Before: **Judge Rowan Downing**

Registry: **Geneva**

Registrar: **René M. Vargas M.**

MASSI

v.

SECRETARY-GENERAL OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, HRLU

Introduction

1. By an application filed by postal mail on 13 July 2015 with the New York

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25. Upon further review of the Applicant's situation, the then Secretary of the ABCC noted that his predecessor had made an error when calculating the monthly payment due to the Applicant under art. 11.2(d) of Appendix D. As a result of that review, and upon recalculating the Applicant's benefit, the Secretary of the ABCC found that the Organization owed the Applicant an amount of USD72,226.46 for the compensation to which he was entitled under art. 11.2(d) of Appendix D until 30 April 2012.

26. By email of 29 May 2015, the ORCC informed the Applicant that his the supervisor of the Secretary of the ABCC, namely the Chief, Risk Management and Compensation Section, Insurance and Disbursement Service, Accounts Division OPPBA/DM, United Nations Headquarters ("Chief, Risk Management and Compensation Section"), had requested to have a telephone discussion with him "concerning [his] claim under the Appendix D".

27. On 2 June 2015, the above telephone discussion took place; during it, the Applicant was orally informed of the mistake that had been made (amount due to him), and that it would be corrected via a lump sum payment.

28. By email of the same day, the Chief, Risk Management and Compensation Section, confirmed to the Applicant that the Organization would be paying him USD72,226.46 as a full settlement of all funds due to him up to 30 April 2012 under art. 11.2(d) of Appendix D for loss of earning capacity, and asked the Applicant to "acknowledge and agree" that this payment "settles all claims in connection with any compensation under Appendix D to the Staff Rules to [him] through 30 April 2012". He also confirmed that the Applicant's claim for any benefit under Appendix D beyond 30 April 2012 would be submitted for consideration to the ABCC.

29. By email of 3 June 2015, the Applicant notified his disagreement with the proposed settlement and asked for "a better offer". By email of 10 June 2015, the

30. On 9 June 2015, the ABCC decided to defer consideration of the extension of the Applicant's compensation under art. 11.2(d) of Appendix D beyond April 2012, pending further review of the claim by the Medical Services Division, and sought clarification about the Medical Services Division's decision to extend the Applicant's compensation "only until April 2012".

31. On 10 June 2015, the Applicant submitted a request for management evaluation challenging the amount offered to him as settlement of his claim for compensation under art. 11.2(d) of Appendix D until 30 April 2012, and the decision to reassess his entitlement to compensation after 30 April 2012.

32. By email of 13 June 2015, the Chief of the Risk Management and Compensation Section provided the Applicant with a detailed breakdown of the updated calculation of award under art. 11.2(d) of Appendix D until 30 April 2012. He also notified the Applicant that his claim for compensation after 30 April 2012 was vetted by the ABCC on 9 June 2015, and that he would be informed of the outcome in due course.

33. By email of 18 June 2015, the ORCC informed the Applicant that the amount of USD72,266.46 had been paid to him on 15 June 2015. He also advised the Applicant that the ABCC had reviewed his claim on 9 June 2015 and had decided to defer consideration of the extension of his compensation under art. 11.2(d) of Appendix D after April 2012 pending further review of the claim by the Medical Services Division.

34. On 22 June 2015, the Management Evaluation Unit notified the Applicant that it considered his request moot insofar as it concerned the settlement of his claim under art. 11.2(d) of Appendix until 30 April 2012, because payment of the sum of USD72,266.46 implemented fully the decision to pay him compensation. It also found that the Applicant's request for compensation after 30 April 2012 was irreceivable as no decision had yet been made.

35. By email of 24 June 2015, the Applicant provided a copy of a medical

36. On 13 July 2015, the Applicant filed by postal mail his application with the New York Registry of the Tribunal, which was rerouted to the Tribunal's Geneva Registry, and, on 17 August 2015, he filed an amended version of it.

