suffered. On the contrary, Instruction 122/1.3 mentions: '- and if he claims to have suffered damages, the documents useful to the review of his claims in this respect.'
37. The Staff Association submitted its comments, concluding by stressing the need to preserve the JAB as an advisory body and to safeguard its effectiveness by ensuring that it remains available to claimants.¹²
38. Some international organisations have dispute resolution mechanisms that involve two judicial bodies, implying a right of appeal against decisions given by the first instance.¹³ Several international organisations have committees or boards to which officials must resort ex officio before taking a matter to the Administrative Tribunal. Other organisations have committees or boards, usually consisting of three (3) to five (5)

¹¹ On the duty of care see ILOAT 4427, 4240,4405, 4385,4369, 4239,4171,2067. UNDT/2018/099;

¹² Written comments submitted by the Staff Association.

¹³ The UN, the Organisation de la francophonie.

members, to which officials may resort without obtaining the permission of the Secretary-General, and consultation of which is not a prerequisite for taking a matter to tribunal.¹⁴ The JAB, consisting of seven (7) members, falls into this latter category. A JAB consisting of three (3) or five (5) members would also meet the purposes of Regulation 22 of the Staff Regulations, i.e. an advisory opinion intended for the Secretary-General.

39. In this case, the officials of the OECD only have access to one judicial body, the Administrative Tribunal. They may, however, have recourse to the Joint Advisory Board after having made a request for referral to the Secretary-General.
40. In order to fully guarantee access to administrative justice, it is necessary to give a broad interpretation of the rules governing the establishment of and access to the Joint Advisory Board set out in Regulation 22a) as well as in Instruction 122/1.3 of the Staff Regulations so as to ensure their usefulness.
41. Regulation 22a) of the Staff Regulations does not make referral to the JAB subject to the authorisation of the Secretary-General. The instructions simply determine the procedures for the procedural application of a right clearly recognised in Regulation 22 of the Staff Regulations.
42. Accepting that the Secretary-General has the power to decide, on a discretionary basis, whether to refer a request to the Joint Advisory Board would affect its relevance and undermine its usefulness. Such an interpretation of Regulation 22a) and Instruction 122/1.3 of the Staff Regulations would allow the Secretary-General to paralyse the functioning of the advisory bodies and to infringe the right of officials to have recourse to them.
43. Consequently, the interpretation of Regulation 22a) of the Staff Regulations, read in conjunction with Instruction 122/1.3 c), is as follows: if an official, a former official or a duly qualified claimant to the rights of an official or former official submits a formal request for referral, the Secretary-General must forward it to the Joint Advisory Board.

¹⁴ Joint committee, joint commission, disciplinary board, report committee, joint appeal board: see *Fonction publique internationale*, Plantey A. and Loriot F, CNRS Éditions, 2005, para 1328.

He or she does not have the discretionary power to assess whether the request is well founded in procedural or substantive terms. His or her sole discretionary power is to admit a request submitted outside the time limit of six (6) months.

44. At this stage, it is not for the Tribunal to rule on the bullying experienced by the Applicant which resulted in an occupational illness recognised by the experts and the Organisation, or on the assessment of the damages incurred as a result of the decisions taken by the Organisation. The only point to be decided is whether the Applicant was able to request a referral to the JAB in order to seek its opinion on the alleged fault and damages.

45. The issue of redress does not have to be decided on by the Tribunal at this stage.

It will be up to the JAB to consider it, if necessary, in the exercise of its jurisdiction. We note, however, that in Case No. 63, the Secretary-General consented to referral to the JAB in a case involving moral harassment, blocking of the applicant's career and administrative mistakes for which the applicant claimed compensation. This was thus a request in which compensation was sought. The Tribunal emphasised:

Secondly, and in any event, Mrs. M. is not asking for old decisions, such as the refusals of her requests for promotion, to be annulled but for monetary compensation for the prejudice she claims to have suffered as a result of these decisions.¹⁵

46. As to whether any compensation claim based on Regulation 17/8 or set out in an application to the Tribunal is well founded, such questions remain hypothetical and need not be considered at this stage. Only the request for referral to the JAB is at issue in this proceeding. It is possible that the advisory opinion will bring the dispute to an end. It is therefore premature to request a declaratory decision on a dispute which is not before the Tribunal.

¹⁵ OECD Administrative Tribunal, Judgment no 63, 24 February 2009 p.4. See applications in OECDAT nos 57, 63, 68, 90; ILOAT nos 2829, 3064, 4222.

FOR THESE REASONS, THE TRIBUNAL

1. **DECIDES** that the Applicant's application is admissible
2. **UPHOLDS** the Applicant's right to request a referral to the JAB and orders the Organisation to comply with the request.
3. **REJECTS** the claim for moral damages.
4. **DECLARES** that 3,840 euros should be awarded to the Applicant's counsel in costs.