37. The Respondent submitted his reply on 13 October 2015.

38. By decision of 29 October 2015 of the Secretary-General, the continuation of the Applicant's compensation for loss of earning capacity under art. 11.2(d) of Appendix D was granted retroactively from 1 May 2012 until his normal retirement age on 31 May 2019, at the age of 62.

39. A copy of this decision was communicated to the Applicant by letter of 23 November 2015. He was also informed that the sum

Parties' submissions

42. The Applicant's principal contentions are:

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a. He was entitled to compensation for loss of earning capacity under art. 11.2(d) of Appendix D since 18 May 2005, when the overpayment made to him had been fully recovered;

b. The Administration's delay in paying said compensation for the period from 18 May 2005 until 30 April 2012 was unjustified, and caused him prejudice as he was not compensated for the drop in the exchange rate between the United States dollar and the Swiss franc and the loss of interest between the time payments should have been made and that at which payment was made;

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c. By decision of 29 October 2010, the Secretary-General combined the compensation awarded to him under art. 11.2(d) of Appendix D with the disability benefit granted to him under the UNJSPF Regulations and Rules;

d. As the United Nations Staff Pension Committee decided in 2012 to maintain his disability benefit with no further review, his compensation for loss of earning capacity under art. 11.2(d) of Appendix D should have automatically continued after 30 April 2012, without the need to request an updated medical report and to submit his claim for review to the ABCC;

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e. Consequently, the Applicant requests the Tribunal to award him:

i. Compensation for material damages resulting from the Administration's delay to pay him compensation for his loss of earning capacity under art. 11.2(d) of Appendix D until 30 April 2012, taking into account fluctuations in the exchange rate between the

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d. The extension of any compensation under art. 11.(d) of Appendix D after 30 April 2012 is neither an implementation of the Secretary-General's decision of 29 October 2010, nor dependent upon any decision taken by the United Nations Staff Pension Committee; it required the taking of a new decision by the Secretary-General, upon recommendation by the ABCC;

e. The Organization's request for the Applicant to provide an updated medical report was a preparatory step in the process of determining whether the Applicant was entitled to compensation under art. 11.2(d) of Appendix D after 30 April 2012; therefore, it does not constitute an administrative decision that can be appealed before the Dispute Tribunal;

f. In any event, the request for an updated medical report was made to enable the Applicant to have his claim reviewed by the ABCC in the best conditions, and complied with art. 15 of Appendix D; furthermore, the Applicant submitted the requested report on 24 June 2015;

g. The application is irreceivable insofar as it concerns compensation after 30 April 2012, as no decision had been taken at the time of filing the application; it has also become moot following the Secretary-General's decision of 29 October 2015, which is favourable to the Applicant;

h. Consequently, the Respondent requests the Tribunal to dismiss the application in its entirety as irreceivable.

individual case (individual administrative act), which produces direct legal consequences to the legal order" (*abar* **2010-UNAT-030, endorsing the definition adopted by the former United Nations Administrative Tribunal Judgement No. 1157,** *Andronov* **(2003)).**

45. The Tribunal notes that, on 2 June 2015, the Administration decided to pay compensation to the Applicant for his loss of earning capacity, under art. 11.2(d) of Appendix D, for the period from 14 May 2005 to 30 April 2012, and that payment of the amount of USD72,266.46 was effectively made to him on 15 June 2015.

46. However, the Applicant challenges the amount paid, notably on the ground that the delay in making such payment was not taken into account. There can be no doubt that the determination of the amount to be paid retroactively to the Applicant as compensation for loss of earning capacity is an administrative decision, as defined above. The Applicant submitted a request for management evaluation of said decision on 10 June 2015, within the 60-day time limit set forth in staff rule 11.2(c).

47. Therefore, the Tribunal finds that the application is receivable insofar as it concerns the payment of compensation under art. 11.2(d) of Annex D until 30 April 2012.

48. Turning to the payment of compensation for loss of earning capacity after 30 April 2012, the Tribunal notes that the Applicant challenges the decision of the Compensation Claims Service, UNOG, of 14 April 2015, to reassess his

49. Still, the Tribunal remains seized of this matter insofar as the Secretary-General's decision to extend compensation after 30 April 2012 was delayed until 29 October 2015. To fully resolve it, the Tribunal needs to examine whether an application in this respect is receivable and, if so, whether such delay was attributable to the Administration.

50. Even if the letter of 14 April 2015 was not considered to be an administrative decision, the Tribunal finds the application receivable on the basis that the Administration failed to decide on the extension of the Applicant's compensation for loss of earning capacity after 30 April 2012 by the time of the application, namely on 13 July 2015. This failure amounts to an administrative decision. In this respect, the Tribunal recalls that it is well established that "not taking a decision is also a decision" (*abar* **2010-UNAT-030). The Respondent's argument that the application was premature as no decision had been taken on the Applicant's entitlement to compensation after 30 April 2012 at the time is misplaced.**

51. Therefore, the Tribunal finds that the application is receivable insofar as it challenges the delay by the Administration to decide on the Applicant's entitlement to compensation for loss of earning capacity beyond 30 April 2012.

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52. Entitlement to compensation for loss of earning capacity is provided for by art. 11.2(d) of Appendix D, which states that:

> **Where, upon the separation of a staff member from the United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1 (c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience.**

53. In turn, art. 11.1(c) of Appendix D provides that:

> **Immediately following the date on which salary and allowances**

55. As to the administration of claims, art. 12 provides that "[c]laims for compensation under these rules shall be submitted within four months of the death of the staff member or the injury or onset of the illness; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a claim made at a later date".

56. Art. 14 provides that "[t]he Secretary-General may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules". Art. 15 also provides that "[e]very person claiming under these rules or in receipt of a compensation under these rules shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules".

Compensation for loss of earning capacity until 30 April 2012

57. It is undisputed that the Applicant was entitled to receive payment from the

persists. It is therefore of the outmost importance

relevant given that the calculation sheet provided to the Applicant in 2002 clearly indicated that "[f]uture cost-of-living increases will shorten [the overpayment recovery] period". As the amount to be deducted every month from the Applicant's debt was subject to yearly variation based on the adjustment to the cost-of-living, in accordance with art. 4.2(d) of Appendix D, it was incumbent upon the Organization to follow-up closely on the balance due by the Applicant.

67. Not only did the Organization not follow-up on the Applicant's case as it was required, but it also prevented him from doing it himself by not providing him information about the amounts due to him under art. 11.2(d) of Appendix D or the balance of his debt to the Organization. The

70. Therefore, the Tribunal finds that the amount of USD72,266.46 paid to the Applicant on 15 June 2015 does not compensate him fully for the delay in the payment of his compensation under art. 11.2(d) of Appendix D for the period of 14 May 2005 through 30 April 2012. The Applicant is entitled to be compensated for the damages caused by such delay.

Compensation for loss of earning capacity after 30 April 2012

71. The same reasoning applies for compensation under art. 11.2(d) of Appendix D due to the Applicant for the period from 1 May 2012 until 31 December 2015.

72. At the outset, the Tribunal dismisses the Applicant's argument that no new decision by the Secretary-General was necessary to extend his compensation after 30 April 2012 because the UNJSPF had decided to no longer review his entitlement to a disability benefit, pursuant to its Regulations and Rules. The two procedures, although interconnected to some extent, are nevertheless distinct. It is clear from art. 11.2(d) of Appendix D, that the decision to award and extend compensation for loss of earning capacity must be taken by the Secretary-General. It is also clear from arts. 14 and 15 of Appendix D that the Secretary-General was entitled, for the purpose of extending compensation under art. 11.2(d), to request the Applicant an updated medical report.

73. However, the Tribunal is again concerned with the fact that the decision to extend the Applicant's compensation under art. 11.2(d) of Appendix D after 30 April 2012 was made only on 29 October 2015, more than three years after it was due. The Tribunal finds that this delay is essentially attributable to the Organization. It appears that the Organization did not initiate the review of the Applicant's case until 14 April 2015, when it requested the Applicant to submit an updated medical record. Although the Applicant initially refused to submit such record, he did so on 24 June 2015, less than three months later. This is not unreasonable and certainly does not account for most of the delay incurred before a decision was issued.

74. In view of the foregoing, the Tribunal finds that the Administration failed to comply with its obligation under art. 11.2(d) of Appendix D in not making timely payments of the Applicant's compensation from 1 May 2012 through 31 December 2015.

75. The Tribunal notes that according to the Respondent's submissions of 15 January 2016, payment of USD42,310.67 to the Applicant for compensation under art. 11.2(d) of Appendix D for the period from 1 May 2012 to 31 December 2015 was made on 17 December 2015. The Tribunal recalls that the Administration's decision to pay the Applicant an amount of USD42,310.67, which was issued after the filing of the application, is not under review in the current proceedings, as it already pointed out in its Order No. 4 (GVA/2016) of 6 January 2016. That having been said, the making of a payment during the course of the proceedings does not affect the Tribunal's jurisdiction to examine remedies in respect of the Organization's failure to fulfil its obligation under art. 11.2(d) of Appendix D.

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76. Having found that the Administration failed to satisfy its obligation to make timely payments to the Applicant for the compensation due to him under art. 11.2(d) of Appendix D for the period of 14 May 2005 to 30 April 2012 and for the period of 1 May 2012 to 31 December 2015, the Tribunal shall examine the Applicant's request for remedies summarised in para. 42.e above, insofar as they are relevant to these findings. The Tribunal will consider the remedies in light of art. 10.5 of its Statute, which delineates its powers regarding their award as follows:

> **As part of its judgement, the Dispute Tribunal may only order one or both of the following:**
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> **(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific**

c. The Applicant's compensation is paid in United States dollars but he lives in Switzerland where his compensation is also deposited; hence any fluctuation in the exchange rate between the United States dollar and the Swiss franc affects his net income; and

d. The Applicant has not been paid any interest for the delay in payment,

81. Finally, the Tribunal acknowledges that the payment of a lump sum of USD72,266.46 in 2015 instead of monthly instalments over a period of seven years is likely to have tax implications for the Applicant. However, these could not be known at the time the application was filed, i.e. on 13 July 2015, so no evidence has been submitted in this respect. To place the Applicant in the same position he would have been had the Organization complied with its obligations, the Organization shall bear responsibility for any amount the Applicant will have to pay to the Swiss tax authorities as a result of receiving payment of his compensation as a lump sum of USD72,266.46 in 2015, rather than through monthly payments between 14 May 2005 and 30 April 2012.

82. As the Tribunal is not in a position to determine the difference between the taxes the Applicant will have to pay as a result of receiving a lump sum in 2015 and that he would have had to pay annually if he had received monthly payments between 2005 and 2012, it will order the Organization to make this calculation, upon production by the Applicant of his tax declarations for the years 2005 until 2012 and for 2015.

83. As to damages resulting from the late payment of the Applicant's compensation under art. 11.2(d) of Appendix D for the period from 1 May 2012 to 31 December 2015, the Tribunal finds that the Applicant is equally entitled to be paid interest at the United States of Am,5(kk'FsHôhmh(y'y'yFpHe(m'b3(F Hô[7ôyh(((F35('050k,F

Compensation for moral damages

85. The Applicant also requests compensation for moral damages as a result of the stress and anxiety caused by the Organization's failure to provide him with the necessary information to follow-up on his case, the Administration's bad faith in the handling of his case, and the ten years delay in resuming payment of his compensation for loss of earning capacity after the overpayment made to him had been fully recovered, which put him under financial pressure and further impaired his health condition.

86. Pursuant to art. 10.5(b) of its Statute, the Tribunal may award compensation for moral injury if it is sufficiently substantiated by evidence. It is settled jurisprudence that "[a]n entitlement to moral damages may (…) arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological eadings,y

matter, it can reasonably be concluded that the Applicant sustained stress, anxiety and frustration, as well as a sense of unfairness and lack of care, arising from the

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